Liability for Foodborne Illness & Injury

Roughly one in six individuals in the United States become sick each year as a result of foodborne illness. Of these, thousands are hospitalized or die from foodborne diseases. In the United States, a person who is injured as a result of a foodborne illness may bring a civil cause of action against another by claiming that the other individual is legally liable for the harm caused by the foodborne illness.

This fact sheet will discuss civil liability for harm caused by foodborne illness.

Q. How does liability impact access to healthy food?

With efforts to increase access to and consumption of healthy and safe food, people and communities are exploring alternative ways to access healthier foods, such as through local farm to fork initiatives, CSA efforts, farmers’ markets, and other efforts to increase access to fresh fruits, vegetables, whole grains, and lean

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**FOODBORNE ILLNESS**

Illness caused by ingestion of food contaminated with disease-causing microbes, pathogens, poisonous chemicals, or other harmful substances. Foodborne illness is also referred to as foodborne disease, foodborne infection, or food poisoning.

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**Part of a series on foodborne illness in Minnesota**

Please consult the other resources accompanying this guide for additional information on:

- Preventing foodborne illness
- Government response to foodborne illness
proteins. As people seek fresh and local food sources, questions and concerns arise regarding what the legal components are in creating a safe food system.

Understanding how the law addresses the responsibility for foodborne illness can be invaluable, as foodborne illness or injuries from eating unsafe food can seriously sicken or even kill individuals. Because many of the issues discussed are incredibly fact-specific, this fact sheet includes references to additional information when appropriate.

Q. What is civil liability?

Civil liability determines the responsibility an individual or entity has for harm caused by an illness or injury. The standards for holding someone liable differ depending on what and who caused the injury. Typically, for someone to be held liable for another's injuries, the injured person (the plaintiff) must prove that the liable person (the defendant) had a legal responsibility to protect him or her from harm (otherwise known as a “duty of care.”). Then, the injured person (the plaintiff) has to show that the liable party (the defendant) failed to protect him or her, and that as a result the injured party (the plaintiff) was injured in a way that was foreseeable. What obligation a person owes to protect another depends on the situation.5

Civil liability is different from criminal liability. Unlike the purpose of criminal liability, which is when the government punishes an individual for a wrong done to society, the civil liability system provides individuals with an opportunity to seek compensation for a loss or injury.6 A civil claim is called a “tort.”

Liability and food

Liability can be a confusing subject, especially when it comes to food. Several legal theories and definitions will be used to help develop a better understanding of how the law treats foodborne illness or injury.

LIABILITY

Legal doctrine under which a party is legally accountable for an illness or injury.8

PRODUCT LIABILITY

Legal doctrine under which a party that is in the business of selling or distributing products, and who sells or distributes a defective product, is subject to liability for harm to an injured person caused by the defect.9

STRICT LIABILITY

Legal doctrine under which a party is responsible, without proof or fault, for injuries caused by the products he or she manufactured, distributed, or sold.10

Q. What is product liability?

The theory of “product liability” provides an injured person a cause of action (a reason to bring a lawsuit) against the source of the product to seek a monetary remedy for that injury. Product liability is how the law determines whether a party should be held liable for a harm caused by a defective product. There are three elements to a product liability claim: (1) the product must have been in a defective condition, which is unreasonably dangerous for its intended use; (2) the defect must exist when the product leaves its source (i.e., manufacturer or food processor); and (3) the defect must have been the proximate cause for the injury sustained.11

From 2000 to 2011, there were 320 publicly recorded foodborne illness settlements and verdicts in the United States.7
Product Liability and Food

The basic rules of product liability do not change just because the case involves food as the product.\textsuperscript{12} As applied to unsafe food, food is the “product,” and food suppliers, manufacturers, processors, distributors, and others that are part of the food chain may be held liable if an individual becomes ill or injured by a food that was either unsafe (“defective”) or if the quality of the food was misrepresented.\textsuperscript{13} A product can be defective if the instructions or warning are proven to have been inadequate to protect the user or consumer. A food product may also be defective if it contains certain pathogens (especially if that pathogen is considered to be an adulterant in that type of food).

