

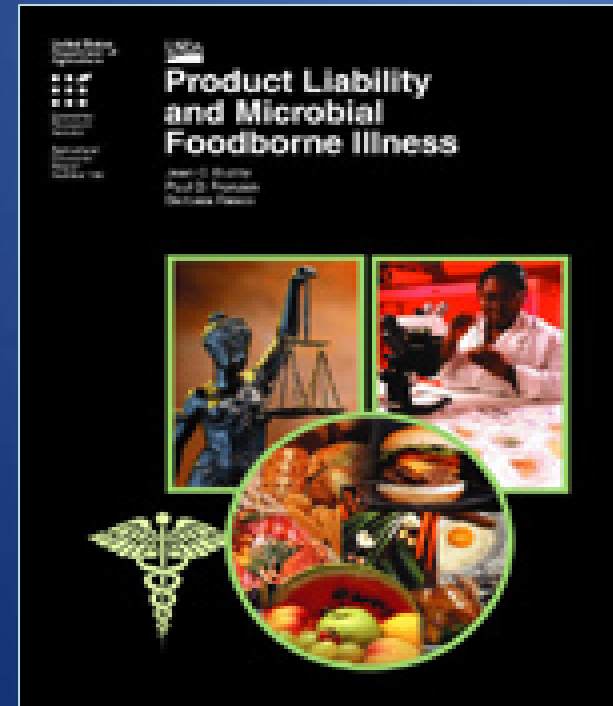
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Foodborne Illness and Hawaii Law: Two Perspectives

MARLER CLARK
ATTORNEYS AT LAW, L.L.P., P.S.

FOOD: the most Dangerous Product in the United States?

“Contaminated food products caused more deaths each year than the combined totals of all 15,000 products regulated by the U.S. Consumer Product Safety Commission.”



See Buzby, et al. *Product Liability and Microbial Foodborne Illness* (2001)
ERS Agricultural Economic Report No. 799

Foodborne Illnesses Cost U.S. An Estimated \$3 - \$7 Billion Each Year

- 76 million cases annually in the US
- 325,000 hospitalized
- 5,000 deaths

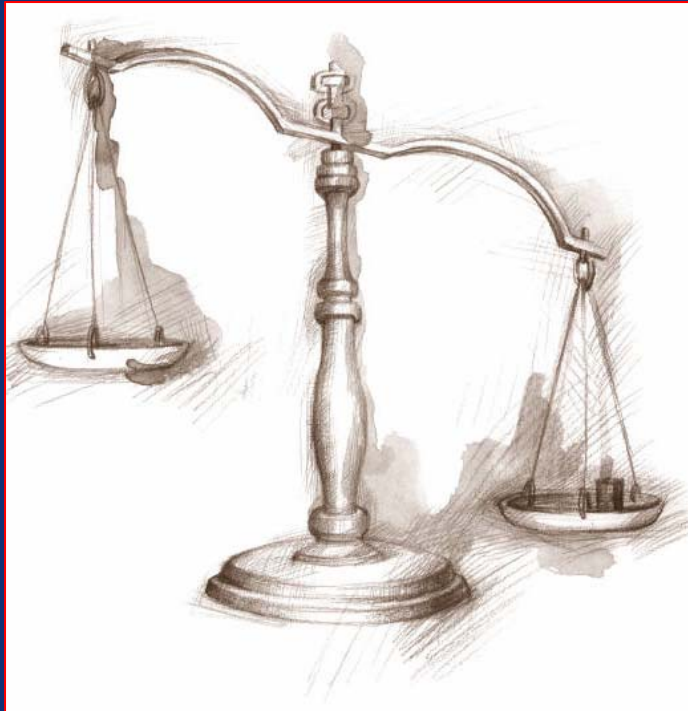


Incentives for Companies to Produce Safe Food Products

- Market Forces - risk of damage to business reputation, loss of market share, and decreased sales revenue;
 - Contract Specifications as a “market force”
 - Charging a “premium” for safer food



Incentives for Companies to Produce Safe Food Products



- Food Safety Laws and Regulations - violations can result in fines, product-recalls, plant-closures or criminal penalties

Incentives for Companies to Produce Safe Food Products



- Product Liability Law - forcing firms to bear the full costs of decisions made about product quality and safety by requiring the payment of monetary compensation for the injuries caused by defectively manufactured or unsafe products

Strict Liability =

“Liability without regard to fault”

???





Strict Liability Applied:



So What is the Logic???

- Protect the Public
 - Some things are inherently dangerous
- Non-repressive check on freedoms
 - You can do it, just be ready to meet the consequences
- Actor should bear the costs, not the victim—this encourages change



Strict Products Liability



Rationale for strict products liability is a little different because the thing is not inherently dangerous

So, the new rule of Strict Product Liability:

The manufacturer of a defective product is liable if the defect rendered the product unreasonably dangerous, and the defective product caused the victim's injuries.

