

Product Liability in the Food Industry

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INTRODUCTION

The food supply chain often deals with product liability on an ad hoc basis and believe that a voucher for a few hundred South African Rand can put everything right.

Consumers are becoming ever more militant.

In South Africa, laws are being drafted to give consumers teeth, such as the proposed Consumer Protection Bill and the recently published Food Labeling Regulations.

In the light of the new legislative and regulatory environment, as well as the ever more litigious society we live in, food manufacturers, wholesalers, retailers, restaurants, and the entire food supply chain need to sit up and pay attention to product liability issues in the food industry.

CIVIL LIABILITY

Currently, civil liability in food related cases is no different from that of a vehicle accident or any other case in which one party damages another parties interests and an allegor of product liability must prove at least negligence on the part of the party that is being sued.

The sued party could even apportion part of the blame back on the allegor, for example, if the meat smelt bad before you ate it why did you eat it.

Typical matters which could be the subject of a civil matter include food poisoning, foreign objects in food, long term effect of additives and the like, and labeling issues, although many other causes of action may also exist or be created in the future.

The "good news" for the food industry is that South African law does not provide for punitive damages.

A court may however award actual damages such as medical costs, lost earnings, travel costs, and the like, as well as consequential losses such as future loss of earnings. Further still, a court can award special damages for loss of amenities and enjoyment of life, for example, no longer being able to eat a specific type of food.

In the proposed Consumer Protection Bill, which is currently in its final stages before being voted on by parliament, a radical change in the determination of liability, where a consumer is one of the parties, is proposed.

The basis of liability as between a supplier and a consumer will likely change from that requiring the consumer to prove negligence by the supplier, which is presently the case in South Africa, to a no fault liability regime in terms of which the consumer will merely have to show that the food was off or that there was a foreign object in a package in order to prove liability by the supplier.

The supplier and any other party in the supply chain will then be liable, regardless of what steps they took to prevent the occurrence.

Employers will also be liable, regardless of any fault on their part, for the actions of their employees even if these actions are directly against the instructions of the employer. A consumer who purchases a food item sabotaged by an employee will have a claim against the employer of the employee regardless of what training and other steps the employer had in place.

Under present South African law, there are few reported cases on the liability of a retailer or food outlet to a consumer who has been poisoned or where a foreign object has been found in a food item.

One case of food poisoning, and claims arising there from was heard by the Cape High Court in the matter of Muzak v Canzone-del-Mare.

In this case a patron of the restaurant ordered sea food and after eating the meal experienced symptoms of food poisoning which lead to his hospitalization and further medical treatment. Muzak then sued Canzone-del-Mare for actual damages which included his hospital and other medical expenses as well as loss of earnings for the period in which he was to ill to work.

In the matter of Muzak v Canzone-del-Mare.

He further sued for special damages claiming that he always enjoyed sea food and now he can no longer eat it out of fear of suffering food poisoning again. The Court held in favour of Muzak and awarded his actual losses as well as an amount for the loss of enjoyment of life. The special damages exceeded the actual medical expenses and loss of earnings.

Canzone-del-Mare was also ordered to pay Muzak's legal costs which would have been very high.

The Muzak case should be a warning to all manufacturers, retailers, and food outlets that the consumer does not have to accept excuses and gift vouchers but can sue in a Court of law and get an award of damages, special damages, as well as legal costs against such a manufacturer, retailer, or food outlet.

This will become even more acute when the Consumer Protection Bill becomes law.

It is important to remember the legal maxim that "you take your victim as you find him" . This maxim means that if 99% of the public would suffer no effects from a particular cause, such as food poisoning, but a particular person suffers very badly and is permanently disabled, the responsible party cannot rely on a defense of not expecting such dire consequences, and would be liable.

An example of this are the so called "egg shell skull" cases. A person with a weak skull was pushed and bumped his head. This lead to a skull fracture which would not have occurred if he had not had a weak skull. The courts held that the person pushing the weak skulled person caused the harm. Arguing that it would not have happened to the average person was not a defense.

It appears that this maxim may be relevant to food allergies and contamination of products by allergens. If a person with a rare but extreme allergy were to consume food not adequately labeled, and if it contains that allergen and the person suffers a severe allergic reaction, that person could take legal action against the supplier or the manufacturer.

CRIMINAL LIABILITY

Criminal liability is often overlooked because the South African Health Department and many local authorities have not been enforcing the laws and their criminal provisions.

In terms of Section 2 of the Food, Cosmetics and Disinfectants Act it is a criminal offence to sell or distribute food which is unfit for consumption or which has a foreign object in the packaging.

This criminal conduct can be attributed to any party in the supply chain from importer, manufacturer, distributor, retailer, to food outlet regardless of actual knowledge of the foreign object in the food or the state of the foodstuff.

In food poisoning cases the afflicted party should go to the District Surgeon, and have stool samples analysed as well as the food item, if available. If the District Surgeon finds that the person is suffering from food poisoning a criminal prosecution can follow by the Health Department of the local authority. The criminal prosecution can result in a criminal record for a proprietor of the company or a representative of the company such as the Managing Director.

A major potential source of criminal liability across the food supply chain is the presence of foreign objects in food. Many by-laws and the Food, Cosmetics and Disinfectants Act introduce strict liability for foreign objects found in foodstuffs which should lead to criminal prosecution but often doesn't due to neglect by the inspectors.

The public is not powerless however and a member of the public can institute a so called "private criminal prosecution" in terms of which the member of the public rather than the public prosecutor lays a charge

and prosecutes the criminal case in Court.

Private Criminal Prosecution is an option

One such case of a private criminal prosecution was when a member of the public prosecuted Amalgamated Beverage Industries Natal (Pty) Ltd for a bee found in a soft drink bottle. The company was convicted in the Magistrates court and appealed to the High Court and later the Supreme Court of Appeals. The Supreme Court of Appeals found that ABI were guilty of the offence as charged because they permitted the filled bottles to pass an inspection point at a speed which did not permit for proper control.

Although the fine was relatively small, the costs of fighting a case in the Magistrates court, the High Court, and the Supreme Court of Appeals could have run into hundreds of thousands if not millions of Rands!

What is important to note is that criminal and civil liability are separate issues since to obtain a criminal conviction the level of proof required is that of "beyond reasonable doubt" which is higher than the level of proof required to succeed in a civil matter which is "on a balance of probabilities" i.e. 50.1% is good enough.

The fact that a criminal conviction was unsuccessful does not mean that on the same facts a consumer will not be successful in a civil claim. Where a company is convicted in a criminal matter it would be a good indication that the consumer will be successful in a civil claim, although such civil claim will have to be separately proven in a Court.

In the case of the bee in a soft drink bottle, if the consumer had drunk the softdrink and been stung by the bee, and possibly been allergic to bee stings, the consumer could have also sued ABI civilly for damages suffered, such as in the Muzak case discussed above.

CONCLUSION

In conclusion, manufacturers, importers, distributors, retailers, and food outlets have been lucky that the authorities and consumers have not been more aggressive in pursuing criminal prosecutions and civil claims. The tide is turning and the day of the voucher is fast coming to an end.

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