

*Food Safety Lawsuits in the
United States – A 25 Year
Perspective*

MARLER CLARK
THE FOOD SAFETY LAW FIRM

Barcelona June 11-12, 2018

Post Upton Sinclair “The Jungle”



The “poke and sniff” system was designed to prevent rotten, blemished, or damaged meat from entering the food supply.

Cuts of meat with lesions, growths and abrasions were found by inspectors, who used their sense of smell and touch to identify contaminated meat from clean cuts.

The “command and control” approach meant that the USDA inspectors were in control of the facility and meat safety was the responsibility of U.S. Government.



Following the public outery, meat packers tried to create a better image of conditions in their plants and of the thoroughness of government inspection. In fact, when this picture was taken in 1906, postmortem inspection as shown here had not been at all common. (Library of Congress)

A History of Food Safety and Litigation

“In construing both the Wholesome Meat Act and the Wholesome Poultry Products Act we are mindful that the presence of salmonellae can be detected only by microscopic examination. No one contends that Congress meant that inspections should include such examinations. We think it follows therefore that Congress did not intend the prescribed official legends to import a finding that meat and poultry products were free from salmonellae.”

“The American consumer knows that raw meat and poultry are not sterile and, if handled improperly, perhaps could cause illness.” In other words, American housewives and cooks normally are not ignorant or stupid and their methods of preparing and cooking of food do not ordinarily result in salmonellosis.”

APHA v. Butz, 511 F.2d 331, 334 (1974).

A Warning Ignored

In 1983 the New England Journal of Medicine reported two outbreaks of an unusual gastrointestinal illness that affected at least 47 people in Oregon and Michigan in February through March and May through June 1982 in Oregon and Michigan that affected at least 47 people. The outbreaks were associated with eating at restaurants belonging to the same fast-food restaurant chain in Oregon and Michigan.

E. coli O157:H7 was isolated from 9 of 12 stools collected within four days of onset of illness in both outbreaks and from a beef patty from a suspected lot of meat in Michigan.



California – A Missed Opportunity

In late December, the San Diego County Department of Health Services was notified of a child with *E. coli* O157:H7 infection who subsequently died. After the Washington outbreak was reported, reviews of medical records at five hospitals revealed an overall 27% increase in visits or admissions for diarrhea during December 1992 and January 1993 compared with the same period 1 year earlier. Illnesses of 34 patients met the case definition. The outbreak strain was identified in stool specimens of six patients. Fourteen persons were hospitalized, seven developed HUS, and one child died. The median age of case-patients was 10 years.



“The Beef Industry’s 911”

From November 15, 1992, through February 28, 1993, more than 600 laboratory-confirmed infections with *E. coli* O157:H7 and four associated deaths occurred in four states: Washington, Idaho, California, and Nevada. In Washington, as a result of publicity and case-finding efforts, during January-February 1993, 602 patients with bloody diarrhea or HUS were reported to the state health department. Onsets of illness peaked from January 17 through January 20. Of the patients, 30% were hospitalized; 30 developed HUS, and three died. The median age of patients was 7.5 years.



Litigation as Incentive – 25 Years Later

Jack in the Box





TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

FROM: Wendy Cocharella

TITLE/POSITION: Shift leader

RESTAURANT: 8466

PHONE: (602) 435-3178

DATE: 6/10/92

IN THE SUGGESTION BOX

Type of suggestion: (Check)

Restaurant Procedure (POS, Admin, Maintenance, etc.)


Quality Improvement (Procedure, Equipment, System)

CHECK STANDARDS

New Product

Other

Describe change/new Product idea I think regular patties
should cook longer. They don't get done and
we have customer complaints



Describe change/new Product idea I think regular patties
should cook longer. They don't get done and
we have customer complaints

Describe benefit/new Product build If we change this we
will be making our burgers done and edible.

