



NALS 61st Annual Education
Conference & National Forum
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Food Safety Litigation

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My Perspectives





"Christening" the Carpet

*" I opened a box of Tyson Buffalo wings and dumped them out on a plate to be cooked in the microwave. An unusually shaped piece caught my eye and I picked it up. When I saw that **the 'piece' had a beak**, I got sick to my stomach. My lunch and diet coke came up and I managed to christen my carpet, bedding and clothing. I want them to at least pay for cleaning my carpet etc. "*





Lending a Helping Hand

*" My husband recently opened a bottle of salsa and **smelled an unusual odor** but chose to eat it regardless, thinking that it was just his nose..."*





Lending a Helping Hand

*“ After taking two bites and tasting rather badly, he found what appeared to be a rather large piece (approx. the size of the back of an adult's fist) of **human or animal flesh**. Even though he didn't seek medical attention, he did become very nauseated. I do feel that the manufacturer should be held responsible for this mishap. ”*





The Types of Claims Being Litigated

FOOD SAFETY LITIGATION



Foodborne illnesses ...

... cost us an estimated
\$3-\$7 billion each year

- 76 million cases of human illness annually in the United States
- 325,000 people hospitalized per year
- 5,000 deaths can be attributed to foodborne illness



Why Do We Hear So Much About This?

Is our food less safe
than 20 years ago?



The role of scientific
detection techniques



The interest of the
media



E. coli O157:H7



According to estimates from the Centers for Disease Control:



— 73,000 cases
occur annually

— 2,100
hospitalizations

— 61 fatal cases



E. coli O157:H7 and HUS

- 5 to 10% of people with E. coli infections develop HUS
- Characterized by
 - Destruction of red blood cells
 - Destruction of platelets
- Organs affected: Kidneys, pancreas, liver, brain, heart

ABNORMALITIES

Serum Cr	2.5 mg/dl	High
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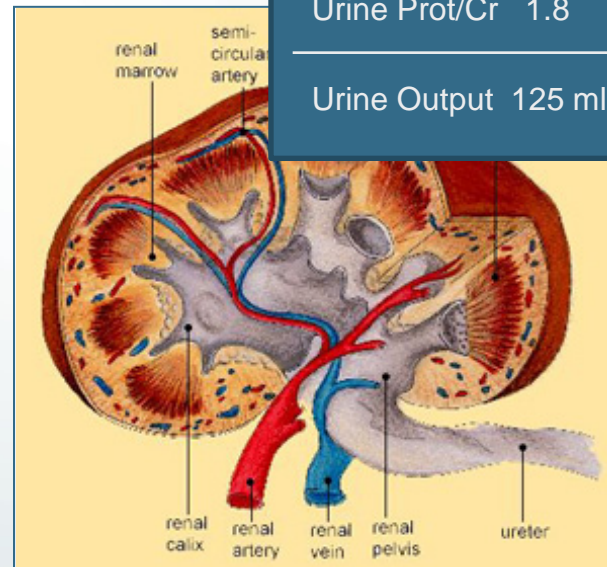
GFG	23 ml/min/1.73m ²	Low
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BP	140/90	High
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Urine Protein	300 mg/dl	High
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Urine Prot/Cr	1.8	High
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Urine Output	125 ml	Low
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Case Study: Katelyn Koesterer

- Onset of symptoms: one week before hospitalization
- Bloody diarrhea, abdominal pain, dehydration
- Stool positive for E. coli O157:H7 (although not a genetic match to meat in freezer, unopened package, nor child who ate meal with her)



Case Study: Katelyn Koesterer

Hospitalization
– three weeks

Hemolytic Uremic Syndrome

Destruction of red blood cells and platelets

Impaired kidney function

Pancreatitis

Central Nervous System involvement, seizures, slurred speech

Liver involvement

Increased blood pressure

Case Study: Katelyn Koesterer

- Katelyn the person vs. Katelyn the patient
 - Once well-adjusted first grader
 - Now irritable, not focused, moody, frustrated
 - CNS involvement of HUS caused cognitive and behavioral problems
 - Diabetes and ESRD





