Pure and Wholesome: Is food a risky business? A lawyer’s perspective

By William D. Marler, J.D.

A few years ago, I was invited to an international conference on food safety – much like this one – where I participated in a panel discussion alongside a young, intelligent, and very serious dairy farmer from Wisconsin. He was there to make the case for the health benefits of pure, wholesome, unpasteurized milk.

He explained Wisconsin’s so-called “farm share” system, where consumers can buy a share of a milk cow, receiving in return a regular share of the raw milk from that cow – thereby circumventing state laws requiring pasteurization. *E. coli* and other foodborne illnesses come from cows on industrial feedlots, he insisted, not small family farms. In fact, people benefit from drinking raw milk, he said. “Vitality is regained, children thrive and are seldom sick, medications are reduced or eliminated... and I have proven that raw milk can be produced safely and routinely from a 36-cow herd. Trust in the product, but verify... Everything else is up to the individual consumer.”

Speaking next, I suggested that farm shares and raw milk amount to a personal injury lawyer’s dream, a lawsuit in the making. That, of course, is exactly what has happened. In December of 2005, eighteen people in Washington State were sickened by an *E. coli* outbreak linked directly to a cow-share program on a small dairy farm in Southwest Washington State. Five of those people, all young children, were hospitalized, four of them with hemolytic uremic syndrome (HUS). Investigators from the Centers for Disease Control and Prevention (CDC) found that, of 140 people who reported drinking milk from the farm, more than 10 percent had been sickened (CDC, 2007).

And this outbreak was not unique. Caught in a price squeeze, hundreds of small dairy farms have been appealing to the “Buy Local” movement and to the closely related demand for organically grown food. The dairy farmers may be conservative Christians following “The Maker’s Diet,” or counter-culture liberals who equate industrial dairies with Big Oil. Whatever their motivation, there’s a powerful resonance to the image of a rosy-cheeked child gulping down a pure and wholesome glass of milk.

But there is also substantial risk. Raw milk—even raw milk from healthy, happy cows raised under sanitary conditions—can still carry deadly pathogens. In 2006, several more young children were hospitalized in an *E. coli* outbreak linked to raw milk from a similar dairy in Northwest Washington, sold widely by popular stores that specialize in organic foods.

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1 Hemolytic uremic syndrome (HUS) is a frightening illness that even in the best American medical facilities has a mortality rate of about 5%. About 50% of patients require dialysis due to kidney failure, 25% experience seizures, and 5% suffer from diabetes mellitus. The majority of HUS patients require transfusion of blood products and develops complications common to the critically ill. Among survivors of HUS, about five percent will eventually develop end stage kidney disease, with the resultant need for dialysis or transplantation, and another five to ten percent experience neurological or pancreatic problems which significantly impair quality of life. More information available at: [http://www.about-hus.com](http://www.about-hus.com)
Between 1998 and 2005, the federal government identified 45 additional outbreaks of *E. coli*, *Salmonella*, or *Campylobacter* linked to raw milk or cheese.

What about our friend’s statement that unpasteurized milk is healthy and inherently antimicrobial? “Research has shown that these claims are myths,” the FDA reported (FDA, 2007).

So are we to conclude that milk isn’t so pure and wholesome after all? Should we stop drinking milk and turn to something less risky, like red wine? Or are these isolated incidents, spread across time and space and a nation of 300 million people, most of whom have never been made sick by milk – pasteurized or not? Aren’t people – farmers or consumers – free to undertake some element of risk in the interest of a pure and natural product like milk? Isn’t there some risk to everything we do, and everything we eat? Isn’t this one of life’s harsh realities?

These are reasonable questions being asked by thinking members of a society constantly trying to balance its physical well-being with its economic health. We all yearn to live in a risk-free world – especially for our kids. But at what price? And who pays? If we can’t eliminate hazards, how can we best manage risk in a free society?

In a very real sense, that’s what I do for a living. If people eat something that makes them sick, they come to me in hopes of making them whole again. And if somebody sells a product that makes people sick, I’m liable to show up on their doorstep, lawsuit in hand, demanding that they compensate my client.

But is this the best way to deal with foodborne illness? Before we explore that issue, let’s review the recent American experience with *E. coli* and other foodborne illness.

