

# A Safer Food Supply

Attorney Bill Marler of Marler Clark in Seattle has dedicated his career to representing people injured by foodborne illness and to advocating for better food safety regulation. *Trial* spoke with him about what's challenging about these cases, common misconceptions, and what more needs to be done to protect consumers.

Interview by || **KATE HALLORAN** Photos by || **CAMERON KARSTEN**

## How did you get started in food safety?

My first experience with food safety litigation was the 1993 Jack in the Box E. coli outbreak, which was linked to the fast-food chain's meat. More than 700 people were sickened, with hundreds hospitalized—dozens with acute kidney failure—and four children died. It was one of the first major foodborne illness cases that happened in the United States.

A woman I had done some legal work for called me, and she asked if I would meet with a friend of hers whose kid was in the hospital with E. coli. I met with the family, and I filed the first lawsuit against Jack in the Box that week. I didn't even know what E. coli was, frankly. I gathered information from the University of Washington's medical school to get up to speed.

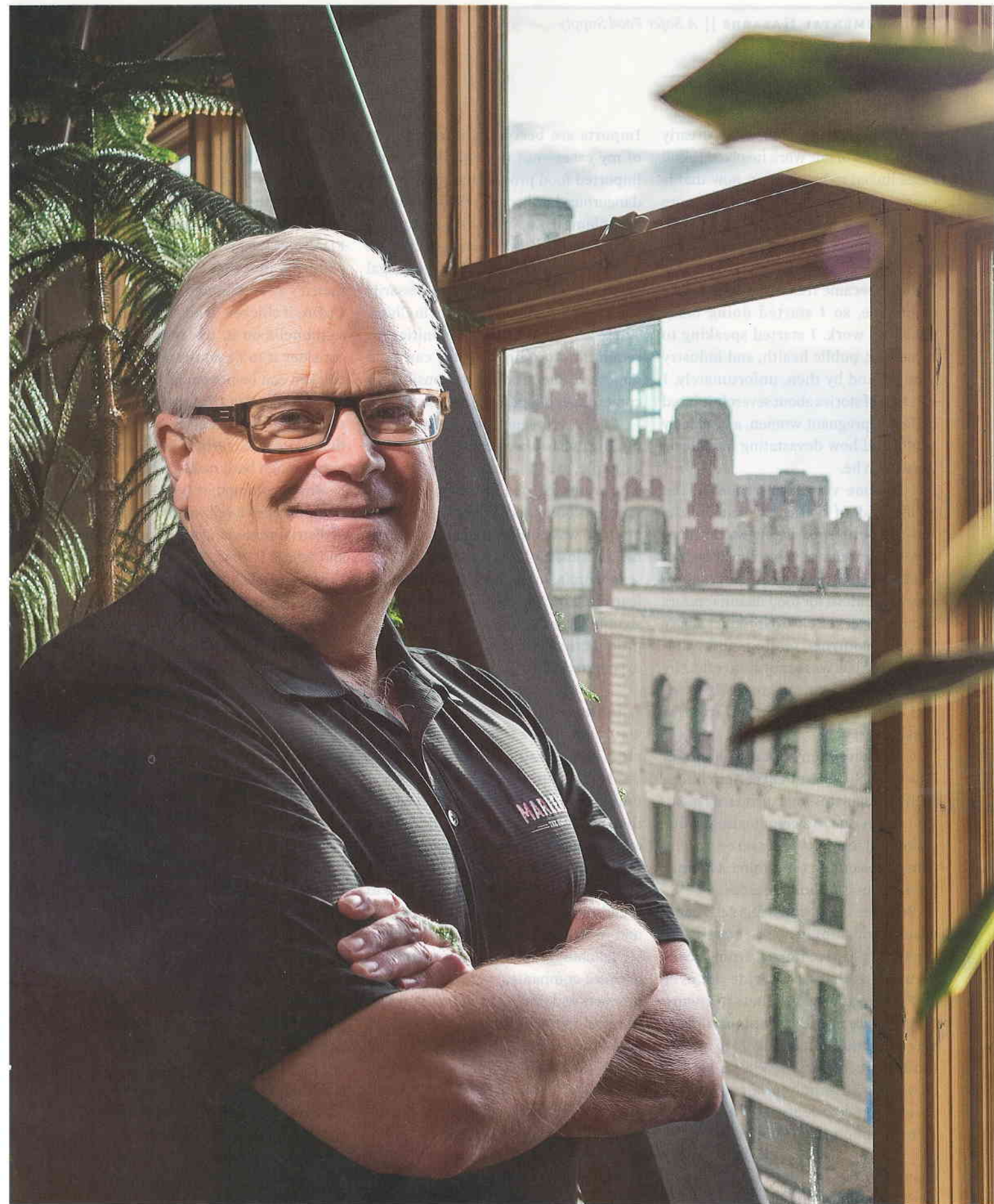
Very quickly, I went from having a handful of cases to

being lead counsel for more than 400 cases that were filed in several states against the restaurant. By the time Jack in the Box started settling cases, I probably knew more about E. coli than one would ever want to. Shortly after that, there was an outbreak linked to unpasteurized juice sold by Odwalla, and I started working on those cases. After that, I decided to start my own firm, and I hired Bruce Clark, who had been chief counsel for Jack in the Box. Now all we do is handle food cases nationwide.

