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The Use of Public Health Data and Documents in Foodborne-Illness Litigation

Editor's note: From April 2001 to March 2004, the Journal featured a Legal Briefs column that presented short case studies about legal issues important to environmental health professionals. Vincent Sikora, the author of Legal Briefs during that time, passed away in December 2003. Because his columns were well received by many of our readers and provided practical and relevant legal information, we decided to search for a committed columnist with the appropriate knowledge and experience to restore Legal Briefs. We are happy to announce that we found several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, Patti Waller, and David W. Babcock, all of the law firm Marler Clark. Their columns will appear in every other issue of the Journal.

The attorneys at Seattle-based Marler Clark, LLP, PS (www.marlerclark.com) have developed a nationally known practice in the field of food safety. Marler Clark represents people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers. The attorneys have litigated thousands of food contamination cases throughout the United States, many of them high-profile, including the Jack in the Box and Odwalla E. coli outbreaks; the Malt-O-Meal, Sun Orchard, and Chili's Salmonella outbreaks; the Senor Felix Shigella outbreak; and the Subway and Chi-Chi's hepatitis A outbreaks.

David W. Babcock, the author of this month's installment, joined Marler Clark as the firm's senior litigation associate in 2001. Representing children and the elderly has been central to Mr. Babcock's practice at Marler Clark, where he focuses on litigation resulting from foodborne-illness outbreaks.

A According to a study commissioned by the U.S. Department of Agriculture (USDA), a very small percentage of foodborne illnesses result in any form of litigation.¹ When litigation does result, the information collected by both epidemiologic and environmental health personnel is often put to various uses by parties to the action. Epidemiological investigations and conclusions may be used to support or attack assertions that a particular food item or food service entity was the source of one or more illnesses. Environmental health inspection reports may be used to establish the mechanism of contamination in a single instance or to discern a pattern of substandard behavior.

Epidemiologic Data in Litigation: Differing Standards, Differing Points of View

Epidemiologic investigations of potential foodborne outbreaks often form the foundation of a claim for damages by those sickened against the purveyors of the allegedly contaminated food product. Two basic questions may be answered by documentation of these investigations: whether an outbreak of illness was caused by a particular food or foods and, if so, whether a particular individual was part of such an outbreak.

The determination by a health department of either of these questions carries great weight in any litigation. It is a rare case in which either "side" in litigation has successfully cast doubt on a health department's conclusions on either issue. In fact, attacking these conclusions has seemed like a sure-fire recipe for losing credibility with

juries. That said, it is important to understand that the "burden of proof" differs in the epidemiological context and the legal context. Epidemiologists typically require a statistical measure of 95 percent confidence to establish an association between a cause and illness. In civil litigation, a plaintiff meets the burden of proof by convincing the jury (or judge) of the defendant's liability "more probably than not." This burden has often been expressed mathematically as 51 percent, and is a far easier benchmark to reach than the criminal standard of "beyond a reasonable doubt." Thus, as a practical matter, there may be little difference, legally, between "confirmed" and "probable" members of a given outbreak. In other words, a determination that an individual was more probably than not one of the outbreak victims is legally sufficient. Also, a claimant may be able to establish a legal link between a given product and a group of illnesses even where the proof of such a link is not conclusive by a standard such as a 95 percent confidence interval.

Litigation following a 1999 *E. coli* O157:H7 outbreak among children in Eastern Washington provides a prime example of the burden-of-proof issue. After investigation, the Washington State Department of Health (WDOH) concluded that the source of the outbreak was a taco meal served at the local elementary school. One of the most seriously ill children was a young girl with hemolytic uremic syndrome (HUS), a sister and playmate of other children at the school, but not herself a student. After the WDOH epidemiologic investigation revealed a likely

transmission link from the schoolchildren to the young girl, investigators testified in court that she was a probable case. The jury found this sufficient proof and included her among the victims compensated for their injuries. The trial court judge and the court of appeals concurred that being designated a “probable” case was sufficient to meet the legal burden of proof.²

Different Burdens, Different Goals

Not surprisingly, lawyers ask somewhat different questions of their scientist counterparts, and the two worlds do not always fit perfectly together. For example, in a buffet restaurant outbreak, an epidemiologic study might be aimed at determining the particular buffet item that was likely causing illness. Those making claims of injury in litigation, however, probably would not focus on pinpointing an exact food, but simply on establishing that the restaurant in question had served some food that was contaminated. The restaurant, in contrast, would be interested in identification of a particular item, as it might be able to make a claim back “upstream” against the supplier of the implicated item.

