



The Society of
Food Hygiene
and Technology



Successfully Defending Food Prosecutions

INTRODUCTION

Food Law offences include: -

**unfit food,
food which is not of the required quality or substance or nature,
misleading labelling,
food with expired 'use by dates' and
food hygiene offences.**

Whilst some prosecutions are merited, some prosecutions are disproportionate and appear to be brought by enforcement authorities to give themselves a public relations coup to show that they are aggressively protecting consumers, or to 'encourage' other businesses to comply with the law.

So how can food businesses successfully defend themselves against investigations which may lead to prosecutions?

BASIC PRINCIPLES

Food Law offences are strict liability offences which can be committed without any intention to breach the law. If convicted, the food business or its owner will obtain a criminal record.

Since Food Law offences are criminal offences, businesses are protected by the requirement that the Enforcement Authorities must prove their cases '*beyond a reasonable doubt*', a burden of proof which is not lightly satisfied.

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EXPERIENCED LEGAL KNOWLEDGE

Knowing how Local Authority and Government departments work, and having a good relationship with your 'Home Authority' Trading Standards and Environmental Health departments will help you to know where you stand at an early stage, and be in a better position to resolve challenges.

During the early stages of an investigation and during any subsequent prosecution, it is essential for the food business to instruct a solicitor with a specialised legal knowledge to help deal effectively with the investigation and any resulting prosecution. You should establish that the defence solicitor's expertise covers, as a minimum:

- **regulatory offences under Food Law,**
- **technical procedural defences available under the criminal law,**
- **the guidelines that Authorities should consider before starting a prosecution.**

TAPED INTERVIEWS

Soon after starting an investigation, the officer is likely to require a taped interview. However, it is rare that a taped interview will be beneficial to the food business. The officer is already likely to know your defences and wants a PACE (Police and Criminal Evidence) interview simply to gather evidence which is admissible against your business in court. The specialist Food Law solicitor will insist that written questions are provided and make sure that no adverse inferences are drawn from not attending an interview, or alternatively provide a pre-prepared written statement.

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THE DUE DILIGENCE DEFENCE

Whilst the '*due diligence defence*' is well known in the food industry, many solicitors are not familiar with it unless they specialise in Food Law, Weights & Measures, Trading Standards, Consumer Protection or Product Safety offences. The defence requires that the food business prove upon the balance of probabilities that:

- (a) **It took all reasonable precautions to avoid the alleged offence**
(i.e. established a system of procedures to prevent the offence)
- (b) **It exercised all due diligence** (i.e. implemented the system)

It is important to be thoroughly prepared before discussing this defence with the investigating officer. The officer will be well practised in defeating due diligence defences, and will have no hesitation in exercising the benefit of hindsight to suggest that the business failed to take or implement simple precautions. Of course, businesses do not have the luxury of hindsight!

At this point, there is a trap waiting for the unwary. The officer may offer to treat you sympathetically and imply that he will recommend that no further action be taken if you accept or implement additional precautions. However, if you are then prosecuted, the acceptance or implementation of additional precautions may damage your due diligence defence. Expert advice can protect businesses from this and other unfair tactics which officers frequently employ.

ENFORCEMENT POLICY GUIDELINES

Authorities have internal Enforcement Policy guidelines, which their investigating officers should take into account before starting a prosecution. For example, the Enforcement Policy may provide that a prosecution should

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not be started unless the food business has blatantly breached the law. Sometimes the investigating officers are unaware of their own Authority's guidelines, and so the specialist solicitor's knowledge of their wording can be crucial in helping to win a case.

ENFORCEMENT CONCORDAT AND REGULATORY COMPLIANCE CODE

Some companies have experienced the zeal of some investigating officers in pursuing prosecutions. However, in March 1998 the Government issued the Enforcement Concordat which contained principles of good enforcement. The principles of helpfulness, openness, proportionality and consistency are based on the idea that prevention is better than cure. 96% of all central and local authorities have now signed the Concordat.

Due to the reluctance of Authorities to comply with the Concordat, the Government in April 2001 threatened to penalise Local Authorities and Government departments which prosecuted businesses when more constructive action would have assisted the businesses to comply with the law.

Whilst some enforcement activity has become more constructive, there have still been numerous examples of oppressive enforcement action.

This led to the Government commissioning in March 2005 the Better Regulation Taskforce Report "*Regulation: Less is More*" and the Hampton Report "*Reducing Administrative Burdens: Effective Inspection and Enforcement*," which recommended the adoption of a risk-based approach to enforcement activities. This was followed in May 2006 by Professor Macrory's consultation document which has suggested alternative sanctions for regulatory breaches.

