

Horsemeat Scandal – Protecting Your Business

Maria O'Loan



As the horsemeat scandal continues to dominate the news headlines, we ask Maria O'Loan, Director of Cleaver Fulton Rankin's Food and Drink Unit what the implications are for business.

Q: Could Businesses face a criminal prosecution?

The horsemeat scandal raises issues for all elements of the food supply chain from abattoirs to supermarkets and restaurants. It creates issues of both civil and criminal liability. The Food Safety (Northern Ireland) Order prohibits the selling, offering or advertising of food which does not comply with Food Safety requirements. Under Northern Ireland law, food fails to comply with Food Safety requirements if:

- It has been rendered injurious to health, i.e. by the addition of any article or substance to the food;
- It is unfit for human consumption; or
- It is so contaminated that it would not be reasonable to expect it to be used for human consumption in that state.

It is also unlawful under Northern Ireland law to sell or offer for sale, food which is "not of the nature or of substance or quality demanded" by consumers. This would cover the scenario with the horsemeat scandal where the food is not unsafe but where we have, in Northern Ireland, sensitivities regarding its condition, in this instance, horsemeat which was sold as beef.

It is an offence under the 1991 Order to sell food which has been labelled or wrapped which falsely describes the food or is likely to mislead as to the nature or substance or quality of the food.

Again, in this instance selling items described as beef which were in fact a combination of beef and horsemeat, fall foul of this provision.

Q: What are the potential penalties?

The potential fines can be unlimited if the conviction is in the Crown Court and could see offenders facing up to 2 years in jail. However, there are defences available to retailers who genuinely did not know and could not have known that the products they have been supplied with have been contaminated with horsemeat.

Q: Could consumers sue supermarkets or restaurants?

In this instance there is no evidence that horsemeat is unsafe to eat. There are questions about the consumption of equine anti-inflammatory drugs known as Bute, although the levels detected so far are said to pose a negligible risk to human health. Therefore there are unlikely to be a large number of personal injury claims.

Less clear, is the instances where beef products were found to contain pork and individuals who for religious reasons do not consume pork products may have a claim for personal injury damages.

A more likely risk for retailers in restaurants is that consumers could seek redress under the Sale of Goods legislation. The legal issue is one of description and labelling. If something is described as beef, it should have beef in it. There is a potential breach of contract for consumers who buy one thing but actually receive another. Consumers will have a direct contractual remedy against the retailer or restaurant and that is to claim for losses suffered. In most cases this will only be the amount of money spent on the product itself and possibly some allowance for returning it, such as petrol costs.

Q: What are the risks to wholesalers and suppliers?

The greatest risk facing suppliers of meat products to restaurants and retailers is from commercial claims. Businesses that have received contaminated meat could claim for breach of the express terms of supply contracts and the implied terms of the Sale of Goods legislation. The damages claimed could include contractual penalties, fixed costs and the costs of settling compensation claims. In exceptional cases, retailers and restaurants may seek to recover for damage to their reputation and even exemplary damages to punish behaviour which was calculated to be profit seeking. However, such exemplary damages would only be payable if it could be shown that the supplier knew that the meat was not beef.

Such suppliers could also face criminal prosecutions under the 1991 Order.

We are more likely to see a significant number of contractual claims between suppliers and retailers.

Q: What should suppliers, retailers and restaurants do to protect themselves?

The first thing to do is to check your supply contracts and specifications of products supplied to you. You should contact your suppliers and see what they are doing about the issue.

If these results give rise to concern you must take steps to immediately remove or recall those products. The extent of any trade withdrawal or recall needs to be carefully considered balancing the speed of response against the information you have at the relevant time. If you do have to do a recall, keep a record of any steps taken and the costs incurred, including a detailed log of any management time diverted to dealing with the issue, this may be necessary if you need to recover your costs from your supplier or insurance company at a later date.

You should have a system in place to monitor any action taken. The Food Standards Agency must be kept informed of the situation as it develops. You should also seek professional advice.

Q: Will businesses have insurance cover?

Some businesses may have a product contamination policy or a recall insurance policy. This is likely to cover recall costs, loss of profits and the cost of re-establishing the product in the market. Product liability policies generally cover only liability for damages for any bodily injury or damage to property caused by your product.

As there is currently no perceived food safety issue, it is unlikely that you will be able to claim under your product liability policy unless you can establish that the accidental contamination has caused "property damage", where contaminated beef is mixed by the purchaser with uncontaminated beef or where contaminated beef is used as an ingredient in a processed food product. Whether damage has been caused in such cases will be a very complex issue and the subject of significant litigation in the future.

Some product contamination policies provide cover which is triggered by a regulator's recall. However, such policies usually provide that a product must also be unfit for human consumption. It will very much depend on the policy wording whether such policies will apply in this instance.

Businesses should check their individual insurance policies to identify whether or not such other cover is available. Importantly, businesses should ensure that they comply with any notification requirements of such policies. If in doubt seek professional advice on the wording of your insurance policies.