

# Product Liability Claims in the Food and Drink Sector

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# Focus of the session

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- Product liability - why it matters
- Typical risks faced by food & drink businesses
- Mitigating risk
- Practical considerations for minimising risk
- Managing product liability crises
- Notifications/recalls
- Practical tips – claims management
- Q&A



Product liability:

Why it matters

# Why does it matter? (1)

## Russell Hume – food hygiene and labelling failures



## Product contamination



## Product provenance



## Failure to warn of allergens



# Why does it matter? (2)

## January 2020 recall examples:



**Food Recall Alert** 

**Incorrect Allergen Information**

**BOOTH'S**  
**LEMON MERINGUE CAKE**  
PERFECT FOR SHARING

A light cream sponge topped with a thick swirl of white meringue paste. Made in accordance with standards.

**Booths Lemon Meringue Cake**

We are recalling Booths Lemon Meringue Cake due to some products being affected by incorrect Allergen Information. Some products may contain Bakewell Cake instead of Lemon Meringue Cake; this contains Nuts that are not declared on the label.

**Booths Lemon Meringue Cake**  
Best Before: 03.02.20  
Pack size: Each

 The use by date can be found on top of the product



**CUSTOMER NOTICE**  
**PRODUCT RECALL**

Product: NO MOO Chocolate Puddings

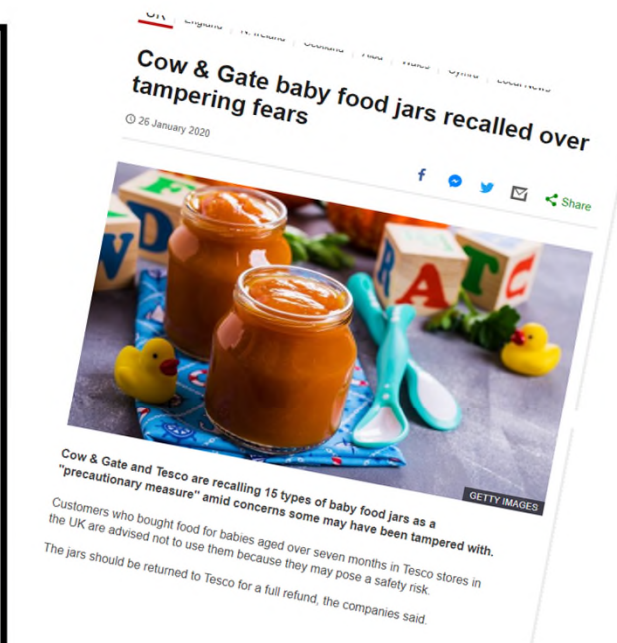


**Best Before: All date codes up to and including 13<sup>th</sup> July 2021**

**Reason:**  
**Product may contain milk**


If you have purchased the above product do not consume. Return to your nearest Iceland store for a full refund.  
If you have any concerns or queries, please contact the Store Manager or call our Customer Care Line on 0800 328 0800 Option 3

019/011 **Iceland** Remove notice on 14/02/20



Cow & Gate baby food jars recalled over tampering fears

© 26 January 2020



Cow & Gate and Tesco are recalling 15 types of baby food jars as a "precautionary measure" amid concerns some may have been tampered with. Customers who bought food for babies aged over seven months in Tesco stores in the UK are advised not to use them because they may pose a safety risk. The jars should be returned to Tesco for a full refund, the companies said.



Product liability:

Areas of risk

# Typical risks faced by food & drink businesses

- Injury to consumers
- Customer complaints
- Financial loss/extra costs
- Operational disruption
- Court claims - from the public and/or others in the supply chain
- Class actions
- Damage to commercial reputation and brand
- Loss of competitive advantage and consumer loyalty
- Corporate goodwill



# Types of legal action





# Areas of risk (1)

- Supply chain issues – leading to defective products
- Harmful products
- Poor quality products
- Incorrect labelling



## Areas of risk (2)





Product liability:

Mitigating your key risks

Audits: food  
mapping and  
supplier audits

Quality control  
procedures

Contractual  
protections

Effective  
enquiries and  
complaints  
systems

Insurance  
contracts

## Managing risk in commercial contracts

- Warranties
- Exclusions and limitations of liability
- Indemnities
- Obligations
- Co-operation in issuing warning notices or a recall
- Insurance coverage
- Entire agreement