Salmonella

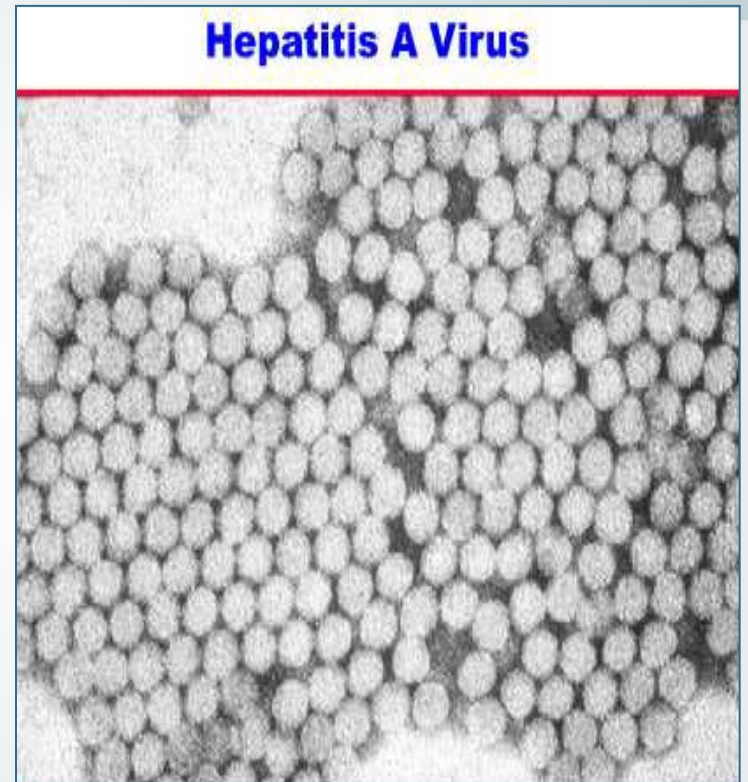
- Symptoms:
 - Diarrhea
 - Abdominal cramps
 - Fever
 - Nausea
 - Vomiting





Hepatitis A

- Kills nearly 100 people every year in the U.S.
 - Average fatality rate is 0.3%
 - People over age 40, fatality rate is 2%





Hepatitis A

- Creates toxins that shut down the liver
- Patients experience:
 - Fulminant hepatic failure
 - Encephalopathy
 - Cerebral edema



Healthy Liver



Effects of Massive
Hepatic Necrosis



Case Study: Richard Miller

- Onset of symptoms: 9 days before hospitalization



- Fatigue

- Stomach cramps

- Fever

- Loss of appetite

- Diarrhea

- Dehydration

It was gut-wrenching to see my dad on life support. Hollywood does not do justice to similar scenes in movies. I can't even begin to count how many tubes and machines he was hooked up to . . . [n]ot to mention all of the wounds and bruises over his body. . . . The night leading up to the transplant was a nightmare. That night we watched in horror as a gentleman across the hall passed away from a liver transplant as a result of being infected with Hepatitis A.



Case Study: Richard Miller

- Hospitalization: 27 days
 - Jaundiced
 - Elevated blood pressure
 - Agitated
 - Disoriented
 - Liver transplant
 - Pneumonia
 - Paralysis of left vocal cord
 - Neuropathy in arms



Case Study: Richard Miller

- Prognosis:
 - Likely additional transplant
 - 11 medications to take every day, all to be taken at different times of day
 - Clinical depression
 - Job loss, financial security





Strict Product Liability

Or, all I ever learned in Law School



- Strict Liability
 - Manufacturer/seller of food?
 - Product unsafe?
 - Cause injury?

- Negligence
 - Did you act "reasonably"?



It's Called STRICT Liability For a Reason

- The only defense is prevention
- It does not matter if you took all reasonable precautions
- If you manufacture a product that makes someone sick you are going to pay
- Wishful thinking does not help



Policy Behind Strict Liability?