Use of Environmental Health Data in Establishing Liability

Environmental health data may be used in conjunction with epidemiologic data to establish the liability of a defendant. In some cases, environmental health data may enhance the strength of epidemiologic data, pointing to a particular source for a person or group of people’s illnesses. This situation occurs most frequently when the environmental health inspection is the result of an illness complaint or part of a larger foodborne-illness investigation.

For example, in 2001 a young girl suffered a particularly severe *E. coli* O157:H7 infection that left her permanently injured. The epidemiologic investigation identified a hamburger purchased and consumed at a mid-sized fast-food chain restaurant as a potential source of infection; no other sources were suspect. The health department did not find any food on site that tested positive for *E. coli* O157:H7, and the case appeared to be isolated. A thorough review of the restaurant’s current and prior inspections, though, revealed a serious flaw in the restaurant’s cooking method that provided an explanation for the client’s exposure. According to the inspection report,

Hamburger buns are toasted on the grill immediately adjacent to the cooking patties, and it is conceivable that, early in the cooking process, prior to pasteurization, meat juices and blood containing active pathogens might possibly splash onto a nearby bun.

In fact, on six separate occasions spanning three years, the management of the restaurant had been advised of the dangers of cross-contamination of the hamburger buns by hamburger juices. The inspection reports were used by the plaintiff’s expert to establish the possibility that cross-contamination in this manner had been the source of the young girl’s illness.

In another case, a Chinese restaurant in Ohio was the suspected source of an *E. coli* O157:H7 outbreak in the fall of 2002. Again, no contaminated leftover food was found. The restaurant was buffet-style, making identification of a single contaminated food item difficult, but the epidemiologic investigation showed that a disproportionate number of the ill patrons were children who had consumed Jell-O. How might Jell-O have become the source of an *E. coli* O157:H7 outbreak? An environmental health outbreak investigation report noted a host of food-handling errors in the restaurant, none more important than this one: “Raw meat stored above the Jell-O in the refrigerator.” Officials concluded that “the likely source of *E. coli* O157:H7 in the Jell-O was from raw meat juices dripping on the Jell-O while it was solidifying in the refrigerator.” These reports and conclusions helped establish the restaurant’s liability.

Even when the epidemiologic link between an illness and its source is not in doubt, environmental health data may be used to demonstrate the negligence of the defendant. Often, this use involves records of previous inspections of a food service facility. The records may be used as evidence of negligent training and supervision of food-handling and sanitation staff, inadequate food safety programs, or disregard for consumer safety.

In 2002, health officials suspected that a Seattle-area restaurant was the source of a foodborne-illness outbreak. Even though one of the patrons had experienced an unusually severe acute illness, medical practitioners and health officials were unable to pinpoint the particular pathogen that had sickened various individuals. The defendant and its insurer were initially unwilling to concede liability, in part because the caus-

ative agent in the outbreak had not been identified. Acquisition of prior inspection reports, however, revealed a consistent pattern of poor food-handling practices. Repeat occurrences of numerous health code violations had previously led the health department to close the restaurant and temporarily revoke its license. The prior health inspection reports and violation letters were used in litigation to establish the liability of the defendant.

Should Potential Legal Action Affect Your Public Health Work?

When you are conducting epidemiologic or environmental health investigations, it may be daunting to consider the possible legal implications of the work that you do. Perhaps bearing these thoughts in mind can reduce the trepidation: First, instances in which foodborne-illness complaints burgeon into litigation are exceedingly rare. It is highly unlikely that any lawyer will ever peruse your work. Second, a well-conducted investigation of any type will prove just short of unassailable in a legal context. For this reason, a well-supported conclusion is probably more likely to decrease extensive involvement in litigation than to heighten entanglement. In other words, allowing concerns about how your results will appear in a legal context to affect your investigation will not ultimately prove helpful to anyone. Finally, it is true that jurors will most likely appoint the public officials as the arbiter of truth in a disputed matter. While this trust does convey a heavy responsibility, it is not really any different than the trust placed in your hands by the public at large on a daily basis. 🐶

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References

1. Jean C. Buzby, Paul D. Frenzen, & Barbara Rasco, *Product Liability and Microbial Foodborne Illness* (U.S. Department of Agriculture Economic Research Service, 2001).
2. *Almquist v. Finley Sch.* Dist. No. 53, 57 P.3d 1191 (Wash. App. 2002), cert. denied 75 P.3d 968 (Wash. 2003).