Foodborne illness has, of course, been around as long as there has been food. But the identification and diagnosis of these diseases is an emerging science that is changing all sectors of the food business, and the legal system in the U.S.

*E. coli* O157:H7, which occupies much of my professional time, was first recognized as a human pathogen in 1982 during an outbreak of illness caused by hamburgers from a fast-food restaurant in Oregon (CDC, 1982).

But the problem drew little public attention for another decade, when, finally, 600 people across the West, most of them children or senior citizens, became ill after eating undercooked Jack in the Box hamburgers (CDC, 1993). Four children died, and many others suffered terrible kidney damage, which may eventually lead to the need for transplants.

I became involved when a woman for whom I’d done some pro bono work years earlier contacted me. Her daughter, Brianne Kiner, had eaten one of those burgers, and was in the hospital with HUS. Brianne proved to be only the first of many young children I’ve seen sprawled in hospital beds, horribly bloated and discolored, hooked up to kidney dialysis and
life support machines, surrounded by doctors frustrated by a disease for which there is no
known cure. Many of these kids died. Brianne barely survived, and she will suffer after-
effects from her *E. coli* poisoning for the rest of her life. I hope that suffering is eased
somewhat by the $15.6 million settlement eventually paid by the company.

At that time, *E. coli* O157:H7 was viewed as a pathogen carried in ground beef – and
especially beef crammed into industrial feedlots. There were outbreaks involving ground
beef from virtually every fast-food chain in America, ground beef from supermarkets and big
box stores and from public school lunches. People were getting sick around the country, and
it was all blamed on hamburger.

Since then, I’ve made a career of representing people poisoned by *E. coli*, *Salmonella* and a
half-dozen other pathogens potentially carried in virtually every food, processed or
unprocessed, fresh or packaged, industrial or home-grown. Here are just a few examples:

Shortly after the Jack in the Box case, we represented most of the seriously affected victims
of an outbreak of *E. coli* traced to Odwalla apple juice (CDC, 1996). Odwalla is a San
Francisco outfit that marketed “fresh” juice with no preservatives. At least 70 people fell ill,
and a 16-month-old Colorado girl died, from drinking unpasteurized juice that is believed to
have become contaminated by apples that fell off trees and into cow manure before being
harvested. The case had a nationwide impact, demonstrating that foodborne illness can be
contracted from fresh produce as well as meats. After an ugly legal fight, the company
eventually paid a multi-million-dollar settlement to the victims and their families – and
Odwalla began pasteurizing its juices.

Year by year, *E. coli* has found new and more frightening ways into the food supply. In
2002, we represented many of the 82 people, more than two-thirds of them children,
poisoned by merely strolling through the modern barns at a county fair in Oregon. Health
officials identified *E. coli* bacteria on or near air circulation ducts, leading them to believe the
pathogen was spread through the air (CDC, 2002). This was just one of dozens of outbreaks
linked to agricultural fairs and petting zoos.²

Vegetables came next. In 2002, more than 50 high school cheerleaders and dancers
contracted *E. coli* from pre-packaged lettuce served at a dance camp in Washington (CDHS,
2002). We represented several victims, including a Spokane teenager who had to endure
dialysis treatments because her kidneys were severely damaged by the *E. coli*. The FDA was
sufficiently alarmed to issue a rare warning that consumers should throw out prepackaged
bags of Romaine lettuce.

The following year, at least 660 people were sickened, and four died, from Hepatitis A
contracted from Mexican green onions served at a Chi-Chi’s chain Mexican restaurant near
Pittsburg, Pennsylvania. The Food and Drug Administration (FDA) attributed the outbreak
to poor sanitation, leading to the largest single-source epidemic of Hepatitis A in U.S. history

We represented many of the approximately 300 victims who sought compensation from Chi-Chi’s and four companies that supplied the green onions.

Just last year, a nationwide *E. coli* epidemic was attributed to pre-packaged spinach from a California company that specializes in organic vegetables. The CDC and FDA confirmed 204 illnesses in 26 states—including a frightening 31 with HUS—104 hospitalizations, and three deaths. Victims of the *E. coli* outbreak were identified in 26 states. *E. coli* was isolated on cattle ranches adjacent to the spinach fields (CDHS, 2006). We represent 93 of the victims.