Wendy Cocharella
Signature

6/10/92
DATE

ORIGINAL COPY TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

SECOND COPY KEPT BY: INITIATOR

REV. 8/88

EXHIBIT
605

FORM NO. 1788



July 24, 1992

Wendy Cocharella
Shift Leader
JACK IN THE BOX #8466
3818 172nd. St. N.E.
Arlington, WA 98223

Dear Wendy:

We have received your suggestion regarding increasing the cooktime for our regular patties.

Your suggestion is currently being researched within the Corporate Office. You will again be notified with more detail as soon as a decision has been made regarding this suggestion.

We would like to acknowledge the time and effort you have taken to contribute to the success of JACK IN THE BOX by enclosing this pen/highlighter. Each person submitting suggestions is eligible to receive one gift per quarter with their first suggestion.

Sincerely,

Randell J. Hoyer

MANAGER

A Division of
Foodmaker, Inc.
1925 Hudson Avenue
San Diego, CA 92101-2148
Mailing Address P.O. Box 383
San Diego, CA 92113-0383
619/573-8123

We would like to acknowledge the time and effort you have taken to contribute to the success of JACK IN THE BOX by enclosing this pen/highlighter. Each person submitting suggestions is eligible to receive one gift per quarter with their first suggestion.

----- ranchin
Mike McQuitty
Janice Eubank, Restaurant Manager JR466
Ed Mulhausen - Northwest
Rex Lynch - Northwest

suggest/jad/sugbox4



August 28, 1992

Wendy Cocharella
Shift Leader
JACK IN THE BOX #3466
3818 172nd. St. N.E.
Arlington, WA 98223

Dear Wendy:

Thank you for your suggestion that we increase the cooktime for our regular patties.

We have researched your suggestion and determined that with the variability of our grill temperatures (350° - 400°) the two-minute cooktime is appropriate. If the patties are cooked longer than two minutes, they tend to become tough. To ensure that you are meeting quality expectations for regular patties, please ensure that the grill temperature is correct and grill personnel are using proper procedures.

Wendy, thank you again for your suggestion. We appreciate and share your concern for

We have researched your suggestion and determined that with the variability of our grill temperatures (350° - 400°) the two-minute cooktime is appropriate. If the patties are cooked longer than two minutes, they tend to become tough. To ensure that you are meeting quality expectations for regular patties, please ensure that the grill temperature is correct and grill personnel are using proper procedures.

cc: Stephanie Green
Vanessa Fanchin
Mike McQuity
Janice Eubank, Restaurant Manager #3466
Ed Mulhausen - Northwest
Rex Lyoch - Northwest

FOODSST-1/3ad/FOODMIS

© Restaurants of
Foodservice, Inc.
1400 Sutter Street
San Diego, CA 92102-0200
Tel: 619-594-1234
Fax: 619-594-1235

What we all want to Avoid



The Most Historic Shift In USDA Enforcement Policy for Meat

“To clarify an important legal point, we consider raw ground beef that is contaminated with *E. coli* O157:H7 to be adulterated within the meaning of the [FMIA]. We are prepared to use the Act’s enforcement tools, as necessary, to exclude adulterated product from commerce. Finally, we plan to conduct targeted sampling and testing of raw ground beef at plants and in the marketplace for possible contamination.”

September 28, 1994

FSIS Administrator,
Michael Taylor, in a
speech to the AMI

E. coli O157:H7 as an Adulterant

MEAT INDUSTRY REACTION:

“How can FSIS treat *E. coli* in hamburger meat as an adulterant subject to enforcement strategies, while not applying the same standard to salmonella in broilers...Such gross policy interpretation favoring the poultry industry and disfavoring the beef industry is a travesty indeed.” —
Rosemary Mucklow

FOOD MARKETING INSTITUTE:

“It is essential that nothing dilute the consumer message that the proper cooking of meat eliminates foodborne pathogens.”

