



PUBLIC HEALTH  
LAW CENTER  
at Mitchell Hamline School of Law



MINNESOTA FOOD SAFETY

# Determining Legal Responsibility for Foodborne Illness & Injury

Roughly one in six individuals in the United States become sick each year as a result of foodborne illness.<sup>1</sup> Of these, thousands are hospitalized or die from foodborne diseases.<sup>2</sup> 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?

A: With efforts to increase access to and consumption of healthy and safe food, individuals and communities are exploring alternative ways to access healthier foods, such as through local farm-to-plate initiatives, Community Supported Agriculture (CSA) efforts, farmers' markets, and other efforts to increase access to fresh fruits, vegetables, whole



## FOODBORNE ILLNESS

*(also referred to as foodborne disease, foodborne infection, or food poisoning)*

Illness caused by ingestion of food contaminated with disease-causing microbes, pathogens, poisonous chemicals, or other harmful substances.<sup>3</sup>

## 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

From 2000 to 2011, there were 320 publicly recorded foodborne illness settlements and verdicts in the United States.<sup>4</sup>

grains, and lean proteins. As people seek fresh and local food sources, questions and concerns arise regarding who is legally responsible for foodborne illness and injury.

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?<sup>5</sup>

**A:** 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.<sup>6</sup>

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

## 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

General legal doctrine under which a party is legally responsible for an illness or injury.<sup>7</sup>

### STRICT LIABILITY

A specific type of liability under which a party is responsible, without proof of fault, for injuries caused by the products he or she manufactured, distributed, or sold.<sup>8</sup>

provides individuals with an opportunity to seek compensation for a loss or injury caused by another.<sup>9</sup> A civil claim is called a "tort."

### Q: What is strict liability?

**A:** 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." Strict liability applies even if "the seller has exercised all possible care in the preparation and sale of his product[.]"<sup>10</sup> 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 recognized by most U.S. courts today:<sup>11</sup>

■ **Manufacturing defects.**

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.<sup>12</sup>

**Example:** a jar of peanut butter contains salmonella.

■ **Design defects.**

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 caused of injury.<sup>13</sup>

**Example:** a recipe for potato chips contains a dangerous chemical.

---

Strict liability governs liability for injuries or illness caused by eating unsafe food in Minnesota.<sup>14</sup>

---

■ **Failure to provide an adequate warning or instructions.**

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.<sup>15</sup>

**Example:** a seller fails to declare on the product label that the product contains soy, a well-known allergen.

## Q: How does one bring a case under a strict liability claim for an injury or illness caused by consuming food?

**A:** 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 the defective condition caused the injury or illness.

With a sharp object in a muffin, as in the Schafer Case discussed below, the “link” between the food eaten and the injury is clear. In the case of food poisoning from *E. coli* or *Salmonella*, the link can be much more 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.<sup>16</sup>

## Q: Are there any potential limits on strict liability for foodborne illness or injury in Minnesota?

**A:** Yes. There are three potential limits on strict liability legal responsibility for foodborne illness in Minnesota. These include Minnesota's Exemption for Passive Sellers, Contributory Negligence, and Protections for Food Donation.

### ■ Minnesota's Exemption for Passive Sellers

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”



## 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.<sup>17</sup> 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.<sup>18</sup>

This case represents the use of the “reasonable expectation test,” which holds a person 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.



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.<sup>19</sup>

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.<sup>20</sup>

For example, if a grocer sold a product that contained *E. coli* contamination from the processing plant, and the product caused illness or injury to the consumer, the grocer may not be liable under the Passive Seller Exemption, so long as the processing plant is able to fully pay for any court awarded damages.

#### ■ **Contributory Negligence**

“Contributory negligence” is a commonly raised defense in liability cases. Contributory negligence means that the injured party was partially responsible for his or her own injury. In particular, the issue of “contributory negligence” can come up in cases involving meat products. For example, in a New Jersey case involving foodborne illness 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.<sup>21</sup>

An injured party can still recover damages under strict liability if he or she failed to find a defect in a product before using it. 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 defects and should not have this duty as a general rule.<sup>22</sup> 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.<sup>23</sup>

#### ■ 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.<sup>24</sup>

More information on food donation and liability can be found in the Public Health Law Center’s “Liability Protection for Food Donation” resource at <http://publichealthlawcenter.org/sites/default/files/resources/Liability%20Protection%20Food%20Donation.pdf>.

Serious illness and loss of life can occur, and an entire industry, food event, or nutrition initiative can be put in a poor light following a foodborne illness outbreak and related lawsuit. The best defense to a potential lawsuit is by avoiding conditions causing foodborne illness and injury, focusing on how to best promote food safety practices and handle food safely.

### Managing risk at local farmers’ markets

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 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.”<sup>25</sup>

#### Q: Are there any ways a seller involved in the food supply system can protect against the risk of strict liability?

**A:** Yes. There are many risk management approaches a seller can take. Some of these include specific provisions in contracts, product liability insurance requirements, and mandatory food safety practices.