# Ways to minimise supply chain risk

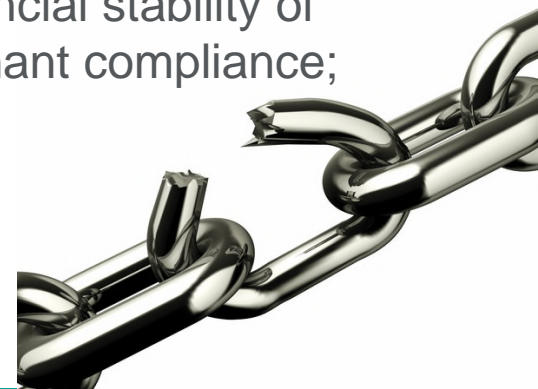
- Identifying where your key risks and vulnerabilities lie, including critical supplies and suppliers
- Designing the right supply chains that are fit for purpose
- Supply chain optimisation - interconnected networks, localisation, intelligent modelling to assess the cost, quality and time implications of any decisions
- Active contract management (eg proactive alerts), benchmarking, mitigation plans, contingencies and continual improvements, including calculation of financial loss scenarios
- Strengthening weak links – eg dual sourcing?
- Appropriate use of technological innovation – predictive analytics, automation, blockchain



# Consider supply chain health checking (1)

- Do you know who your critical suppliers are and how much their failure would impact your company's profits?
- Have you fully mapped your critical supply chains upstream to the raw material level and downstream to the customer level?
- Have you integrated risk management processes into your supply chain management processes?
- Do you have routine timely systems for measuring the financial stability of critical suppliers (eg red flags; D&B reports; KPI and covenant compliance; supplier reviews; company watch, etc)

*And there's more...*



## Consider supply chain health checking (2)

- Do you understand your production facilities and logistic hub exposures to natural catastrophes?
- Do you record the details of supply chain incidents and the actions you have put in place to avoid future incidents?
- Do your key suppliers have business continuity plans that have been tested in terms of their viability?
- Have you provided risk training to your supply chain management team?
- Is risk on the agenda at performance meetings with your strategic suppliers?



# Product traceability – does blockchain offer a future solution?

## Case Study: Walmart

- Walmart says it now has a better system for pinpointing which batches of leafy green vegetables might be contaminated. After a two-year pilot project, the retailer announced in 2018 that it would be using a blockchain, the type of database technology behind Bitcoin, to keep track of every bag of spinach and head of lettuce.
- By 2019, more than 100 farms that supplied Walmart with leafy green vegetables were required to input detailed information about their food into a blockchain database developed by IBM for Walmart and several other retailers exploring similar moves.
- The blockchain could save Walmart money. When another food-borne illness hits — like the E.coli outbreak affecting romaine lettuce — the retailer would only have to discard the food that was actually at risk.



Product liability:

Risk reduction checklists

## Are my products safe?

- Do you have a Product Safety Incident Plan (PSIP) in place, including a quality and safety assurance programme?
- Have all regulations, standards and codes of practice applicable to the products been identified?
- Is the packaging, labelling, warnings, instructions for use/storage appropriate?
- Are your products properly designed, manufactured, tested, distributed and stored?
- Do you run regular product liability audits?
- Has a product safety committee and a safety manager been appointed and is there a written safety policy?

### Do I have appropriate quality systems for:

- Managing supplier risks by conducting appropriate due diligence?
- Ensuring the products are safe when they leave my control?
- Being informed of problems in use?
- Assessing and testing information and returned products?
- Taking appropriate action to inform customers and users of new information
- Understanding the risks associated with the product (including traffic lighting of risk) - any likely areas of liability exposure and possible causes of action?
- Dealing with product enquiries and complaints effectively?



### Do I have appropriate quality systems for:

- Post-market surveillance and early warning systems?
- Ensuring adequate training on product safety throughout the business?
- Establishing a crisis management team ready to act if faced with an urgent product safety issue?
- Instituting an effective recall policy?
- Ensuring product traceability – retaining information to identify particular types, batches or individual products?
- Do you have a document retention and destruction policy?



### Do I have appropriate insurance cover in place?

- Is an appropriate level of product liability insurance held?
- Does insurance cover the costs of taking unexpected action in relation to products, particularly recalls, as well as satisfactory claims handling arrangements?
- Does insurance cover the specific scenario?



### Is my contractual documentation satisfactory?

- Does it provide appropriate warranties and indemnities?
- Does it provide appropriate limitations or exclusions of liability?
- Does it provide for appropriate standards of quality in products supplied?
- Does it set out who is to have what obligations for testing, storage, distribution or providing information on products?



**minimise your risk**

## Is my contractual documentation satisfactory?

- Does it include obligations to pass on information in the chain of distribution, whether back towards producers or forwards to users?
- Does it cover the obligations of appropriate parties in relation to co-operation in issuing warning notices or recall?
- Does it impose product liability insurance obligations on others in the supply chain?
- Does it have a dispute resolution mechanism?
- Are the jurisdiction and governing clauses appropriate?





## How confident are you in the integrity of your food practices?

- Is fraud a significant issue in your sector/company?
- How simple is it to adulterate or counterfeit your products?
- Do you have reliable detection methods in place?
- Are you able to rapidly report incidents?
- How would you describe your production lines?
- How transparent is your part of the food chain?
- Do your suppliers have counter food fraud strategies in place?
- How robust is your recall process?