And so, of course, they sued the
USDA

Public Outrage Caused Change

MEAT INSPECTION TOTALLY RE-INVENTED:

1. From “Command and Control” Model to HACCP-based Model
2. HACCP placed the responsibility for meat safety on the manufacturer
3. Inspectors are there to confirm that the HACCP plan is in place & working
4. USDA implemented microbiological testing in-plant and at retail

A Positive Tend Line

Marler Clark
Revenue



E. coli
O157:H7

Food Production is a Risky Business

- Competitive Markets
- Stockholder Pressures for Increasing Profits over Long-term Safety
- Brand Awareness Risks
- Not least of all, those pesky lawyers



Strict Product Liability



- Punitive Damages /Criminal Liability
 - Did you act with conscious disregard of a known safety risk?

- Strict Liability
 - Are you a manufacturer?
 - Was the product unsafe?
 - Did product cause injury?
- Negligence
 - Are you a product seller?
 - Did you act “reasonably”?

Who is a Manufacturer?

A “manufacturer” is defined as a “product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer.”

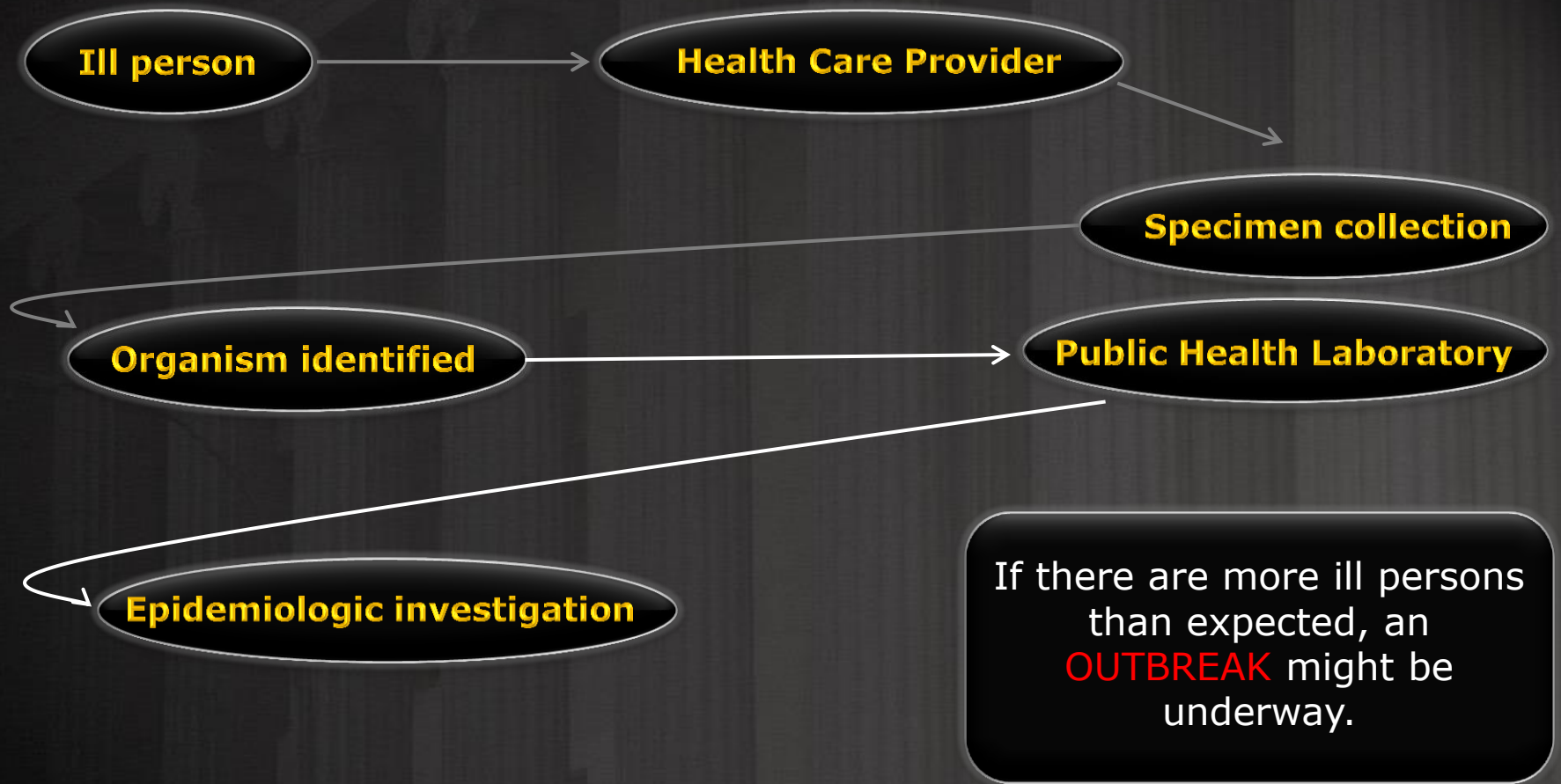


RCW 7.72.010(2); see also *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246 (1992)

Pathway of a Foodborne Illness Investigation



Pathway of a Foodborne Illness Investigation



Pathway of a Foodborne Illness Investigation

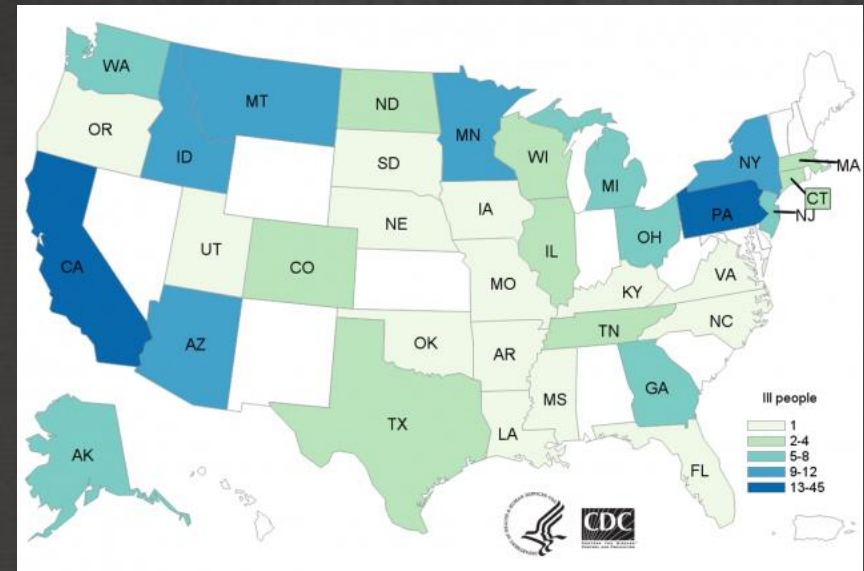


It is a Global Food Economy



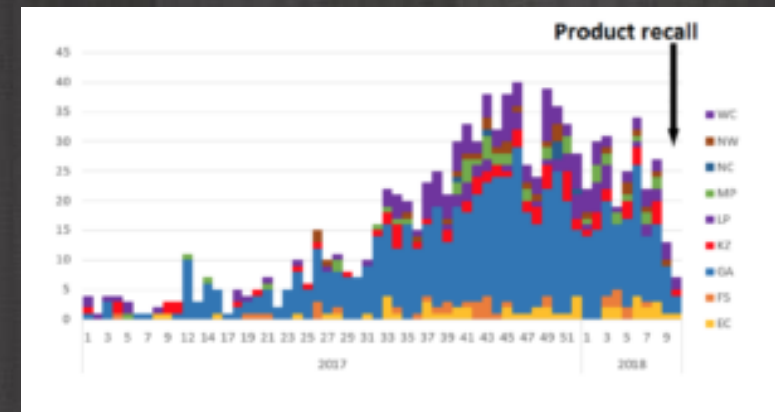
More Still To Do – 203 with *E. coli* O157

- Romaine Letter from Arizona
- Number will Likely Rise
- Product Exported to Canada
- 50% Hospitalized
- 70% Women
- 26 with HUS
- 5 Death so Far



A South African Polony Tragedy

- 1,027 cases have been reported since January 2017.
- 743 cases were reported in 2017.
- 264 cases in 2018.
- Females account for 55% cases where gender is reported.
- Ages range from birth to 92 years.
- 200 patients are known to have died.



