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Beyond the 5-Second Rule: Serving for the Win in Food Poisoning Cases

I. Overview of Foodborne Illness

Incidence and reporting

According to the Centers for Disease Control (CDC), one in every six Americans contracts a foodborne illness every year. 128,000 hospitalizations and over 3,000 deaths are reported each year. Many other instances are never reported. There are two distinct causal groups. One group consists of 31 known pathogens that account for 20% of illnesses. The other 80% of illnesses are due to unspecified or undetermined agents.

Types of foodborne illness

The principal types of pathogens that cause illness are bacteria and viruses. Organisms such as Salmonella, Norovirus and Vibrio cause infection. Norovirus and Salmonella were the leading causes of illness, hospitalization and death as of 2014. Bacteria such as Bacillus Cereus and Staphylococcus Aureus cause intoxication. Contaminants such as E. coli, Clostridium perfringens and Shigella cause toxin-mediated infection. The top five foodborne illness pathogens are Norovirus, Salmonella, Clostridium perfringens, Campylobacter spp., and Staphylococcus Aureus. Other causes of foodborne illness include chemicals like cleaners and pesticides, body parts and fluids, foreign matter such as metals, and food allergies such as shellfish and nuts.

II. Hazardous Conditions

Potentially hazardous foods

The restaurant and hospitality industry must be knowledgeable and train all involved employees about potentially hazardous foods, as well as food storage, handling and service hazards which can expose establishments to liability for food poisoning claims.

Potentially hazardous foods are those which are capable of supporting rapid and progressive growth of infectious or toxigenic organisms. Prime examples include:

- Rice
- Cooked or raw animal products
- Cooked or raw vegetables or starches (including garnishes and spices)
- Raw seed sprouts
- Raw or water-cooled hard boiled eggs
- Cut melons
- Garlic and oil mixtures
- "Melty" cheese

Other factors influencing the potential for food contamination include:

- High protein content
- Acidity level (pH between 4.6-9.0)
- Temperature between 41º and 135º Fahrenheit
- Moisture
- Oxygen
- Time lapse

Potentially hazardous environments, and safe practices

Establishments serving food can minimize the risk of contamination by employing best practices in developing safe processes and training employees in all necessary food storage, handling and service procedures. This will foster a safe hospitality environment. On this subject it is useful to remember the "Three Ps"-- Personnel, Process and Procedures.

Regarding **personnel**, all kitchen personnel should obtain and keep current food safety certifications such as ServSafe or the like. A certified employee will impress jurors with that certification and the knowledge that comes with it. Training regarding safe **processes** should address the dangers of improper handling; contamination, including via illness of an employee; improper preparation of food; use of low-grade or dangerous food products; poor storage; and preparation or storage at improper temperatures. Note that employees suffering from any communicable disease with symptoms like sore throat with fever, nausea, vomiting, or diarrhea that can cause foodborne diseases such as Staph intoxication, Shiga toxin-producing E. coli, Salmonellosis, Shigellosis or the Hepatitis A virus, should not work in any area where there is a likelihood of contaminating food or food contact surfaces.

Procedures to prevent contamination must include avoiding cross-contamination in food preparation, glove use, hand washing, keeping fresh cleaning items stocked, and sanitizing surfaces. Be sure to comply with local and federal health regulations, and document your compliance. Even if they are not required by your state law, you should also consider compiling a Hazard Analysis and Critical Control Points (HACCP), or a Hazard Analysis and Risk-Based Preventative Controls (HARPC). These are standards codified by the FDA and the *Food Safety*

Modernization Act, 21 *U.S.C.* 2201. Small and very small businesses are exempt, but the principles are useful in formulating your company's food safety practices.

III. Diagnosis and Investigation of Foodborne Illness

Diagnostic criteria

While most foodborne illnesses become symptomatic between two and twenty-four hours after ingestion, some can occur as rapidly as within one hour (e.g., Bacillus Cereus and Staphylococcus), or as long as twenty-eight days (Hepatitis A). Symptoms can include nausea, vomiting, cramping, diarrhea, fever, lethargy, and flu-like symptoms. Symptoms can vary greatly depending on the causal agent and the individual.