# Managing Product Liability Crises:

When things go wrong!

# When things go wrong!

**Make an  
initial  
matter/risk  
assessment**

**Early  
notification  
to insurers**

**Investigate  
the product**

**Identify and  
protect legal  
professional  
privilege**

**Notify other  
relevant  
third parties**

**Identify and  
retain  
expert  
consultants**

**Preserve  
documents  
and  
information**

**Diarise key  
dates**

## Take into consideration:

- The product itself
- The nature of the claimed issue/product hazard
- Isolated incident or is there a pattern?
- Injury/damage scenarios and likelihood
- Severity and probability of injury/damage to the public/business?
- Health and safety implications to the public?
- Are special groups affected? – children?
- Have laws/regulations been violated?
- Consider notification/recall obligations
- Review contracts
- Corrective action (including how to safely dispose of the product)



- Do nothing?
- File a notification to a regulator to provide information on an informal basis?
- Recall from public (with replacement/refund/exchange)?
- Withdraw affected items from the supply chain?
- Issue product warnings?
- Amend labelling for future sales?
- Redesign the product?
- Modify product distribution chain?
- Introduce additional quality control measures?
- Changing the production method?
- Settlement of claims/complaints?



# Legal requirements for notification/withdrawal/ recall of food and drink products – General Food Law Regulation (178/2002)

## Article 19:

- If Food Business Operator ("FBO") considers or has reason to believe the product it has **imported, produced, processed, manufactured or distributed is not in accordance with the food safety requirements**, it shall **immediately** initiate procedures to withdraw the food in question from the market **where the food has left its control and inform the competent authorities** of the relevant Member State
- **Where the product may have reached the consumer**, the operator shall effectively and accurately inform the consumers of the reason for its withdrawal, **and if necessary, recall from consumers products already supplied to them** when other measures are not sufficient to achieve a high level of health protection
- A food business operator responsible for **retail or distribution activities** shall, within the limits of its respective activities, **initiate procedures to withdraw** from the market products not in compliance with the food-safety requirements and shall participate in contributing to the safety of the food by passing on relevant information necessary to trace a food, cooperating in the action taken by producers, processors, manufacturers and/or the competent authorities
- FBO must **immediately** inform the competent authorities if it considers or has reason to believe that a food which it has placed on the market may be **injurious to human health**. Operators must inform the competent authorities of the action taken to prevent risks to the final consumer

## Article 14(3) of EU General Food Law Regulation – Determination of whether food is unsafe:

- Requires objective assessment with regard to:
  - normal conditions of use; and
  - the information provided to the consumer, including information on the label; or
  - other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods

## Article 14(4) of EU General Food Law Regulation – Determination of whether food is injurious to health:

- regard must be had to:
  - probable immediate and/or short-term and/or long-term effects of food on health of person consuming and subsequent generations;
  - probable cumulative toxic effects; and
  - particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers



- **Notification** means informing competent authorities that food in the market is unsafe
- **Withdrawal** means removing the product from the supply chain/ market ie stopping the sale or supply of the product
- **Recall** means any measure aimed at achieving the return of an unsafe food that has already been supplied or made available to consumers eg
  - Tracing affected products
  - Communications to consumers
  - Managing returns
  - Disposition of recalled product





# Tips for successful claims management (1)

- Make an early and accurate assessment of the merits of any claim/defence
- Collate contemporaneous documents
- Suspend routine document destruction policies
- Interview witnesses and draft witness statements – preferably before memories dim
- Upfront cost: Spend to save?



## Tips for successful claims management (2)

- Involve in-house/external legal teams to secure the benefits of legal advice and litigation privilege (eg when carrying out investigations, interviewing witnesses of fact and engaging experts)
- Keep accurate records of all post dispute meetings with other side
- Where appropriate, mark documents "Without Prejudice"
- Consider involvement of third parties (eg external forensic accountants to assist in the assessment of loss)
- Devise case strategy and optimum method of resolution based on your attitude to risk, eg negotiated settlement, mediation or trial?



## Useful resources

## GLOBAL SUPPLY CHAIN LAW BLOG

### Federal Focus on Forced Labor in Xinjiang: Supply Chain Risks

By [Sarah Rathke](#), [Ludmilla Kasulke](#) and [Jordan E. O'Connell](#) on November 21, 2019  
POSTED IN [INTERNATIONAL](#)

There have been longstanding tensions in the Xinjiang province of China between the Chinese government and the Uyghurs, a predominately Muslim ethnic group. The UN estimates that there are more than 1 million Uyghurs in detention camps, and there are reports of pervasive surveillance, wide-spread forced-labor, and “re-education” programs.