“Manufacturer”

- Differs in every state
- Many states exclude product sellers
- Working definition: entity that designs, constructs, or fabricates the product



“Unreasonably Dangerous”

“A product that is unsafe beyond that which would be expected by the ordinary consumer”



Does ANY ordinary consumer expect to be sold food that makes them SICK?

STRICT Products Liability

- The only defense is prevention
- Diligence does not matter
- If you poison somebody, you pay
- Wishful thinking does not help



A Few Words About Ignorance:



- Ignorance is no defense
- Ignorance is also a bad defense

A Little Ancient History

Jack in the Box



TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

IN THE SUGGESTION BOX

Type of suggestion: (Check)

- Restaurant Procedure (POS, Admin, Maintenance, etc.)
- Quality Improvement (Procedure, Equipment, System)
- QSC&H Standards

FROM: Wendy Cochicella
 TITLE/POSITION: Shift leader
 RESTAURANT: 8466
 PHONE: (DCL) 435-3178
 DATE: 6/18/92



Describe change/new product idea I think regular patties
should cook longer. they don't get done and
we have customer complaints

Describe benefit/new product build If we change this we
will be making our burgers done and edible

cook times

I clearly understand that all ideas and suggestions by me become the property of Foodmaster, Inc. the JACK IS THE BOX Restaurants and QSC&H, whether or not Foodmaster, Inc. uses or benefits from such ideas/suggestions. I will not receive and have not been granted any compensation whatsoever.

Wendy Cochicella 6/18/92
 Signature Date

ORIGINAL COPY TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO SECOND COPY KEPT BY INITIATOR

EXHIBIT
65



A Division of
Foodmaster, Inc.
7000 Wilshire Center
Van Nuys, CA 91411-2116
Huntington Park, CA
Van Nuys, CA 91411-2116
619/273-1222

August 28, 1992

Wendy Cocharella
Shift Leader
JACK IN THE BOX #3466
3818 172nd St. N.E.
Arlington, WA 98223

Dear Wendy:

We have researched your suggestion and determined that with the variability of our grill temperatures (350° - 400°) the two-minute cooktime is appropriate. If the patties are cooked longer than two minutes, they tend to become tough. To ensure that you are meeting quality expectations for regular patties, please ensure that the grill temperature is correct and grill personnel are using proper procedures.

ensuring quality of product.

Sincerely,

RANDY HOPPER
Manager, Operations Service and Maintenance

RH:jad

Attachment

cc: Stephanie Green
Vanessa Fanchin
Mike McQuitty
Janice Eubank, Restaurant Manager J3466
Ed Mulhausen - Northwest
Rex Lyoch - Northwest

subject: 1/jad/FOCUS

Strict Liability For Food: In Sum



- The focus is on the product; not conduct.
- You are liable if:
 - The product was unsafe and thus defective
 - The defective product caused an injury

STRICT LIABILITY IS LIABILITY
WITHOUT REGARD TO FAULT

The Environmental Health Perspective



Governmental immunity then: The king can do no wrong



Governmental immunity now:

The king is occasionally wrong



HRS 662-2

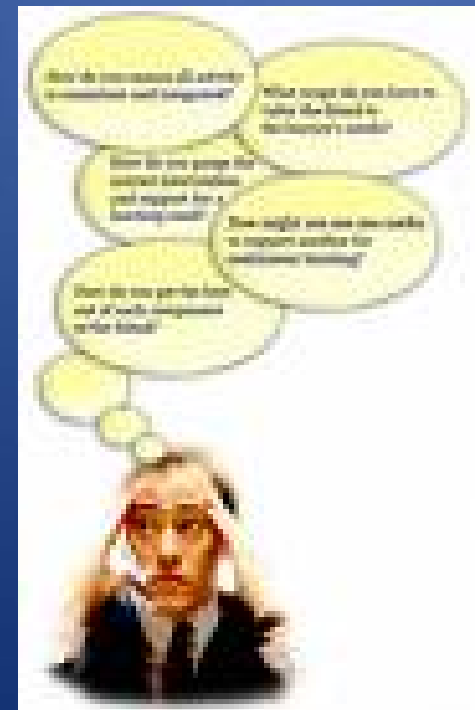
- The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Factors to Consider:

- Defense and indemnification for actions done “in the scope of the employee’s employment”
- Not strict liability
- No punitive damages
- Municipal liability may be different
- Apportionment of fault

Exceptions to Rule of Liability: HRS 662-15

- Execution of a statute or regulation
- Discretionary function or duty



Hypotheticals

- Cross over center line while driving to inspection
- Negligent failure to discover obvious violations that thereafter cause an E. coli outbreak
- Punch the coach of your son's basketball team who happens to be dining at the site of your inspection



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Questions?

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