Most food poisoning is mild and passes in a few days. Most people therefore don't go to a doctor for a diagnosis, or by the time they seek treatment, tests to determine the cause may be delayed, inconclusive, or not done at all. Traditional tests include blood tests, cultures of stool, urine and even vomit. It may take at least 48 hours to obtain results, which can be inconclusive if the pathogen has passed through the system.

There is a trend toward culture-independent diagnostic tests (CIDTs), which are faster and easier to use than traditional cultures. These tests identify the general type of bacteria causing illness within hours (e.g., Campylobacter). This is usually sufficient for diagnosis and treatment purposes. However, for public health purposes, these tests do not enable microbiological technicians to determine the organism's particular strain or subtype (such as DNA fingerprints), resistance pattern, or other characteristics. Such information is needed to detect and prevent outbreaks, track antibiotic resistance, and monitor disease trends to know if prevention measures are working.

Investigating the source

When a foodborne illness is suspected, the source must be investigated. Emergency room doctors are typically not epidemiologists, but emergency rooms are supposed to report apparent outbreaks to local health departments. The CDC defines a foodborne disease "outbreak" as: "An incident in which *two or more persons* experience a similar illness after ingestion of a common food, and epidemiologic analysis implicates the food as the source of the illness."

At the hospital, taking a thorough patient history is critical to determining the nature and potential source of the illness. It is important to know what foods the patient ingested in the last several days, any recent dietary changes, allergies or sensitivities, other potentially relevant illnesses or chronic conditions, and possible exposure to people who were otherwise ill.

If the local health department is alerted to a suspected food illness, its inspector and technicians will inspect the establishment that allegedly produced or served the tainted food. They will also interview the "person in charge," staff and any other diners allegedly exposed to the illness. The local health department possesses inspection and licensing powers bestowed by state law (e.g., New Jersey's food safety and inspection regulations are codified at *N.J.A.C*. 8:24-1, *et seq*.). However, the FDA serves as a scientific and technical consultant to state and local regulatory agencies by publishing the *FDA Food Code*, which contains model provisions for food safety in restaurant, cafeteria and institutional food operations. Most states adopt these provisions as legal requirements applicable to food service establishments within their jurisdictions.

The health inspection will likely yield several minor and/or major violations, many of which can be abated on the spot. Many foodborne illness investigations yield no conclusive determination as to the specific pathogen or specific food safety issue causing the illness. Nevertheless, the targeted establishment can suffer serious reputation damage by a mere allegation. Also, even if the source is traced to a product shipped to a restaurant, such as contaminated raw tomatoes served in salad, the restaurant's business will be damaged even where its food safety practices are completely compliant.

IV. Defense of the Foodborne Illness Case

Fact Discovery

If you have received a food poisoning claim, the plaintiff is often alleging symptoms that are more than transitory, and claiming damages that are more than trivial. If so, then the need to gather *all* the facts cannot be emphasized enough. You will of course need to obtain all hospital and doctors' records regarding the alleged illness. Of particular interest will be the time lapse between the ingestion of the alleged tainted food and the onset of symptoms (incubation period). You should also get plaintiff's primary doctor's file and any other prior medical records. Those records, and depositions of plaintiff and any fact witnesses such as friends, coworkers and family members, can yield key information regarding possible other culprits for the medical condition.

It is also useful to interview the local health department official(s) involved with any inspections and investigation of the reported illness. Depending on how long after the alleged exposure the health department inspection was conducted, you can demonstrate that many violations are irrelevant to the plaintiff's claims. Get all records of annual inspections for your establishment. Of course, you must also meet with your establishment's person in charge and food service employees to discuss their food safety processes and procedures, including food safety certifications.

In one food poisoning case, the plaintiff died from a lacerated gastric artery which her estate claimed was caused by violent vomiting and retching after she had eaten chicken and pasta at our client's catering facility. However, at the emergency room, plaintiff's husband

never mentioned vomiting when he would have been expected to divulge any pervasive or extreme symptoms. It was also determined that a lap band on plaintiff's stomach had shifted more than a year earlier, and plaintiff had failed to follow up with her bariatric surgeon as directed. The band eroded the stomach wall and ultimately cut the gastric artery, causing her to bleed out.

