

THE COURAGE TO CRITICIZE

My legal partners and I spend the majority of our time representing victims of foodborne illness outbreaks. This also means that we spend the majority of our time representing the most vulnerable among us – the very young, the very old, and those with compromised immune systems. Because these victims did nothing more than consume food that was assumed to be safe, but was not, I often allow myself the conceit of thinking that I am on the side of the angels, and am fighting the good fight.

Of course, we are not alone in this fight. Every day thousands of health inspectors across the United States impressively and professionally fight the same good fight, diligently inspecting food service establishments, public swimming pools, and food manufacturing operations – all with a single-minded focus on ensuring the public safety.

But despite the best efforts of all involved, we know that outbreaks still occur, and that the vulnerable among us are injured, and sometimes die. And we also know that when outbreaks occur, lawsuits often follow.

In its simplest terms, a lawsuit is a mechanism for assigning legal responsibility for an injury-causing event, *e.g.*, a foodborne illness outbreak. And, in most cases, this is not difficult, because a manufacturer is held strictly liable for any injury caused by its product. This means that the injured person need only prove: (1) I was injured, (2) the product was defective, and (3) the defect caused the injury. The injured person does not need to prove that the manufacturer was negligent, and it is utterly irrelevant that the manufacturer had a “state-of-the art” plant.

People who are unaware of the doctrine of strict liability tend to view lawsuits in moralistic terms, as an exercise in finger pointing, and as means of assigning *blame*. In fact, there is not always a “bad-guy” to blame, and in most cases it simply doesn’t matter, because a lawsuit’s primary purpose is compensation of the victim, not retribution. As a society, we have concluded that manufacturer should be held legally (*i.e.*, financially) responsible, regardless of blameworthiness, if and when a person is injured by a defective product.

But what about those cases that really do involve a “bad guy” – a company that consciously disregards an obvious safety risk and knowingly puts the public health at risk. In such cases, it is mostly anger that motivates the lawsuit, plus the family’s desire “to send a message.” Yet, in industry circles, I find that these kinds of cases, the ones motivated by anger and outrage, are too-often explained away as a psychological aberration – a family *crazy* with grief, *blood-thirsty*, and *bent* on revenge, or they are attributed to society’s litigious-nature, as if the decision to file a lawsuit was, of itself, some kind of moral failure.

When the family of a seriously injured child decides that they want “to send a message,” and that “it’s not about the money,” this decision is not a psychological aberration, and it is not a by-product of society’s allegedly litigious-nature. Indeed, most of our clients spend weeks, if not months, agonizing over whether to file a lawsuit, resisting the decision, and quite-rightly noting that “a lawsuit won’t undo the damage done.” Not a single parent we have ever represented

would choose a mountain of money over a time-machine that could send the family back in time, before their two-year old took a sip of contaminated juice, or splashed about in an unchlorinated pool.

Wouldn't you choose the same for your child? And wouldn't you be angry too? Thus, I wonder, to what extent are we not complicit in a company's bad acts if we refrain from open criticism of the company, and fail to join the family of an injured child in being angry. Under the appropriate circumstances, anger is not a bad thing, and certainly it is justified in many cases.

What do you say to the manufacturer of unpasteurized orange juice that mixed juice produced in its own state-of-the-art plant with juice imported from a plant in Mexico that apparently had no HACCP plan in place? What do you say to the restaurant in the Midwest that, for the second time, has been linked to an *E. coli* 0157:H7 outbreak as a result of making coleslaw with cabbage that it failed to wash before using? What do you say to the operator of the county fair in upstate New York that relied on non-chlorinated well water to supply dozens of on-site food vendors with water, despite the fact that the well it relied on was adjacent to a very large pile of cow manure?

Of course, with respect to each of these outbreaks, there *was* a public outcry. Notably absent, however, was any outcry from the juice manufacturing industry, the National Restaurant Association, or the public health officials involved in the outbreak investigations. And while I am not surprised at industry silence, I continue to be surprised when health department officials allow themselves to act as apologists, leaping to a company's defense before an outbreak investigation has begun, or is completed.

To cite another example: when an *E. coli* 0157:H7 outbreak occurred last year in the Atlanta area, and was attributed to a contaminated wading pool at a water park, Virginia Galvin, director of the Cobb County Public Health Department, said of the park, "I don't believe there is any evidence of negligence." Shortly thereafter, the Georgia Department of Health concluded, in its preliminary epidemiology report, that "there may have been virtually no free chlorine available" in the contaminated wading pool, and that this situation was in violation of Cobb County health and safety regulations.

The question therefore arises, why did Ms. Galvin feel it necessary to so vigorously defend the water park? Was it because she believed that her department had somehow failed and that, in defending the park, she was also defending herself?

Whatever the motivation, I believe that it is time for health department officials, and responsible people in the food industry, to avoid the reflexive defensiveness that so often accompanies the announcement of another foodborne illness outbreak. This "circle-the-wagons" mentality is, in the end, hugely counterproductive, because it erodes people's faith in the food safety, and prompts cynicism about industry's commitment to the consumer. Until members of food industry have the courage to criticize their own, the families of injured children will continue to feel the need to "send a message."

Can you blame them?

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