Strict liability governs liability for injuries or illness caused by eating unsafe food in Minnesota.\textsuperscript{14}

Q. What is strict liability?

Strict liability is a legal concept that stands for the idea that: “One who sells any product in a defective condition unreasonably dangerous to the user or consumer … is subject to liability for physical harm thereby caused,” with liability applying even if “the seller has exercised all possible care in the preparation and sale of his product[.]”\textsuperscript{15} In plain terms, strict liability basically means that someone can be held liable even if he or she did not cause the problem leading to the injury.
Strict Liability and Food

While there is significant variation in the details from state-to-state, generally-speaking, there are three strict liability theories impacting foodborne illness or injuries from eating food still recognized by most U.S. courts today:\footnote{16}

\begin{itemize}
\item \textbf{Manufacturing defects.}
\begin{itemize}
\item Food (or food product) is in a defective condition if an ordinary consumer would not reasonably expect the food to contain the substance that caused the harm.\footnote{17}
\item \textbf{Example:} a jar of peanut butter contains \textit{salmonella}.
\end{itemize}
\item \textbf{Design defects.}
\begin{itemize}
\item A product has a design defect if it was manufactured in a way that fit the manufacturer’s designs, but the design itself was not reasonably safe and the cause of injury.\footnote{18}
\item \textbf{Example:} a recipe for potato chips contains a dangerous chemical.
\end{itemize}
\item \textbf{Failure to provide an adequate warning or instructions.}
\begin{itemize}
\item A product lacks an adequate warning if a manufacturer or seller failed to provide warnings of product dangers or instructions on how to safely use their product.\footnote{19}
\item \textbf{Example:} a seller fails to include a warning label on oranges that states that the dye applied to the skin of the oranges contains a well-known allergen.
\end{itemize}
\end{itemize}

\textbf{Q. How does one bring a case under a strict liability claim for an injury or illness caused by consuming food?}

To successfully bring a strict liability case for an injury or illness caused by consuming food, the injured party must demonstrate that the other party’s food product was in a defective condition, and that condition caused the injury or illness. With a sharp

Proving a food product is defective in Minnesota: The Schafer Case

In 2005, a woman brought a civil case against a restaurant when her throat was seriously scratched after she swallowed a piece of a pumpkin muffin.\footnote{20} Even though the object that caused the injury was never identified, the restaurant was held liable for the muffin being defective because a consumer would not reasonably expect the presence of something that sharp in a muffin at the time the muffin was purchased.\footnote{21}

This case represents the use of the “reasonable expectation test,” which holds a person is legally liable for a defective food product if the consumer could not have reasonably expected the food product to contain an “ingredient” that caused the harm. Notably, this test has only been applied to a few facts in Minnesota. Bacterial contaminations and allergies have not been addressed by Minnesota law. Therefore there is currently no clear answer to how Minnesota law would apply the reasonable expectation test to those types of fact patterns.
difficult to establish. Unless the illness is linked to a wider outbreak of foodborne illness, it can be difficult if not impossible to prove that a particular case of illness resulted from one particular food item. This is because the bacteria or other pathogen involved can take days or weeks to incubate. Also, the consumer may not report symptoms to a doctor. Even if the consumer does go to the doctor, the doctor may not order the correct lab tests. In addition, even if the correct lab tests are ordered, the likelihood that other people have experienced the same symptoms, gone to a doctor, and were correctly diagnosed to establish a verifiable outbreak, is very low.22

What this means in practice is that an injured party can sue the party in the chain of distribution with the “deepest pockets” to make sure the injured person is fully compensated for injuries or damages according to the amount of damages determined by the court. Then, the party that was sued can either turn around and sue every other party that contributed to the injury or can bring them into the same original lawsuit and the court can work out which party is responsible for what percentage of the illness or injury.24

Q. What are other legal “issues” impacting liability?

As mentioned above, liability is a legal concept under which a party is legally accountable for an illness or injury. However, liability is not absolute. There are several legal theories that may reallocate the liability depending on the facts of the case.

Joint and several liability

The term “joint and severally liable” means that anyone in the chain of distribution that contributed to the illness or injury could be both jointly liable and severally liable.

