

IN DEPTH

FOOD FOR THOUGHT

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GROWTH INDUSTRY

Washington's agriculture economy is fertile ground for legal issues

A farmhouse in the Palouse seen from Steptoe Butte State Park.

Photo ©Getty / Justinreznick

BILL MARLER TALKS
ABOUT THE STATE
OF OUR FOOD,
MICROBIOLOGICAL
INVESTIGATION, AND
JACK IN THE BOX



GUT REACTION

**BY COLIN
RIGLEY**

It helps to think of Bill Marler's area of law—plaintiffs' litigation for foodborne illness injuries—as less *Law and Order*, more *CSI* plus stool cultures.

For Marler, a raspy-voiced, avuncular Seattle lawyer and a founding partner of Marler Clark LLP PS, most of his firm's work happens before the lawsuit is filed. By the time the firm approaches the defendant, he says, it's hard for a food manufacturer to argue the case because Marler Clark has already built a genetic fingerprint linking the plaintiff, the contaminated food source, and the party at fault. It's a uniquely heuristic

practice area where a team of legal and biological experts spend much of their time chasing microscopic pathogens back in time to figure out how they got into the stuff we eat.

On a Tuesday afternoon when I arrive at Marler Clark, Marler is sitting at a nondescript desk at the far end of the firm's fifth-floor offices. The walls are adorned with news clippings and media highlighting the firm's and Marler's biggest foodborne illness cases. He has a U.S. map posted next to his desk that's pimped with markers to track the latest *E. coli* outbreak, which the Food and Drug Administration (FDA) has narrowed to Yuma, Arizona, but stopped short of identifying where in Yuma and how it spread—that's where Marler Clark steps in.

Nationally recognized as an expert in foodborne illnesses—with appearances in outlets like the *Washington Post*, *The Atlantic*, CNBC, and more—Marler is neither an epidemiologist nor an FDA

Content Warning: This article deals with death, childhood illness, and some graphic descriptions of medical situations.



As an expert on foodborne illness plaintiff's litigation, Marler Clark LLP PS Partner Bill Marler has handled decades of high-profile cases involving outbreaks.

Jack in the Box, later joined Marler to sue Odwalla in 1996 and became another founding partner in Marler Clark.

It was the Jack in the Box case that propelled Marler from a relatively unknown associate in Seattle to partner at a relatively new firm to founder of his own firm that has become the go-to for people who've been injured by something they ate and seek redress.

The Jack in the Box case also unraveled and reshaped the beef industry as a whole. Hundreds of children were admitted to hospitals with moderate to severe symptoms, ranging from diarrhea to Hemolytic Uremic Syndrome (HUS) and corresponding multi-organ failure. E. coli-tainted hamburger meat prematurely took the lives of four children: three from Washington state, and one from California—a six-year-old from San Diego who suffered irreparable brain damage and died in the hospital in the arms of her mother, who sang a final lullaby before doctors removed life support.¹

Washington native Brianne Kiner, one of the lucky survivors, turned 35 this year, an astonishing fact given what happened when she was 11 and ate a hamburger that put her into a six-week coma. Kiner's doctors removed her large intestine and kept her alive with a tangle of machinery and an open, gauze-covered incision running from collarbone to waist because her organs were too swollen for her to be sutured shut after surgery²—even still, her heart stopped once before she awoke.

If there's a positive to be taken from these tragedies, it is that the fallout has led to expansive industry-wide reforms and improvements in the quality of beef.

The collected data on E. coli outbreaks—as the bug has evolved and new technologies emerge to track it—show a downward trend in E. coli from beef between 1993 and 2018, according to records from the Centers for Disease Control and Prevention (CDC)

agent; he's a liberal arts major and Seattle University Law-School-educated lawyer who, through a blend of tenacity (translation: stubbornness) and some luck, ended up at the center of seminal cases against food manufacturers responsible for the Jack in the Box and Odwalla E. coli outbreaks of the '90s.