## What are some of the most significant changes you've seen resulting from food safety litigation?

I think that, like a lot of lawyers who do products cases, the hope is that litigation leads to structural changes in whatever industry you're going after, and I think for the





most part it does. From the 1990s to early 2000s, most of our work involved *E. coli* cases linked to hamburger; now that is nearly zero. The positive changes—more testing, more interventions to prevent contamination—have led to a safer meat supply.

But I became frustrated by the pace of change, so I started doing more advocacy work. I started speaking to consumer, public health, and industry groups. And by then, unfortunately, I had a lot of stories about severely injured children, pregnant women, and elderly adults and how devastating foodborne illness can be.

I became very involved with the political side of food safety, including the run-up to the Food Safety Modernization Act, which was signed by President Obama in 2011. It established a variety of new regulations for food manufacturers and importers to ensure product safety through controls, testing, and sanctions. That law was a multiyear effort by consumer and industry groups, lawyers, and clients who testified in front of Congress.

I also have seen a lot of changes in how the U.S. Department of Agriculture (USDA) regulates food, primarily meat. And that is due to a combination of litigation and regulatory pressure—making companies do the right thing, whether for economic or moral reasons.

With the FDA, which regulates most of our food supply, we're starting to see some positive impact from recent regulations that cast a wide net over all FDA-regulated products to ensure that they are manufactured to enforceable standards that are likely to reduce foodborne illnesses. We've seen a downturn in salmonella and *E. coli* cases linked to leafy greens, which were common 10 years ago.

### **What food safety issues are you seeing become more common?**

Imports are becoming a bigger part of my cases—not necessarily because imported food products are inherently dangerous, but because the increase in the volume of imported food means that more tainted food cases are coming from imports. That creates additional legal challenges because you can't necessarily sue a supplier or manufacturer in China. There are some real opportunities for regulation to help. We still can hold importers and retailers responsible for contaminated food from overseas.

And we're seeing outbreaks happening with unexpected foods. For example, we're representing people who were sickened by a soy nut butter *E. coli* outbreak, including an 11-year-old boy who was hospitalized for months in the ICU, lost his large intestine, suffered severe brain and kidney injuries, and is learning how to walk again. These are significant and serious cases from a food product that you wouldn't necessarily expect to cause injury.

### **What are the strengths and weaknesses of the consumer alert and recall process for contaminated food?**

I'm a big fan of recalls and product testing that prompts recalls. Like litigation, testing and recalls are a market-driven exercise. Companies tend to try to find a way to fix a problem so they don't have to spend money on it. We saw this during the mid-to-late '90s when it was common to see hamburger recalls on a weekly basis because companies were testing their products and finding *E. coli*, so they had to recall them. Then, to prevent recall costs, they started testing and holding the product, so it wouldn't even get into the marketplace; or they'd test it and divert it to be a cooked product to kill the bacteria. The number of *E. coli* cases from hamburger dropped like a stone.

But there are some odd delineations between USDA and FDA when it comes

to food safety. USDA regulates meat, except fish (other than catfish). FDA regulates everything else—fruits, vegetables, and fish primarily, as well as baked goods and similar processed foods. The FDA rules are pretty clear: If food has a pathogen in it that can make you sick, then it's an adulterated product. But for USDA, if chicken in a grocery store has salmonella on it, the agency may not consider it to be adulterated until the chicken can be proven as the source of an illness—then that would prompt a recall. And there are some recall rules that relate to *E. coli* but not salmonella—even though both make people sick.

But one thing that USDA does when there's a recall is tell you the entire chain of distribution—who produced the item and where it went. The FDA does not. When the FDA recalls something, it names the manufacturer, but it doesn't tell you where the products went. The soy nut butter product I mentioned before was recalled in March 2017, but we're still finding it for sale online and in grocery stores. To me, that's a real failing of the FDA not to look at the system from manufacturer through where people buy the product and make the public aware of what's going on.

### **As the local food movement and farmers' markets have become popular, has that changed where you're seeing problems in the food supply?**

That's a difficult question to answer. The reason why is that most people who get a foodborne illness never figure out what made them sick. Even when there are clusters of ill people, they seldom link it to a particular food item, restaurant, or manufacturer. It is very difficult, and it's what we spend most of our time figuring out. We figure out causation, and then we can do something. But we turn away 90 percent of prospective cases because causation is unclear.



