

Warning labels on raw milk won't cancel out liability for producers



JOHN MCCARTHY*

I found Darina Allen's opinion piece in Irish Country Living (23 July) compelling. That's probably because her stance on the proposed ban on the sale of raw milk resonates with my core belief that, to the greatest extent possible, Government should keep its nose out of how people choose to live their lives.

That said, however, when you consider the potential carnage that food-borne illness can wreak, as was dramatically exemplified by the recent outbreak of Shiga toxin-producing *E. coli* O104:H4 (STEC O104) in Germany, it would be difficult to cast the FSAI's enthusiasm for the prohibition as nanny-statism gone mad.

The lawyer in me was particularly intrigued by the mechanism which Darina Allen proposed to increase risk awareness amongst consumers – raw milk should be sold in glass bottles and clearly labelled “may contain pathogens”.

This got me to thinking about how this would work in the liability regime which applies to defective products, which is quite different to that of the general law of negligence.

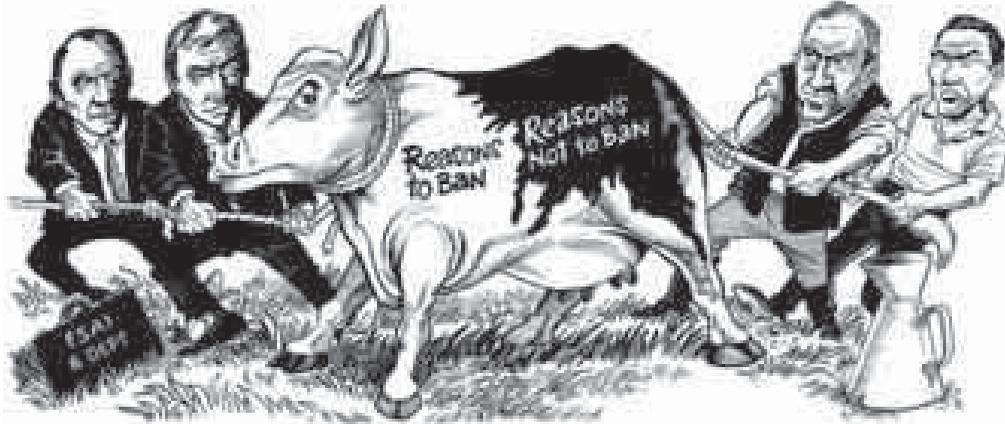
Normally, an injured party secures the right to be compensated by proving that someone else was at fault for the injury. But the rule for attaching liability to the producer of a defective product imposed by the Liability for Defective Products Act 1991 (“LDPA”) is fundamentally different.

It imposes strict liability once the consumer can show that the product was defective and that this defect caused the consumer harm, even if the producer was scrupulously careful in the production process.

The LDPA provides that a product is defective if it fails to provide the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product.

What safety is your ordinary punter entitled to expect of a bottle of milk, assuming that it carries the label suggested?

There is Finnish case law relating to that country's equivalent of the LDPA stating that tobacco cannot properly be regarded as a defective product because



The prevailing perception amongst the population generally is that milk is a particularly wholesome and healthy foodstuff.

any consumer with a reasonable level of intelligence and awareness will know that tobacco is inherently deadly.

What about milk, though? The prevailing perception amongst the population generally is that milk is a particularly wholesome and healthy foodstuff – we feed it to babies, for goodness' sake.

So, would the application of a label “may contain pathogens” be sufficient to put Jane Dough on notice of the risks associated with consuming raw milk?

The first question that has to be asked is how the label would appear on the bottle. If it was in the same format as those ghastly warnings on cigarette packets then it might indeed cause your average consumer to perform a “second take” before committing to the transaction.

However, if you decided instead to point out subtly that there might, just might, be bad things contained in the product, how would you fare if it transpired that there actually were?

This is where the question becomes interesting. Thankfully, TB and Brucellosis, the bugs which triggered the original introduction of pasteurisation, have been on the wane for some time and so far this country has not suffered a serious case of widespread food-borne illness like that recently experienced in Germany.

Consequently, the potential impact on public health of Verocytotoxinigenic *E. coli* O157:H7 (VTEC O157) is not in the general consciousness, meaning that your average man in the street will not be aware that it can lead to the onset of haemolytic uraemic syndrome (HUS), a rare and

severe kidney complication.

HUS has been observed to cause fatality or permanent kidney damage in up to 30% of those contaminated in a number of documented outbreaks.

Neither will your average Joe be aware that in a surveillance project carried out in 2005 by the FSAI involving 74 holdings which were supplying raw milk to cheese makers, comprising 56 cow, 13 goat and five sheep flocks throughout Ireland, 26 *E. coli* O157 isolates were detected, five of which contained the VTEC toxin.