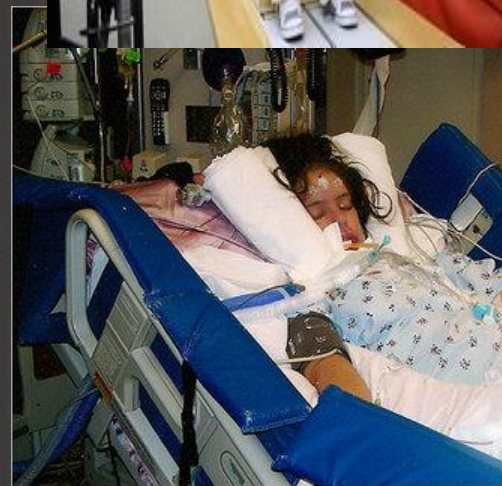
Stephanie Smith Before

- 20-year-old Dance Instructor
- High School Graduate
- Running Three *Just for Kix* Dance Studios
- Boyfriend – looking forward to marriage and children



Stephanie Smith After

- *E. coli* O157:H7 after eating hamburger
- Hospitalized September 27, 2007 – June 18, 2008
- Hemolytic Uremic Syndrome
- Stroke leaving her brain injured and unable to walk
- Acute Kidney Failure – Two months of dialysis – will require multiple transplants
- Neurogenic Bowel and Bladder
- Will not have children
- Past Medical Expenses \$1,886,434
- Future Care Costs \$29,445,688
- Wage Loss \$1,229,085



Linda Rivera Before

- Wife, Mother of Six
- Worked with Disabled Children
- Dedicated "Sports Mom"



Linda Rivera After



- *E. coli* O157:H7 Cookies
- Hospitalized May 3, 2009 – May 20, 2011
- Large Intestine Removed
- Stroke
- Mechanical Ventilation
- Multiple Septic Infections
- Missed Three Kid's Graduations
- Dialysis, Plasma Exchange
- Congestive Heart Failure
- Hospice Care Suggested Multiple Times
- Liver Failure
- Hemolytic Uremic Syndrome
- Dialysis
- Dr. Siegler: "Linda has survived the severest multi-organ (bowel, kidney, brain, lung, gall bladder, pancreas and liver) *E. coli* case I have seen in my extensive experience."
- Medical Bills to date \$5,537,755
- Future Care Costs \$26,289,768 to \$61,769,699

Are things are Different Today?