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As a result, the Government has introduced the Legislative and Regulatory Reform Bill 2006. The Bill requires that the exercise of regulatory functions should be transparent, accountable, proportionate, consistent and targeted. The Bill also provides for the issue of a Code of Practice which will supersede the voluntary principles of the Enforcement Concordat, by setting out compulsory principles in relation to the exercise of regulatory functions.

Accordingly, reminding an Enforcement Authority of its signature to the Enforcement Concordat, or (in the event of its replacement) requiring enforcement authorities to have regard to the principles of the Code of Practice, represents a useful weapon in the defence solicitor's armoury.

ABUSE OF PROCESS

If the Enforcement Authority has prejudiced your defence by delay or other action, then the Court has the power to stop the proceedings on the ground that the prosecution is an 'abuse of process.'

There is considerable case law which relates to this complicated topic, but it can be possible to persuade the Authority to withdraw the prosecution or the Court to stop the proceedings.

The case law originally penalised regulatory enforcement delays and failure to disclose information to assist the defence. However, following the cases of Duchett in 2000 and Adaway in 2004, abuse of process principles have now been extended to prevent oppressive conduct in regulatory cases.



REQUESTS FOR UNUSED MATERIAL

The successful defence solicitor will require the prosecution to supply '*unused material*.' This is documentation (e.g. investigating officers' notebook entries and public analyst's scientific notes) in the possession of the Authority which does not assist the prosecution case, but may assist the defence case.

If the prosecuting authority fails to provide information which may assist the defence case, a Defence Statement should be prepared setting out the defence case and justifying the request for unused material. There are rules which can limit full disclosure of unused material (for example where national security is at risk, or where informants may be identified) but Authorities frequently take unfair advantage of them. Fortunately the preparation of the defence case can be assisted by the Freedom of Information Act and by reported cases under UK and European Human Rights legislation where Courts have ordered that unused material be made available to the defence. The relevant law reports can be used to persuade the Authority to provide unused material, or obtain a Court order requiring the Authority to provide it.

The unused material can be of great assistance to the defence case. For example, in a Salmonella food poisoning outbreak where an elderly person died, the prosecution took cooked meat samples from the premises of the butcher whom they suspected of being the source of the outbreak.

The butcher was subsequently prosecuted, and the defence solicitor and independent expert obtained the results of the microbiological examination, by insisting upon receiving unused material. Since none of the samples showed the presence of Salmonella, the defence solicitor and independent expert were able to challenge the prosecution case, which helped the Defendant win his case.



REQUEST TO THE AUTHORITY TO REVIEW THE CASE FOR THE PROSECUTION

Having carefully analysed the strengths and weaknesses of both the prosecution and the defence cases, the defence solicitor and independent expert are in a position to try and persuade the authority that it would not be appropriate to continue with the prosecution.

Most Enforcement Authorities comply with the Code for Crown Prosecutors which requires the Prosecutor to review the case. The Prosecutor must be satisfied that two tests are satisfied: first, that there is a reasonable prospect of conviction; and secondly, that the prosecution is in the public interest.

Not only must these two tests be satisfied before the commencement of a criminal prosecution but also throughout the proceedings, so there is a continuing duty to review the case prior to its conclusion.

Authorities can be persuaded to withdraw prosecution cases, by presenting to them either a Request for a Review or the Defence Statement containing weaknesses of the prosecution case coupled with the strengths of the defence case. The withdrawal of prosecution cases, not only prevents potentially large fines, but also minimises damaging publicity, which can be exacerbated by the tendency for the public to believe that there is no smoke without fire. Moreover, there are a number of unreported cases which provide legal authority for the food business to recover the costs which it has incurred in its defence. As a result, defence costs are frequently paid by the taxpayer!



THE IMPORTANCE OF INDEPENDENT EXPERT EVIDENCE

Whilst it is important to have assistance and advice from a solicitor with experience of the defence of food cases, the defence solicitor cannot give evidence to the Court.

Therefore, an independent scientific assessment of the evidence by an expert can help persuade Authorities that you are not the easy prey that they normally find when investigating Food Law offences, and force them to think again. The defence expert must be open-minded and question the basic assumption of whether the Authority has proved the case for the prosecution. Some eminent scientists have surprisingly closed minds, and whilst qualified at proving theories on the balance of probabilities, have difficulty in assessing proof beyond a reasonable doubt. It is therefore essential to instruct an expert with experience of defending such cases, and who fully understands the burden upon the enforcement authority to prove its case beyond any reasonable doubt under the procedures of criminal law.

