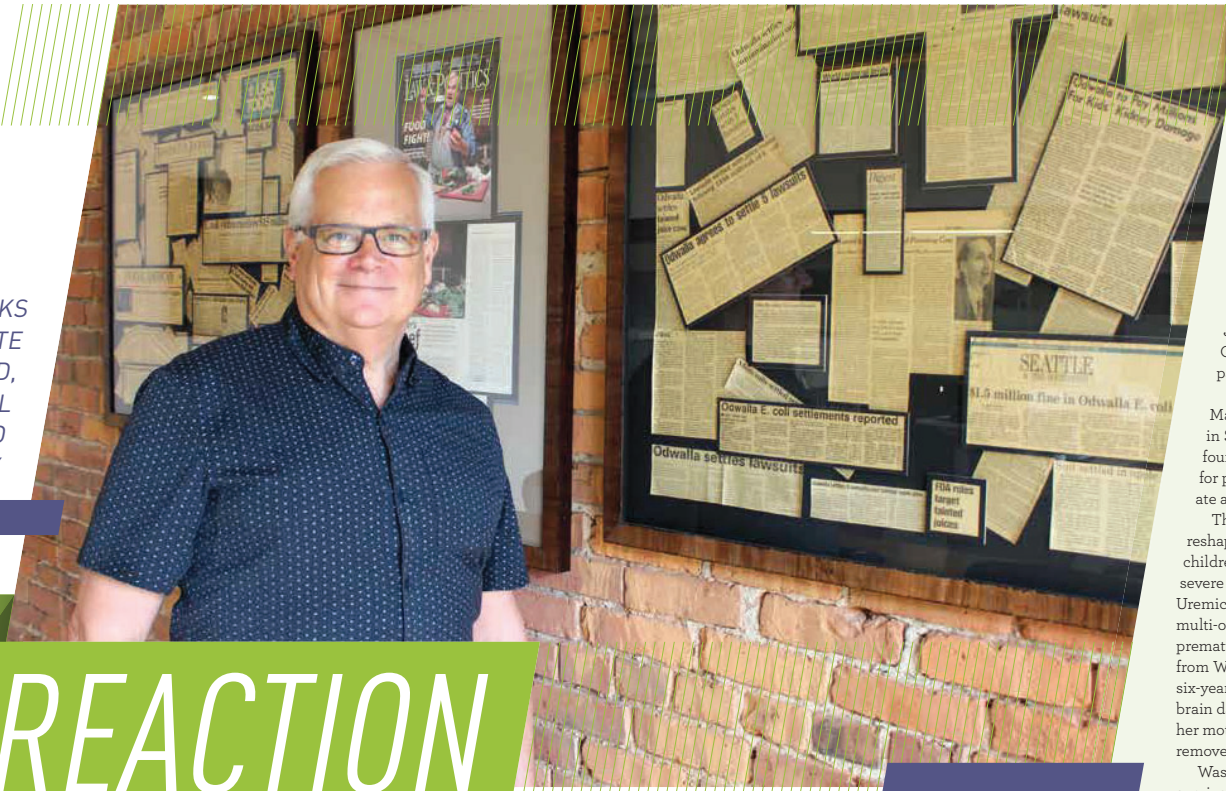


## FOOD FOR THOUGHT

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 pimpled 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

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

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.<sup>1</sup>

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 surgery<sup>2</sup>—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)

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

Staff photo by Connor Smith

## ONLINE

More of our interview with Bill Marler can be found on the WSBA blog, NWSidebar, at [www.nwsidebar.wsba.org](http://www.nwsidebar.wsba.org).

**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.<sup>3</sup> ... [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. ...

GUT REACTION: Q&A WITH BILL MARLER

**Q:** Over the course of your career, what steps have you seen going in the right direction in terms of food safety?

**A:** From about '93 to 2002, almost all the revenue that I was getting in food cases [was from] E. coli cases linked to hamburger. In 1994, the FDA deemed E. coli O157, which is the nasty bug that was in Jack in the Box [meat], deemed it an adulterant, which meant that if you found it in your food product—and they required that you test it—you had to recall it or you couldn't ship it. In 1993, if you tested and found E. coli O157, you could ship it and basically put the onus of protecting the public on a burger flipper at McDonald's or Jack in the Box ... That changed the dynamic of everything, and the industry went absolutely nuts. They sued the U.S. government; eventually the government won. Eventually industry and the government worked together to create processes that helped drive E. coli O157 cases down. I haven't had an E. coli case linked to hamburger in my office for two years. ...

So meat has gotten better. Beef is safer. The problems that still exist are ready-to-eat foods. E. coli-tainted leafy greens. E. coli has become an environmental pathogen, so the approaches that we have to take against it are much more holistic. You can't be growing lettuce near a concentrated feed lot. You've got to do a lot more testing, you've got to use potable water.