These human rights abuses present significant risks for companies whose supply chains include products from Xinjiang. Xinjiang produces the majority of China’s cotton, and cotton from Xinjiang may be mixed with cotton from other regions (or not be labeled as being from Xinjiang). Because of this, some companies, such as

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## Legal NewsBITE: Food and Drink Quarterly

December 2019

### Reaping the Rewards of Your Recipe: What *Shanks v. Unilever* Means for Employee Inventors in the Food Industry

Obtaining a patent for a recipe is possible, but by no means easy. Employers in the food and drink industry whose staff have concocted recipes that are both novel and inventive may be able to obtain patent protection for the invention. However, for employees devising such recipes during the course of employment, a recent decision of the UK Supreme Court has made it slightly easier for them to be compensated for their patentable creations.

The decision in *Shanks v. Unilever* has clarified that employee inventors are entitled to a "fair share" of the benefit that the employer has received from employee inventions, if the invention/patent has been of "outstanding benefit" to the employer. Whilst the bar to demonstrating the "outstanding benefit" of a patent remains high, culinary inventors may be encouraged to pursue compensation claims where they can show that their recipe has led to significant monetary benefit.

Food businesses should (i) require employees to disclose all inventions immediately; (ii) keep careful records identifying employee inventors; and (iii) consider a scheme to adequately compensate employee inventors, rather than risk litigation where an employee seeks to enforce their right to compensation.

### Protected Designations of Origin and Geographical Indications: Balsamic Vinegar Does Not Have to Come From Modena

Our Frankfurt office successfully represented Balema GmbH in proceedings before the European Court of Justice (ECJ). The [decision](#) is now available in English, and in its judgment, the ECJ ruled that the term "Balsamico" is not protected as a designation of origin and geographical indication. The key question of the legal dispute that began in 2015 was whether the protection afforded by the registration of the entire name "Aceto Balsamico di Modena" also extended to the use of individual non-geographical components of that name, namely the terms "Aceto", "Balsamico" and "Aceto Balsamico", and whether the exception under the relevant EU regulation on quality schemes for agricultural products and foodstuffs applied, specifically whether the term "Balsamico" could be considered a generic term (and, therefore, a breach had not been committed).

This case also attracted international interest from the governments of Germany, Greece and France, which all held the view that the terms "Aceto", "Aceto Balsamico" and "Balsamico" are generic terms or non-geographical names, and only "Aceto Balsamico di Modena" as a whole should be protected, a view also agreed with in July by the Advocate General. Partner Dr. Christofer Eggers commented on the ECJ's ruling: "I am very happy that



## Food Provenance, the question on everyone's lips: Is Blockchain the answer?

“Everywhere we go! People always ask us. Who we are? Where we come from”, this may be a favourite song of many children around the world, however now more than ever, global consumers are applying the very same mentality to the provenance of the food they consume. Modern day society has become focused on what we eat, the ingredients, the source of the food and the environmental impact.

Consumers are becoming increasingly cognisant to the importance of food provenance, paying much greater attention to the food supply chain. Although ‘country of origin’ labelling is nothing new, it can have a significant influence on consumers’ purchasing, and is why businesses such as McDonalds advertise the local source of their vegetables and meat products. Increasingly, for many consumers “locally sourced” is no longer sufficient, and they want to know how that food has gone from field-to-fork.

### So what is blockchain and where can it help?

Blockchain is nothing more than a very safe database. However,

This process is then able to continue throughout the supply chain, allowing the end consumer to simply scan a QR barcode in order to track the ownership and authenticity of the food, as they move from the manufacturer across the supply chain. Carrefour, the French retailer has done exactly that with 20 items (including chicken, eggs, raw milk, oranges, pork and cheese) specifically choosing products that consumers may consider higher risk, with a further 100 more items to follow.

The IBM Food Trust, Provenance, Origintrail, arc-net and more, are all BaaS (Blockchain-as-a-Service) solutions helping to increase food safety for all network participants, including growers, processors, senders (dispatchers), retailers, regulators and consumers. These BaaS solutions give end consumers an opportunity to learn more about their food origin and give authorised users instant access to data across the entire supply chain from farm-to-store. Accessing the complete history and current location of each individual food item is just a click away. Network data meets all global standards and is shared only with business partners as per a need-to-know basis, within a safe and confidential environment.

Not only does this use of blockchain software provide reassurance to the consumer of the provenance of the food, it has also been at the centre of recent food safety discussions. Blockchain provides a secure and very efficient means to monitor food produce and apply

<https://www.gov.uk/food-safety-your-responsibilities>

<https://www.food.gov.uk/business-guidance/safer-food-better-business>

<https://businesscompanion.info/en/quick-guides/food-and-drink>

<https://food.gov.uk>

# Q&A







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