Strict Liability: Minnesota’s Exemption for Passive Sellers

Under strict liability, all parties are liable even if they are not at fault. However, Minnesota law provides a potential limit on strict liability for “passive sellers” who did not contribute to or cause the injury, death, or damage caused by the consumption of a food item. A “passive seller” is an individual or entity involved in the food supply system that exercised all possible care in the preparation and sale of the food item that caused the injury or illness, but did not create the unsafe condition causing the injury or illness.25

This “sellers’ exception” lessens the impact of strict liability on passive sellers who did not contribute to the unsafe condition that caused an injury or illness. Under Minnesota’s “pass through” statute, a passive seller may not be liable for damages if the correct identity of the party who caused the unsafe condition is identified and the passive seller did not contribute to the unsafe condition causing the injury. However, a passive seller can still be held liable for injuries and damages caused by another party if the party who created the unsafe condition is unable to pay for the awarded damages or for some other reason cannot be located or brought before the court.26
Joint and Several Liability and Food

When applied to strict liability and food cases, “joint and severally liable” means that everyone in the chain of distribution is both jointly liable and severally liable. Using joint and several liability, someone who suffers an injury or an illness from eating food purchased at a grocery store could sue anyone in the food supply chain, such as the grocery distributor, for full compensation for damages through joint and several liability even if the grocery distributor did not cause the problem that led to the illness or injury. In this situation, the grocery distributor can then either sue every other party in the food supply chain, such as the grower, packer, or food retailer, or bring these other parties into the original lawsuit and have the court determine which party is responsible for what percentage of the injury.

As a result, many operators in the chain of food distribution include a clause in their contracts that a particular party is responsible for all of the damages if someone gets sick or is injured from a food product. For instance, a food distributor can include language in contracts with various growers that the grower would be responsible for all damages if someone gets sick from consuming the produce even if a court would find the distributor liable for all of the injury. These agreements also frequently include a requirement for the grower to have product liability insurance to cover the cost of potential lawsuits. In addition, these agreements can require certain safety or inspection practices. For instance, the Farmers Market Coalition recommends that farmers’ markets require vendors to have certain production safety practices, product liability insurance, and include clauses in vendor agreements with the market that vendors

Donated food

The Bill Emerson Good Samaritan Food Donation Act is a federal law that provides protection from civil liability to individuals (“donors”) donating grocery or food products so long as the food products are “apparently fit” at the time of donation. This law also extends protection to the non-profit organizations (“donees”) receiving the food in most circumstances. This legal protection does not protect donors and donees if they engaged in acts of gross negligence or intentional misconduct.
will “not hold the market liable for any loss, damages, liability, claims, suits, costs, and expenses they incur related to their involvement in the market.”

**Contributory negligence**

“Contributory negligence” is a commonly raised defense in liability cases. While contributory negligence is not a defense to strict liability, it may come up in other types of liability cases. Contributory negligence means that the injured party was partially responsible for his or her own injury. Particularly in cases involving meat products, the issue of “contributory negligence” can come up. For example, in a New Jersey case involving food poisoning as a result of eating undercooked pork, the New Jersey Superior Court held that the meat seller was not liable for a family’s illness because the parent did not cook the pork to the proper temperature and the inherent danger in not adequately cooking raw meat is common knowledge that every consumer should know.

An injured party can still recover damages under strict liability if he or she failed to find a defect in a product. Courts are generally willing to hold that a manufacturer has a duty to inspect the food or beverages whereas a consumer would not be expected to inspect such objects and should not have this duty as a general rule. However, if an injured party knew (or should have known) of the risk of eating or drinking a product that is commonly known to be risky, such as raw meat or seafood, contributory negligence can be a viable defense against strict liability and the injured party may be able to only recover partial damages.

An entire industry can be put in a poor light following a foodborne illness outbreak. Obviously, the best defense to a potential lawsuit is by avoiding conditions causing foodborne illness and injury. Therefore, consumers and food businesses should continue to focus on how to best promote food safety practices.

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**Endnotes**


Please note, there are several legal consequences of foodborne illness, such as administrative or financial penalties and criminal punishment, however, this fact sheet only addresses the concept of civil liability.


Liability, [link](http://publichealthlawcenter.org/topics/healthy-eating/liability) (last visited July 6, 2015).


Restatement (Second) of Torts §402A (1965).


*In re Shigellosis Litig.*, 647 N.W.2d 1 (Minn. Ct. App. 2002); See also *McCormack v. Hankscraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967) (adopting the concept of strict tort liability against the manufacturer of a defective product).

Restatement (Second) of Torts §402A (1965).


4A *Minnesota Practice*, CIVJIG 75.60 (6th ed.).


*Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570 (2005).

*Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 575 (2005).


See generally *In re Shigellosis Litig.*, 647 N.W.2d 1 (Minn. Ct. App. 2002).