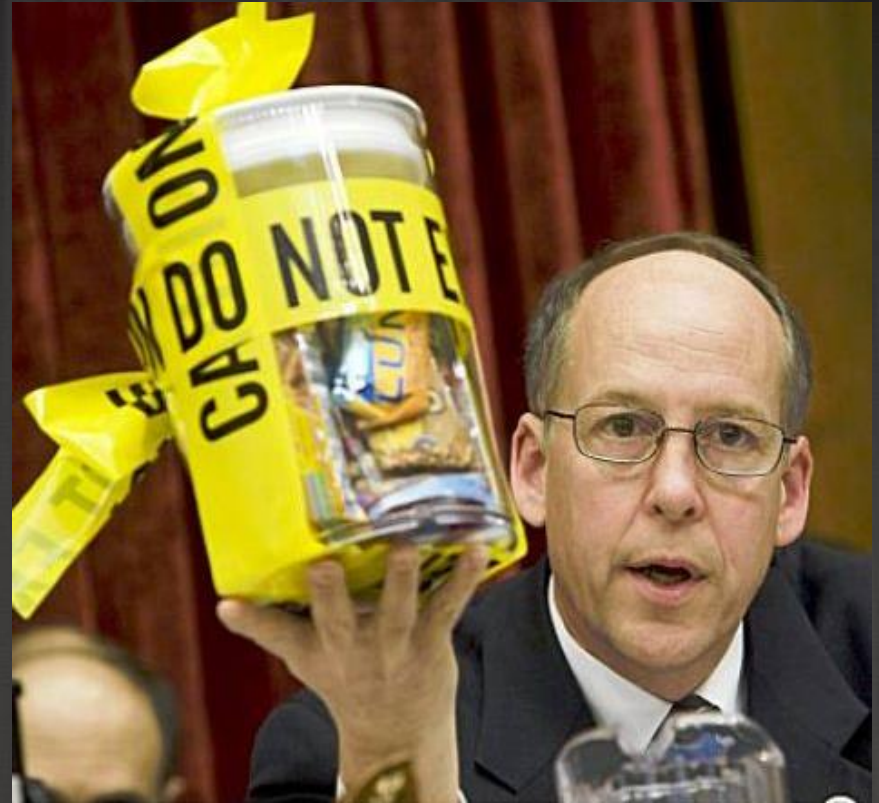
It Started with just a Little Salmonella



- 714 persons infected with the outbreak strain of *Salmonella* Typhimurium were reported from 46 states.. Additionally, one ill person was reported from Canada.
- Among the persons with confirmed, reported dates available, illnesses began between September 1, 2008 and March 31, 2009. Patients ranged in age from <1 to 98 years. The median age of patients was 16 years which means that half of ill persons were younger than 16 years. 21% were age <5 years, 17% were >59 years. 48% of patients were female. Among persons with available information, 24% reported being hospitalized.
- Nine deaths: Idaho (1), Minnesota (3), North Carolina (1), Ohio (2), and Virginia (2).

Then there were Congressional Hearings

- *"Turn them loose," Parnell had told his plant manager in an internal e-mail disclosed at the House hearing. The e-mail referred to products that once were deemed contaminated but were cleared in a second test last year.*
- *Parnell ordered products identified with salmonella to be shipped and quoting his complaints that tests discovering the contaminated food were "costing us huge \$\$\$\$\$."*
- *Parnell insisted that the outbreak did not start at his plant, calling that a misunderstanding by the media and public health officials. "No salmonella has been found anywhere else in our products, or in our plants, or in any unopened containers of our product."*
- *Parnell complained to a worker after they notified him that salmonella had been found in more products. "I go thru this about once a week," he wrote in a June 2008 e-mail. "I will hold my breath again."*



Then a 76 Count Federal Indictment

- Stewart Parnell, the former owner of Peanut Corp. of America
- Michael Parnell, who is Stewart Parnell's brother and a former supervisor
- Samuel Lightsey, a onetime plant operator
- Mary Wilkerson, a former quality-assurance manager
- Daniel Kilgore, plant manager
- Allegations Include:
 - Mail Fraud
 - Wire Fraud
 - Introduction of Adulterated and Misbranded Food into Interstate Commerce with Intent to Defraud or Mislead
 - Conspiracy



Planning AGAINST Litigation – What Is Really Important

- Identify Hazards
 - HACCP
 - Do you have qualified and committed people?
- What is the Culture?
- Involve Vendors and Suppliers
 - Do they really have a plan?
 - Ever visit them?



Planning AGAINST Litigation – Establish Relationships

They are your best friends!



Lessons Learned From Litigation

You can insure the brand's and the company's reputation

1. Arm yourself with good, current information
2. Since you have a choice between doing nothing or being proactive, be proactive
3. Make food safety part of everything you, your suppliers and customers do

Questions