The matter was reassigned to us at the 11th hour with a pending trial date in three weeks. The first action taken was to immediately interview the health inspector. She revealed that an outbreak was reported three weeks post-incident by an anonymous caller who turned out to be plaintiff's coworker from the law firm representing plaintiff's estate. The caller refused to give any identities or details regarding the alleged illness, which frustrated the inspector and prevented the investigation from being completed per proper protocol. The inspector did inspect the premises and found *ten violations*, including an off-temperature walk-in refrigerator, raw chicken stored over salad greens, and an employee making a sandwich without gloves. However, the jury found no negligence on our client. Bottom line: It's usually not as bad as it seems.

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Expert Discovery

While most of us feel a sense of familiarity with food poisoning, the truth is that it is a subject with many nuances that benefits from explanation through a competent expert. ~~Be judicious in deciding whether to retain an expert, and if so, the specialization of the expert.~~ Depending on the particular claims you face, you might want to consult with an epidemiologist, internist, food safety expert, or other specialist regarding the circumstances and alleged symptoms. If you do retain an expert, thoroughly discuss your defense theories with him/her, to ensure that the science corresponds with your strategy, and that the expert's opinions ring true for jurors.

In one trial, the plaintiff claimed illness from eating a Middle Eastern raw lamb's liver dish, resulting in Guillain-Barre Syndrome(GBS), with permanent residuals. GBS is an autoimmune peripheral nervous system disorder. Its cause is unknown, but it is usually preceded by viral or bacterial infection, and it has been linked to bacteria such as Campylobacter. Plaintiff had two months of inpatient rehabilitation to learn to walk, and his neurological expert testified that he had permanent residual weakness and cramping of all extremities and tremors of the arms and hands. We retained an internist with a specialty in infectious disease, who noted that plaintiff's stool cultures were negative by the time he was tested, ten days after the meal. Our restaurant's owner and employees were ServSafe certified, and they credibly testified regarding proper handling of meats. The jury found for our client, accepting our expert's opinions over those of plaintiff's infectious disease and neurological experts.

Trial

The most hotly contested legal issues in food poisoning injury trials include product liability, negligence and proximate cause. The defense's focus is to defeat the claim that your product was unsafe and/or caused the alleged illness and damages. You can defeat the claim by showing good food safety practices, and showing that there is insufficient evidence of the specific pathogen and/or a link between the alleged disease and your establishment's food. You can also use the discovery you obtained to point out any other potential proximate causes of the plaintiff's condition, as in our lap band case.

Your opponent's food safety and/or medical experts often base their opinions on preconceived assumptions and cherry-picked facts, which should be scrutinized for the jury. In the trial of the above-mentioned death case, plaintiff's food safety expert admittedly violated the first rule of the effective investigation of a foodborne outbreak by failing to interview any witnesses, including plaintiff's three co-workers who claimed they also felt ill after the meal. The expert was also not up to speed on certain FDA studies which cast the exposure in a different light than that contained in his report. He opined that plaintiff had suffered a Staphylococcus exposure, which would have an almost immediate incubation period between the ingestion and the onset of symptoms. We cross-examined him with an FDA study that identifies 19 different foodborne illnesses recognized by the FDA. Of those 19, only Staph has an incubation period which would be consistent with the plaintiff's alleged onset of symptoms on the evening in question. The FDA materials peg the source of Staphylococcus as "*unrefrigerated or under-refrigerated meats".* The expert was also cross-examined regarding Salmonella exposure, which can arise from poultry, meat, eggs, and various cheeses. He was asked that question because of the FDA study's distinction between "poultry" and "meat". The fact that Staph was not listed as traceable to poultry raised doubt as to whether it was the agent that caused plaintiff's exposure, given that she only had chicken on the evening in question.

~~An attorney's number one role in trial is to educate – to educate is to advocate. Don't just tell the judge and jury, *show* them why your position is the right one. Expose and highlight the flaws in plaintiff's case by appealing to the undisputed facts and a common-sense view of the circumstances.~~