"There are 48 million Americans that get a foodborne illness every year, 125,000 of them hospitalized, and 3,000 dead," Marler tells me. "So you would think with those statistics that I'd have the largest firm in Seattle, but I don't. We've got six lawyers and we are truly the only law firm in the country that solely does this for work."

The founding partners of Marler Clark first met through that Jack in the Box outbreak, which began as a suspiciously high incidence of kidney issues in young children in 1993. Bruce Clark represented Jack in the Box when Marler was suing the fast-food giant's parent company. Denis Sterns, who also represented

GUT REACTION: Q&A WITH BILL MARLER

National Outbreak Reporting System (NORS), as well as additional data from Patti Waller, an epidemiologist with Marler Clark. It's difficult to plot out a trend before Marler filed the first lawsuit in the Jack in the Box case in 1993, however, because the CDC outbreak data only goes back as far as 1998. For the rest of the story, we need to look to Marler.

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MARLER: From the Jack in the Box case until like 2000, probably 95 percent of our firm revenue was [from] E. coli cases in hamburger, and now it's frankly zero. It's not like somebody else is doing the work, it's just that the cases aren't there. It was a combination of government action and industry action and consumer action. It's actually a positive thing. Meat's kind of safer nowadays, at least



Why are we still having problems? It's a function of, in part, industrialized agriculture and the assumption that if it's in a bag and it's triple-washed, it's gotta be safe."

beef. But the real big problem now is, in fact, leafy greens. Uncooked fresh fruits and vegetables is where the real big problem is.

Q: Is that just because of the interaction with cattle fields?

A: The spinach outbreak that

happened in 2006 ... there were 205 people sick, five dead. It was all eventually linked to a 20-acre in-transition organic spinach farm that harvested all of the spinach in that 20 acres in one day. All of it was cut simultaneously, put in bins, and then went straight into an industrialized processing facility. And what had happened was there had been some wild pig intrusion into those fields. But if you had taken that 20 acres, 25 acres of spinach and processed it to the way we used to buy spinach—which was in bunches in our grocery store, and then we would take it home and wash it—would there have been a couple of people sick? Maybe, but it certainly wouldn't have been 205 people ... Why are we still having problems? It's a function of, in part, industrialized agriculture and the assumption that if it's in a bag and it's triple-washed, it's gotta be safe.

Q: Yeah, you hear that a lot. I have a lot of conversations with people where we don't really think about where our food comes from anymore.

A: Right. You know I'm not going to suggest at all that you couldn't get sick at a farmer's market or you couldn't get sick if you raise your own cows or you raise your own food, it's just that the risk profile's different. It's just the ability, especially now that bugs like E. coli are so ubiquitous in our environment that all kinds of things can happen. ...

On my desk—I'm a visual person—I've got this map because we've got 100 romaine lettuce E. coli cases and the FDA trace said the lettuce came from Yuma, Arizona. But never said it came from farm X or Y or Z. But we've got 100 people all across the country ... and we're trying to—because the FDA didn't—tie the

person's consumption back to where the contamination was. ... I'm working back upstream.

Q: So why does the FDA stop at just the city [level]? It seems like it would be in their best interest to find out the exact farm.

A: It's actually in the best interest of everybody to find this out. But it's really a manpower problem for them. What happens is you're a farmer, Walmart wants seven loads of romaine lettuce? I've got six and a half. I call you up and go, "Hey buddy, can you give me half a load of romaine?" And you might say, "I can get you a quarter of it and I can get you another quarter from Joe Blow down the street." The stuff gets comingled. So when the FDA's doing their trace-back, all of a sudden you could hit like six different suppliers, and all of a sudden it's, "Who was contaminated?"

Q: So the steps are: First of all, you have to find out: is there an outbreak of something? And then you're figuring out: is there a group of people sick? Then you have to figure out what did they eat, what was in whatever they ate? How long would a process like that take on average, to track it down to a source?