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.<sup>26</sup> In addition, these agreements can require certain safety or inspection practices.<sup>27</sup>

Last updated: October 2016

The Public Health Law Center thanks Mathew Swinburne with the Network for Public Health Law at the University of Maryland Law School; Tim Jenkins, Linda Prail, and Kirk Smith with the Minnesota Department of Health; and Carrie Rigdon with the Minnesota Department of Agriculture for their review of this document. The Public Health Law Center also thanks research assistants Michelle Hersh, J.D., Marguerite Ahmann, and Jenny Monson-Miller for their research, writing, and editing of this resource.



This publication was prepared by the Public Health Law Center at Mitchell Hamline School of Law, St. Paul, Minnesota, made possible with funding from Blue Cross Blue Shield, the Minnesota Department of Health, and the Centers for Disease Control and Prevention.

The Public Health Law Center provides information and legal technical assistance on issues related to public health. The Center does not provide legal representation or advice. This document should not be considered legal advice.

## Endnotes

- <sup>1</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *CDC Estimates of Foodborne Illness in the United States*, <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> (last visited July 6, 2015).
- <sup>2</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *CDC Estimates of Foodborne Illness in the United States*, <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> (last visited July 6, 2015).
- <sup>3</sup> *Foodborne Illness, Foodborne Disease*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (last visited Oct. 26, 2015, 11:06 AM), <http://www.cdc.gov/foodsafety/foodborne-germs.html>.
- <sup>4</sup> Alexia Marks, *Check Please: How Legal Liability Informs Food Safety Regulation*, 50 *Houston Law Review* 3 (2013).
- <sup>5</sup> 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.
- <sup>6</sup> *Liability*, <http://publichealthlawcenter.org/topics/healthy-eating/liability> (last visited July 6, 2015).
- <sup>7</sup> BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "liability").
- <sup>8</sup> RESTATEMENT (SECOND) OF TORTS §402A (1965).
- <sup>9</sup> Denis Stearns, *Contaminated Fresh Produce and Product Liability: A Law-in-Action Perspective*, in *Microbial Safety of Fresh Produce* 385, 386 (Xuetong Fan et al. eds., 2009).
- <sup>10</sup> RESTATEMENT (SECOND) OF TORTS §402A (1965).
- <sup>11</sup> RESTATEMENT (SECOND) OF TORTS §402A (1965). *See also* RESTATEMENT (THIRD) OF TORTS: Prod. Liab. § 7 (1998) (treating design and warning defects as negligence theories instead of strict liability).
- <sup>12</sup> 4A *Minnesota Practice*, CIVJIG 75.60 (6th ed.).
- <sup>13</sup> DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 495 (2d ed. 2008).
- <sup>14</sup> *In re Shigellosis Litig.*, 647 N.W.2d 1 (Minn. Ct. App. 2002); *See also McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967) (adopting the concept of strict tort liability against the manufacturer of a defective product).
- <sup>15</sup> DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 581 (2d ed. 2008).
- <sup>16</sup> Denis Stearns, *Contaminated Fresh Produce and Product Liability: A Law-in-Action Perspective*, in *Microbial Safety of Fresh Produce* 389 (Xuetong Fan et al. eds., 2009).
- <sup>17</sup> *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570 (2005).
- <sup>18</sup> *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 575 (2005).

- <sup>19</sup> See generally *In re Shigellosis Litig.*, 647 N.W.2d 1 (Minn. Ct. App. 2002).
- <sup>20</sup> MINN. STAT. § 544.41 (2015). See also, *In re Shigellosis Litig.*, 647 N.W.2d 1 (2002).
- <sup>21</sup> *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 340 A.2d 687, 692-93 (1975).
- <sup>22</sup> 124 AM. JURIS. PROOF OF FACTS § 3 (3d ed. 2012).
- <sup>23</sup> 4 CAUSES OF ACTION 787 (1984).
- <sup>24</sup> 42 U.S.C. § 1791.
- <sup>25</sup> *Market Manager & Organizer FAQ: Insurance Liability, and Regulations*, FARMERS MARKET COAL., <http://farmers-marketcoalition.org/education/market-manager-faq> (last visited May 18, 2015).
- <sup>26</sup> Denis Stearns, *Contaminated Fresh Produce and Product Liability: A Law-in-Action Perspective*, in *Microbial Safety of Fresh Produce* 393-394 (Xuetong Fan et al. eds., 2009).
- <sup>27</sup> KRISTEN MARKLEY, CMTY. FOOD SEC. COAL, FOOD SAFETY AND LIABILITY INSURANCE: EMERGING ISSUES FOR FARMERS AND INSTITUTIONS 11 (Dec. 2010), available at <http://www.cias.wisc.edu/farmertools14/3-pre-pare-your-business/food-safety-and-liability-insurance.pdf>.