The defence expert and solicitor should have a mutual respect for each other's qualifications and experience, and (ideally) should be used to working together. Defending Food Law prosecutions is not an exact science, but is an art which is best practised from experience!

Many of these cases appear difficult to win, when first examined, because the Authority rarely has to prove guilty intent to obtain a conviction. This was particularly evident in a case where the proprietor of a delicatessen was accused of causing over 150 cases of Salmonella enteritidis phage type 4 food poisoning. At first sight, the prosecution evidence was overwhelming, but painstaking legal and scientific work presented in court convinced the jury to acquit.



INDEPENDENT EXPERT EVIDENCE AND THE FOOD LAW CODE OF PRACTICE

Authorities are required to have regard to the Food Law Code of Practice, which provides guidance to investigating officers on various procedures including Sampling and Food Hygiene Inspections.

The defence expert is vital in determining whether the investigating officer has complied with scientific requirements in the Food Law Code of Practice, which is designed to preserve the integrity of evidence.

There was one case where the Public Analyst reported that chickens were unfit. However, the defence expert determined that the Analyst's evidence was of no value because of the failures of the investigating officers to comply with the Food Law Code of Practice since the samples were not properly preserved prior to them being taken to the Analyst. As a result, the Authority withdrew all of the charges.

In another case, an expert's report showed that the investigating officers had taken different samples with the same un-sterilized equipment, which could have led to cross-contamination. This was in breach of the Food Law Code of Practice and rendered the analyses of the samples worthless. The defence expert's evidence formed an extremely valuable part of the defence case and assisted the jury in acquitting the defendant.

FINDING OTHER WEAKNESSES IN THE PROSECUTION EXPERT EVIDENCE

Public Analysts or other experts employed by the Enforcement Authorities, sometimes undertake analyses and reach conclusions which appear to be unquestionable.

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However, investigation by an experienced independent expert, frequently leads to the discovery that the analyses or conclusions are insufficient to prove the prosecution charges. This may be due to the lack of homogeneity of the sample, or to the prosecution expert giving an opinion outside his expertise, or to the prosecution expert carrying out an inappropriate test. Alternatively, it may simply be the result of the prosecution expert's failure to appreciate the burden of proof, which requires the acquittal of defendants where there is a reasonable doubt as to their guilt, in accordance with the golden thread running through English criminal law.

In one case the Analyst instructed by an Environmental Health Authority carried out an inappropriate test which led to a charge of selling undercooked ham. As a result of a customer complaint to the Authority, a slice of the suspect ham had been sent for analysis. The Analyst found the ham gave a positive phosphatase reaction, and concluded that the ham was undercooked without carrying out any other tests. As a result, the Authority commenced criminal proceedings. The defence instructed an expert who investigated the charge and produced a report detailing three main reasons why the Analyst was wrong:

First, the Analyst had failed to consider the cooking temperature and how this might have affected the survival or destruction of the phosphatase. The Department of Health had indicated that a temperature as low as 60°C for 45 minutes was satisfactory, and that at 60°C there could be sufficient survival to give a positive result for phosphatase. The Analyst had failed to consider the possibility of cross-contamination from phosphatase contained in other foods or bacteria.

Secondly, the defence expert's physical examination (which had not been carried out by the Analyst) showed that the structural changes in the suspect ham were similar to those in cooked ham.

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Thirdly, the defence expert's electron microscopy showed that the physical structure of the suspect ham was similar to that of cooked ham, whilst the physical structure of raw ham was shown to be distinctly different.

The work carried out by the defence expert was undoubtedly a sledgehammer to crack a nut, but it led to the Authority reviewing its case. The Authority determined that there was no reasonable prospect of conviction, and so it withdrew the charge.

In a recent case involving allegations of food poisoning caused by consuming food in a restaurant at Christmas, the enforcement authority was considering a prosecution when they were persuaded to offer a number of cautions instead. Representations resulted in a reduction in the number of cautions offered, and these were all withdrawn following the service of an expert's report.

FINALLY - THE DETERMINATION OF THE FOOD BUSINESS TO DEFEND THE PROSECUTION

One of the most important factors in success is the determination of the food business to defend the case, particularly when prospects look bleak.

Avoid the temptation to 'roll over' and give up, because you automatically lose that way.

Remember that seemingly hopeless cases can be won if the will to succeed is there!

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