A: So, not to sound like a lawyer, but it does depend a lot on an enormous number of factors. For example, we probably turn away about 90 percent of the calls or emails we get because they're one person or maybe a family who got sick and they're convinced that it was the thing they ate yesterday. And they may well have had a foodborne illness, and they may have gone to a doctor, but the doctor never did a stool test. Why a stool test or a blood test is important is that each bacterium

[has] an incubation period. For example, listeria has an incubation period from three to 60 days. What did you eat 60 days ago? What did you eat three days ago? ... Unless you have a stool culture, it's really difficult. ...

One of the reasons why these stool cultures are so important is that when they pull that E. coli out of your stool, or listeria out of your bloodstream, they do genetic fingerprinting on it, and then they upload that information to a nationwide database called PulseNet. So PulseNet is run by the CDC. State labs upload these genetic fingerprints, which look like a bar code, and they can compare barcodes across multiple states, multiple countries, and they start to see a pattern. ...

So genetic fingerprinting becomes incredibly important. Sometimes we get it, sometimes we don't And that's why these outbreaks become super difficult to link them all back upstream. But we're pretty good at it. ...

Q: Can you talk about anything you've learned back from [the] late '90s to now?

A: We're much better at more quickly figuring out whether or not it's a case we can prove. So we know all the right questions to ask the client right out of the box, where to go for information, and how to see if we can link someone's illness up to other people who got sick and [link those] other people to a food product and work it that way. ... But technology has changed, too. It used to be there was this process called PFGE (Pulse Field Gel Electrophoresis) and that's sort of the genetic fingerprinting we were talking about. But now we're using whole genome sequencing (WGS) and that's looking at 3 million lines on a genome as

opposed to PFGE, [which] might be looking at 2 [million]. So everything else being equal, if you and I are a PFGE match and we both ate at "Restaurant A" on one day and ate the same thing, that's an outbreak, and there's no question about that. But if 500 people have the same PFGE and half of them didn't eat at that restaurant, how do you tie the other half of the people to anything? ... So the technology's gotten better but it still can be a long slog.

Q: You'd earlier mentioned a romaine E. coli and listeria class action; is this in South Africa?

A: Two of the associates who work here are in South Africa right now because there were 1,000 people sickened in an outbreak of listeria, 200 people died, and it was linked to this product called polony.³ ... [In early 2018] I had been asked to speak in South Africa at a food safety conference and I intended not to go—and the conference was about a listeria outbreak that had been perking for four or five months but nobody knew the details. I got an email from the person who had invited me to speak saying that the health department was going to make an announcement. So I watched it live on my laptop and it was like, it's the polony. And I'm like, oh my gosh, I have to go to South Africa. So I call my travel agent. ...

When I got down there and I'm speaking at this conference—by then the conference was standing-room only—people were freaked out. ... It was absolutely like living 25 years ago in the Jack in the Box case. ... So I met with [South African attorney] Richard Spoor and his law firm and said I can help you guys help these people. So obviously I can't practice law in South Africa, but essentially there's never been

a food class action [there], there's never been any food litigation, and I'm basically helping them build from the ground up a law firm down there that's focused and dedicated to taking care of these people. ...

Q: How big of an issue is choice of law when litigating these cases given the realities of food moving in interstate commerce and parent companies headquartered in a state far from the domicile of the injured victim?



Damages can fluctuate really broadly across the country But if you're a retired 65-year-old guy in Kansas and you die, your damages are capped at \$150,000 by an act of the legislature. But if you're in California, Washington, Montana, same thing happened, there's no cap."

A: For the most part you're going to get stuck in the jurisdiction where the person lived, and at the product level—at least as it relates to how damages are going to be determined. Damages can fluctuate really broadly across the country But if you're a retired 65-year-old guy in Kansas and you die, your damages are capped at \$150,000 by an act of the legislature. But if you're in California, Washington, Montana, same thing happened, there's no cap. ... Liability is the one area ... we have to decide whether to file the lawsuit where the person lives or where the principal place of business is. And we sometimes have to make those calls and sometimes the law varies enough, but for the most part you're dealing with strict product liability. ...