- It puts pressure on those that most likely could correct the problem in the first place
- It puts the cost of settlements and verdicts directly on to those that profit from the product





Worthless Excuse # 1

“Everyone else was doing it ...or not doing it.”



If your product was unsafe, it doesn't matter if it met "industry standards"



Worthless Excuse # 2

“We were working on it.”

If you identify a potential problem and an injury occurs before you fix it, the jury will assume you were not serious about food safety





If a document
contains damning
information, the jury
will assume you read
it, understood it, and
ignored it

TO: PLUMBER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

IN THE SUGGESTION BOX

Type of suggestion: (Check)

☒ Restaurant Procedures (POS, Admin, Maintenance, etc.)

☐ Quality Improvement (Procedure, Equipment, System)

☐ Price Standards

☐ New Product

☐ Other

Describe the change/new product idea: I think regular portion should cook longer. They don't get done and we have customer complaints

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

List any new ingredients or equipment: none just longer cook times

I clearly understand that all ideas and suggestions by me become the property of Panera Bread, Inc. and JAMC is the sole proprietor and that, whether or not Panera Bread, Inc. or JAMC will use or benefit from them (whether or not suggested), I will not receive any compensation and I have authorized the Panera Bread, Inc. representative.

Wendy Corbelle 4/16/79
Signature Date

ENCLOSURE COPY TO: PLUMBER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

SECOND COPY SENT INTO BY REGISTRATION

EXHIBIT

65

REV. 8/81

LONG NO. 1000

[www.cba.gov.sg](#)



Jack in the Box –

A Wake-Up Call for the Industry





TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

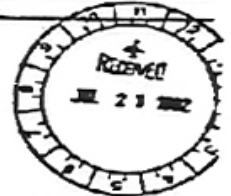
IN THE SUGGESTION BOX.

FROM: Wendy Cocharella
TITLE/POSITION: Shift leader
RESTAURANT: 8466
PHONE: (619) 435-3178
DATE: 6/18/97

Type of suggestion: (Check)

- ☐ Restaurant Procedure (POS, Admin, Maintenance, etc.)
☒ Quality Improvement (Procedure, Equipment, System)
☐ QSC&P Standards
☐ New Product
☐ Other

Describe change/New Product Idea I think regular patties
should cook longer. They don't get done and
we have customer complaints



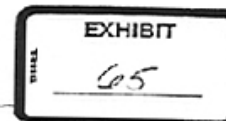
Describe change/New Product Idea I think regular patties
should cook longer. They don't get done and
we have customer complaints

Describe Benefit/New Product Build If we change this we
will be making our burgers done and edible.

ORIGINAL COPY TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

SECOND COPY RETAINED BY INITIATOR

REV. 8/96



LINE NO. 12648



July 24, 1992

Wendy Cocharella
Shift Leader
JACK IN THE BOX #8466
3818 172nd. St. N.E.
Arlington, WA 98223

Dear Wendy:

We have received your suggestion regarding increasing the cooktime for our regular patties.

Your suggestion is currently being researched within the Corporate Office. You will again be notified with more detail as soon as a decision has been made regarding this suggestion.

We would like to acknowledge the time and effort you have taken to contribute to the success of JACK IN THE BOX by enclosing this

A Division of
Foodmaker, Inc.
10000 Redwood Avenue
San Diego, CA 92123-0148
Shipping Address P.O. Box 100
San Diego, CA 92113-0100
619/571-2121

We would like to acknowledge the time and effort you have taken to contribute to the success of JACK IN THE BOX by enclosing this pen/highlighter. Each person submitting suggestions is eligible to receive one gift per quarter with their first suggestion.

Enclosure

cc: Jeff Miller
Stephanie Green
Vanessa Panchin
Mike McQuitty
Janice Eubank, Restaurant Manager J8466
Ed Mulhausen - Northwest
Rex Lynch - Northwest

suggest/jad/augbox4



Who Decides Whether Your Client Should Pay?

All jurors eat food!





What Can A Jury Order Your Client To Pay To Injured Patrons?

