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Current Events

- Spinach E. coli O157:H7 outbreak and recall



The FDA Says

- 146 cases
- 23 HUS cases
- 76 Hospitalizations
- 1 death



The tip of the iceberg?

Who is legally responsible?



- Civil Law
- Criminal Law
- Regulatory Law

Our focus is **Civil Law** -
how do the different
systems interact?

Foodborne Illness and the Law – civil liability

- Strict liability
 - Did a defective product cause injury?
- Negligence
 - Did they act reasonably?
- Punitive damages
 - Did they act with conscious disregard of a known safety risk?



The Legal Standard: Strict Liability

- The focus is on the product; not the conduct
- They are liable if:
 - The product was **unsafe**
 - The product **caused** the injury



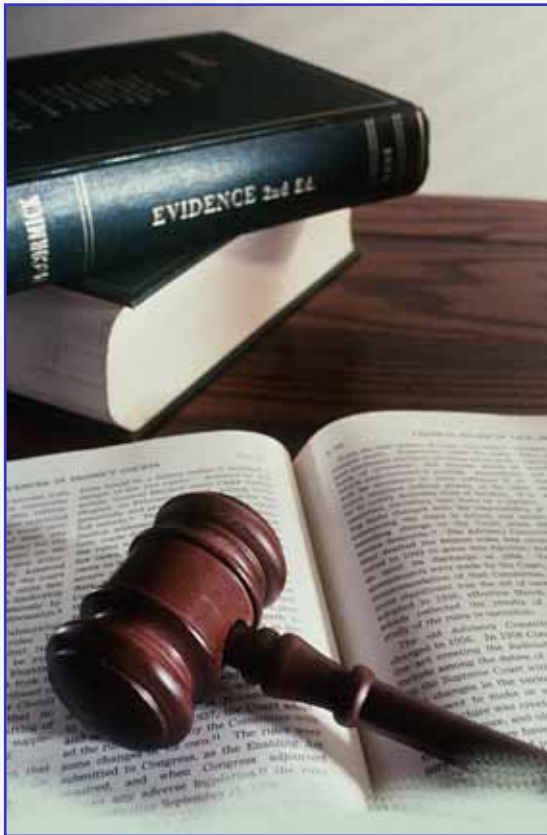
STRICT LIABILITY IS LIABILITY *WITHOUT* REGARD TO THE DEFENDANT'S *CONDUCT*.

Strict Liability and Spinach

- Is Spinach contaminated with E. coli O157:H7 defective?
 - Yes.
- Did the contaminated spinach cause the individual's injury ?
 - Laboratory testing, PFGE, epidemiology.



Who is strictly liable?



- Grower
- Processor
- Packager
- Distributor
- Seller
- Brand Name

Who is a Manufacturer?

A “manufacturer” is defined as a “product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer....”

RCW 7.72.010(2); see also *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246 (1992)



It's called **STRICT** Liability for a Reason

- The only defense is prevention
- Wishful thinking does not help
- If they manufacture a product that causes someone to be sick they are going to pay **IF** they get caught



The Legal Standard: Negligence

FOUR REQUIREMENTS

- DUTY
- BREACH
- CAUSATION
- INJURY



“Negligent conduct is the failure to exercise reasonable care under the circumstances”.

Negligence is the legal standard applied to non-manufacturers



The reason for excluding non-manufacturing retailers from strict liability is to distinguish between those who have actual control over the product and those who act as mere conduits in the chain of distribution.

See Butello v. S.A. Woods-Yates Am. Mach. Co., 72 Wn. App. 397, 404 (1993).

Negligence and Spinach

- Reasonable care?
 - Growers/processors strictly liable
 - What about distributors?
 - What is the responsibility of the sellers/brand names?



Punitive (or Exemplary) Damages:



- Punish the defendant for its conduct;
- Deter others from similar conduct.

Historically, such damages were awarded to discourage intentional wrongdoing, wanton and reckless misconduct, and outrageous behavior.

Punitive Damages: a conscious disregard for a risk of severe injury to others.

- 1998 FDA "Guide to Minimize Microbial Food Safety Hazards for Fruits and Vegetables."
- On February 5, 2004, FDA letter re: "[FDA's] concerns regarding continuing outbreaks associated with these two commodities and to encourage the industries to review their practices."
- 2005 FDA: "In light of continuing outbreaks associated with fresh and fresh-cut lettuce and other leafy greens, particularly from California, we are issuing this second letter to reiterate our concerns and to strongly encourage firms in your industry to review their current operations."

Can civil liability play a role in changes for the better?

Industry Standards

- In nearly every case, industry standards improve after a foodborne illness outbreak
- However, it occurs only after they are caught.



- Increased cook times



- Pasteurization of apple juice

Public Health and Litigation 1998 - Present

- 1999 Sun Orchard Salmonella Outbreak
 - Pasteurization of Orange Juice
- 2000 Senor Felix Shigella Outbreak
 - Pressure from Major Purchaser to Increase Quality
- 2000 Sizzler *E. coli* Outbreak
 - Industry Awareness of Risk of Cross-Contamination
- 2000 Supervalu *E. coli* Outbreak
 - Better Grinding Records at Retail
- 2001 Shipley Sales Salmonella Outbreak
 - FDA Change on import of Cantaloupes

Public Health and Litigation 1998 - Present

- 2002 Conagra *E. coli* Outbreak
 - Tipping Point in Meat Industry
- 2002 Spokane Produce *E. coli* Outbreak
 - Increased Industry Awareness of Lettuce Contamination
- 2003 Paramount Farms Almonds Salmonella Outbreak
 - Increased Industry Awareness of Contamination Risk
- 2003 Harmony Farms Salmonella Outbreak
 - Warnings on Sprouts
- 2003 Quality Inn Salmonella Outbreak
 - Industry Change on use of Pooled Eggs – New FDA Rules

Questions?

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