**“Bacteria don’t care whether you’re a big producer or a small producer—they’ll sicken your customers regardless. That’s why good food handling and manufacturing practices are essential.”**

That helps explain part of the issue with local or regional outbreaks. Multistate outbreaks are much easier to put together because then you can pinpoint common denominators among people. The farther apart people are, the more likely it is you’ll be able to find a common thread. But with just a couple of people in the same city, it may be too difficult to untangle the common denominator—or there may not be enough data available to make that determination.

Because the incubation period of different bacteria can vary from hours to weeks, the smaller the operation, sometimes the more difficult it may be to pinpoint the food item that made someone sick. And that’s important because if you looked at it, you’d say, “Clearly local agriculture’s not poisoning anybody.” But that would be a false assumption. It’s most likely that it is but on a smaller scale and so the statistics don’t necessarily implicate it. Bacteria don’t care whether you’re a big producer or a small producer—they’ll sicken your customers regardless. That’s why good food handling and manufacturing practices are essential.

#### **What are some of the risk factors for foodborne illness outbreaks?**

When you delve into it, you still see companies that have bad manufacturing processes and practices. A lot of it has to do with cooking and cleanliness. A product that’s not cooked is a bigger risk than a product that’s cooked because most bacteria and viruses are killed by cooking. If you have a product that’s heated well, it’s unlikely that you’ll have a foodborne illness outbreak.

Foods that are eaten raw and don’t have what’s called a “kill step,” such as lettuce, can be a riskier food item to the consumer. That’s why certain kinds of cheeses and deli meats—foods that are consumed without cooking them again—shouldn’t be eaten by certain groups, such as pregnant women, because there’s a risk of listeria. Unpasteurized juices, unpasteurized milk, oysters—foods that are close to the environment where contamination can occur and then are eaten raw tend to be more risky.

That’s why fresh fruits and vegetables, while important for human consumption, need to be washed and handled properly. You may not necessarily rid

the food product of all contaminants, but you’re knocking down the bacterial load to the point that your body can handle it. If you consume 10 *E. coli* bacteria, it’s likely that your body will be able to ignore it. But if you ingest 100 bacteria, that might be enough to overwhelm your system and make you sick—and in some instances, really sick.

A lot of foodborne illness tends to have worse effects on the elderly, children, immune-compromised people, and pregnant women. Unfortunately, if you look at the size of the vulnerable population, it’s a big chunk of America. These people are the most vulnerable to becoming ill and the ones most likely to have severe reactions—kidney failure, long-term complications, or death.

#### **What is the biggest challenge when helping clients in different states seek recovery for injuries from a foodborne illness outbreak?**

I often deal with cases following an outbreak in different states that may have the same liability and causation law, but they have differences in damages law. I remember a listeriosis case when we represented 30 people and families of people who died from eating cantaloupe, and they were in 15 different states. A person in Oklahoma’s damages were capped at \$150,000, while for pretty much the same person in Montana, there was no cap—and so the damages would be much more. Even in cases with severe injuries, state legislatures limit legitimate compensation for people, and it’s obviously unfair.

#### **People can be exposed to some of the same bacteria that cause foodborne illness through environmental contamination, such as at a water park or other public recreation area. What are typical issues in these cases?**

In food cases, it's a product that you're consuming that causes the illness, so you're dealing with strict liability laws, which most states have. Once you're able to prove that the product caused the injury, it's really game over and becomes about damages. In

environmental contamination, such as at water parks, swimming holes, or petting zoos, that falls in the negligence category. Whether it is a petting zoo that didn't have adequate handwashing stations to reduce the risk of transmitting bacteria from the animals or a

water park that wasn't chlorinating or filtering the water appropriately, you need to find some act of negligence that caused the outbreak. That tends to be a much larger but not insurmountable challenge.

**What are the most common misunderstandings you see about foodborne illness?**

The biggest misunderstanding in food cases is the science behind incubation periods. Everyone's convinced it was the last thing that they ate. It may well be something you ate two or three days ago. For example, I get a lot of calls from both victims and lawyers who say they or their client ate here and an hour later got sick with E. coli. Well, that isn't the case because the incubation period between the time of ingestion and first symptoms is three to four days.

When evaluating a case, it's always important to find out if the potential client had medical treatment and whether a stool culture or blood culture was done so you know what bacteria it is and have a fairly good understanding of what the time frame is—you're looking for a common denominator. Figuring out what caused the illness is one of the major challenges.

The other big misunderstanding for consumers and even more so for businesses is that some of these cases can lead to devastating injuries. I'm representing a 19-year-old girl who has her whole life ahead of her, and she ate chicken salad that was tainted with E. coli. She spent four months in the hospital, had her large intestine removed, suffered multiple seizures, and her kidneys failed. Fortunately, she was able to get a kidney transplant—but kidneys last 10 to 15 years, and then you need another transplant. People don't realize that foodborne illness can cause such severe, life-changing injuries. ■



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