- Medical expenses both past and future
- Lost wages - Impairment of ability to earn a living
- Pain and suffering
- Attorney fees for the customers' attorneys
- Punitive damages



What Can Your Client Lose In Addition?

BRAND – REPUTATION

A company can't buy enough insurance to protect against that!!





Which Headline Sounds Better?

\$2.00 Single Copy
Volume 23, Number 52

**NATIONAL
BUSINESS
JOURNAL**

**SETTING THE
COURSE:**
*The golf industry is
facing some challenges,
but the future still looks
good for innovators.*
STRATEGIES | 19

FEBRUARY 23, 2007

NICHE MOVES:
Mentor finds its
way serving a
diverse base.

FINANCIAL HIT:
Clinics expect to

Restaurant *Wins* \$10 Mil Ecoli Case Brought By Severely-Injured Child



A real life restaurant nightmare: Chi-Chi's, Inc.



The largest Hepatitis A
outbreak in U.S. history



Chi-Chi's, Inc. background

100+ store Mexican restaurant chain located in the Midwest and East

Contaminated green onions served at a restaurant outside of Pittsburgh in October 2003

Company had filed for bankruptcy three weeks before the outbreak

before the outbreak





The numbers

660

People who became sick

550

Number of legal claims filed

4

Deaths

1

Liver transplant

10,000

People who received IG shots

30

Days of nonstop local media attention



The Outbreak Response

The Response Team

Public Health Investigation

Working closely with public health authorities, initial reports of HAV-infected employee led to CDC conclusion that green onions contaminated in the field were the source and that there was nothing Chi-Chi's could have done to avoid the outbreak.





The legal response

Over 600 claims resolved within months of the outbreak

Few lawsuits and accompanying litigation expense

99% success rate in mediations with lawyers and clients



How to survive an outbreak

1. Have an outbreak response team selected and a plan prepared before you hear the word outbreak and your client mentioned in the same sentence.

Key personnel – whether inside or outside the company

Epidemiologist who is experienced in working with public health authorities



How to survive an outbreak

1

(continued)



Media relations people with outbreak/crisis response experience

Insurance claims professionals

Risk management personnel with mass tort experience

Person most knowledgeable about all vendor relationships

Food safety attorney



How to survive an outbreak

2. All existing documentation which has any possible connection to the event must be immediately secured.

All food purchase documentation for at least three months before the incident

All vendor agreements, contracts, or communication around the relevant time period

All written food preparation instructions, including ingredients and recipes



How to survive an outbreak

2

(continued)



All insurance information, both for your company and its suppliers

All food safety documentation for at least three months before the incident

Employee schedules or time records for at least one month before the incident

All health inspection reports for at least three years before the incident



How to survive an outbreak

3

Immediately have a point person begin a dialogue with any and all food safety authorities- they are your best friends!!

4

Immediately begin outreach efforts to your patrons. Remember: within hours after an outbreak is reported in the media, lawyers will already have retained clients.



How to survive an outbreak

5

Your client must demonstrate ethical, operational, and legal transparency at all times. Transparent: “free from guile, candid or open.” Without transparency, your brand cannot survive.

6

The most important consideration is to take actions which are reasonably likely to protect the safety of customers.



How to survive an outbreak

7

Your client's second most important goal is to maintain the same level of business pre-outbreak – these goals are not mutually exclusive!!

8

Preparing a lawsuit defense is not a priority while you are in the middle of an outbreak situation. Lawyers will still be around a few years later; your client may not.



Being Proactive is Key

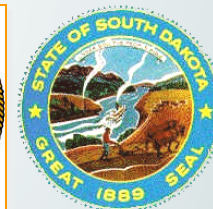
9 Establish relationships with federal and state health authorities



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION



Public Health – Seattle & King County



naccho
NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS





Lessons Learned From An Outbreak

Brand protection = doing what is right for customers

Arm yourself with good, current information

Since you have a choice between doing nothing or being proactive, be proactive

Make food safety part of everything you do

Don't let lawyers hijack the process



Questions?



Davis Wright
Tremaine LLP

DEFINING SUCCESS TOGETHER