There's things that have moved

along. [Congress] passed the [FDA] Food Safety Modernization Act [in 2011], and that is starting to move the rest of the food industry into doing more testing, creating more systems to make food safer. But it's a constant problem. ...

**Q:** Where do you see your role as lawyer, confidant, sort of advocate and champion?

**A:** I remember being in Atlanta, Georgia, one time and this kid had E. coli from being at a water park ... And the family asked me to stay in the room when they unplugged their kid from life support.

This was 1998, and this kid whose plug was being pulled was two. And I'd never seen anybody die before. I'd never seen a human being stop breathing, especially a little kid. And they unplugged the kid in the mother's arms and within like 10 minutes the kid was gray, lifeless. It was the most stunning thing I'd ever seen in my entire life ...

I've had clients die. I've had clients who become friends and then they die. I guess that's just sort of, that's part of what I do. I don't compartmentalize it at all. I don't know if that makes me a better or worse lawyer, but it's just sort of how I am ... It's not like I don't feel it, because I do; it's just part of my job ... I feel like now I can go do something. I took care of that family. I represented this gal who ate Nestle Tollhouse cookie dough and was hospitalized for two years. And \$6 million in medical bills. She was on dialysis; she had a brain injury. She was a 50-year-old woman, she had six kids, her husband was there by her side the entire time ... And I spoke at her funeral ... I had been that close with the family. I just kind of look at this as how honored I get to be to do

that. I can't say that it's not hard sometimes, but I don't internalize it, I go and do something about it.

**Q:** If you're interacting with lawyers in other practice areas, or just people who aren't really familiar with foodborne illness, are there any misconceptions that they have or things they might want to know about?

**A:** This is a practice area that's way more science-based than I think most people realize; that most lawyers don't fully understand strict product liability. Once you prove causation, which is a lot of the science here, who's at fault becomes not really a discussion anymore. You know who's at fault: it's the entity that manufactured the food product that caused the illness. So once you're able to do the science, the liability becomes very clear.

**Q:** There was an allusion in the book [*Poisoned*, by Jeff Benedict: a non-fiction narrative chronicling the events of the 1993 Jack in the Box E. coli outbreak] basically saying that this strain of E. coli ... it was a transition from whatever cattle were eating beforehand and then moving into corn.

**A:** The real reason that Shiga toxin-producing E. coli has exploded in the environment is because part of the gene was acid-resistant, and when you started feeding cows grain, that increased the acidity in the cows' stomachs. The E. coli that didn't like acid disappeared and the E. coli that liked acid stayed. Shiga toxin-producing E. coli—E. coli O157 being one of them—started populating the environment. ...

Same thing with listeria, listeria monocytogenes is an environmental pathogen that existed for hundreds of thousands, if not millions of years, but it's

one of the only bacteria that grows really well at refrigerator temperatures ...


And so it gets in your refrigerator, especially on cheese, fresh fruits, and vegetables that you store in the back of your refrigerator—the hummus that goes in the back of your refrigerator for a month and a half, two months. If some listeria had gotten in there, it's now been populating, and so when you eat it, you're done, you're sick. That's a function of this bug evolving along with us and refrigeration.

It's kind of like dogs and cows and cats evolving alongside of us. Listeria is doing the same thing; E. coli does the same thing.

**Q:** You didn't have a science background ... How did you pick this stuff up?

**A:** I approach the practice of law a lot like probably how I approach life: I always assume that I'm the person who doesn't know what's going on and in order for me to make sure that I sort of break even or get a little bit ahead, I work harder than most people. I've been practicing law for 30 years, I'm a partner in a law firm, I have more than enough to keep me happy, but I've worked 30 days in a row. I have not taken a day off from work because we just have so much stuff to do and so many clients to deal with and it's some of the critical stuff that we're doing on this romaine case ...

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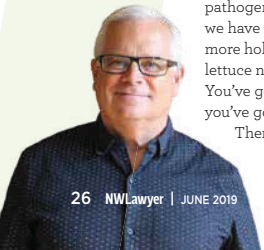
But to obtusely answer your question, I just work my ass off. That's how I've done it ... I'm not a know-it-all, but there's one area of the law, there's one area of science I understand forwards and backwards, and it's this. 

NOTES:

1. As described in the non-fiction narrative retelling of the Jack in the Box E. coli outbreak in *Poisoned*, by Jeff Benedict (February Books 2011), copies of which Marler provided to *NWLawyer* prior to his interview.
2. *Id.*
3. Sliced, ground-meat sausage popular in other parts of the world, most akin to bologna in the U.S.

ONLINE

Additional portions of this interview that were cut for length can be found online on [NWSidebar.com](http://NWSidebar.com) at [www.nwsidebar.wsba.org](http://www.nwsidebar.wsba.org).



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