The bug is part of the normal gut flora of ruminants so, as animals harbouring it show no symptoms, a farmer would be completely unaware of its presence.

If you were to stop a random sample of pedestrians on the street and to present them with a bottle of milk with the words “may contain pathogens” labelled on it, would they be conversant with the risks to their health which have been outlined above? I would suggest not.

I'd wager that a significant number asked wouldn't even know what “pathogen” meant.

If, on the other hand, you were to present the same cohort with a packet of cigarettes and then asked them what could flow from smoking them, I'd hazard a guess that you would be inundated with references to lung cancer and heart disease.

Bearing in mind that the general perception is that milk on offer for sale is a safe foodstuff which is free from harmful contaminants, coupled with the lack of awareness of the consequences of VTEC infection,

it is hard to see how milk contaminated with these pathogens would not be regarded as defective for the purposes of the LDPA merely by reason of the presence of a label of the nature proposed.

It is, of course, tempting to use the analogy of those warnings contained in the “small print” on some food wrappers which state that the product may contain traces of nut. But nuts aren't intrinsically deadly. You've got to have an allergy to them before they are, in which case you'll be extremely vigilant to ensure that anything which you consume doesn't contain them.

What about foods that have raw milk as an ingredient? While, admittedly, consuming some processed products such as raw-milk cheese is not equivalent to consuming unprocessed raw milk, a risk of infection nevertheless remains.

Should menus in restaurants which are offering ice-cream or soft cheeses made from raw milk carry similar warnings?

If you are to accept that raw milk containing pathogens would be objectively regarded as defective irrespective of whether or not the proposed warning label was attached, the LDPA has yet further bad news in store for the producer: a consumer cannot lawfully contract out of their rights under the legislation.

Therefore, no amount of waivers or exclusion of liability clauses would insulate the producer from suit if a consumer fell ill.

The LDPA does provide that a producer won't be liable if they can prove that the defect which caused the

damage did not exist at the time when the product was put into circulation by the producer or that the defect came into being afterwards.

Could this defence be relied upon in the case of VTEC infection contracted from raw milk?

For example, farmers will typically take their milk from the bulk tank at a temperature of less than 5°C and walk across the yard to place the milk in their domestic fridge.

However, if an urban consumer were to buy a pint of milk at a farmers' market early in the morning of a day's shopping and to leave it in their car for the duration of a warm summer's afternoon while completing the remainder of their errands, by the time the milk was brought home any VTEC bugs present may have multiplied exponentially.

Could the trader at the farmers' market successfully argue that, as the increase in VTEC infection was caused by the consumer's treatment of the product in the meantime, no liability should follow? I would sincerely doubt

it. At best, the trader might be able to reduce his exposure somewhat by claiming that the consumer was guilty of contributory negligence.

As I hope is obvious, I'm not suggesting that the risk of contracting food-borne illness is, of itself, a justification for imposing a ban.

What I am saying, however, is that if there was a serious outbreak of food-borne illness caused by raw milk, the producer's exposure to claims for damages could be truly awesome.

Just look at the recent STEC 0104 outbreak which originated in Germany: hundreds suffered serious injuries from an incident caused by a solitary small-scale producer who is reported to have had extremely high hygiene and production standards.

While I am more than willing to let the safety regulators slug it out with the artisan producers as to the pros and cons of a ban on raw milk, I would suggest that the liability which any raw milk producer would bear if their product was ever implicated in a VTEC outbreak is of such potential gravity that if a licensing system were to be introduced relating to the supply of raw milk for sale to the public, any such regulatory regime should impose the obligation to have a minimum level of product liability insurance to allow for the appalling vista of a wide scale and potentially deadly outbreak of food-borne illness.

Any uninsured farmer who was proved to have been the source of VTEC infection could very likely be forced to kiss their holding goodbye in dealing with the damages claims which would inevitably ensue.

* John McCarthy MSc, who has a particular interest in the area of food law, is partner with McCarthy & Co Solicitors (www.mccarthy.ie), Clonakilty, Co Cork. Phone 023-8833348 or email john@mccarthy.ie

KEYPOINTS

- A surveillance project carried out in 2005 by the FSAI involving 74 holdings which were supplying raw milk to cheese makers, comprising 56 cow, 13 goat and five sheep herds throughout Ireland, 26 *E. coli* O157 isolates were detected, five of which contained the VTEC toxin.
- The Liability for Defective Products Act 1991 imposes strict liability once the consumer can show that the product was defective and that this defect caused the

- consumer harm, even if the producer was scrupulously careful.
- If there was a serious outbreak of food-borne illness caused by raw milk, the producer's exposure to claims for damages could be truly awesome.
- If a licensing system were to be introduced relating to the supply of raw milk for sale to the public, any such regulatory regime should impose the obligation to have a minimum level of product liability insurance.