Sometimes you can’t even trust your water. In 2002, the small town of Walkerton, Ontario, Canada, was put under virtual military quarantine for days during an *E. coli* outbreak that eventually killed seven people and sickened hundreds more (PHAC 2000). The source? The town’s water wells had been contaminated by cow manure from a neighboring dairy farm owned by the local doctor. The town was required to chlorinate its water, but the jolly old souls who manage the water system had grown up on farms, and didn’t think chlorine was necessary, so they turned it off and falsified their monthly reports.

It goes on and on. We have handled cases of foodborne illness traced to packaged almonds, homemade apple cider, alfalfa sprouts, fruit salad, packaged breakfast cereal, sushi, orange juice, tomatoes, cantaloupe, Jell-O, and, most recently, peanut butter. We have represented thousands of clients, sued most of the nation’s large restaurant chains and won a total of $300 million in judgments and settlements.

So what’s happening out there? Is there an epidemic of *E. coli* and *Salmonella* and other foodborne illness? Or is it just a bunch of guys like me, chasing ambulances and making life miserable for hardworking businessmen?

We know, after all, that people have been getting sick from eating tainted meat, fruits, vegetables, and yes, dairy products since the beginning of human history; and it may well be true that, thanks to advances such as pasteurization and flash freezing, food is actually safer than it was 50 years ago. So why is this happening now?

First, it may be true that industrial food production fosters an environment friendlier to these bugs. Enormous feedlots, centralized processing plants, long-distance shipping, even air conditioning systems may create new opportunities for pathogens to spread. And in any case, big business makes the system less tolerant of error. If a small town processing plant has an outbreak, a few people might be infected – perhaps too few to detect. But today, a mistake at one plant in Georgia or Colorado can quickly sicken people around the country.

Second, recent technological advances, especially DNA analysis, provide new tools for detecting, tracking, and identifying pathogens such as *E. coli* O157:H7. It’s only very recently that we can establish a direct and virtually certain link between one or more sick people and a specific food source. My job would be far more difficult without DNA analysis.
And perhaps contemporary society is less tolerant of risk as well. People these days expect to be healthy. When they get sick, they want to know why. And if they know why, they want to hold somebody accountable. You can argue with that phenomenon, but it is a fact of life.

So what can you do about it? How can you manage your own business, produce a healthy and profitable product without making people sick? Given these new realities, how can we manage risk in a free society?

There are three broad options. First, we can do what most Western societies have done for most of their history, and what much of the world still does today, which is to rely on the open market. As my friend at the conference advised, it’s up to the individual consumer. We can choose to trust our farmers and food processors, and the marketplace will take care of everything else. If they screw up and some of our kids get sick, that is too bad. The marketplace imposes sanctions; if people are afraid of getting sick, they’ll stop buying the product. Case closed.

We know the problem with that. Consider the case of those nice people in California who produced unpasteurized apple juice, poisoning hundreds of kids. Most farmers and processors will be conscientious. But a few bad apples will get lazy, or cocky, and make a fatal mistake. Consumers will become wary not of just one bad apple, but of the entire apple industry. Everybody pays the consequences of one outfit’s error.

The second option is Big Brother: Regulate. We enact laws, impose penalties, and hire the inspectors necessary to enforce them. But my guess is that this solution doesn’t appeal to anybody in any business. To make it work, we would need trained inspectors on every farm, every creamery, and every pasteurization plant. It’s expensive, and potentially too intrusive.

And there’s another problem: Regulatory systems may work for a while, but success tends to be followed by breakdowns. Inspectors get lazy, or corrupt, and stop doing their jobs; consider those jolly old souls falsifying their water quality reports in Canada. Or the political system intervenes; government budgets come under strain, and politicians look at the system and conclude that nobody is getting sick, so obviously we don’t need so many inspectors. So they cut budgets, the regulatory system gets stretched too thin, some E. coli bacteria slip through the cracks, and suddenly we have another tragic outbreak.

The third option is the legal system. If people get sick, you allow them, even encourage them, to go to court and sue for compensation. Food producers go about their business, and if they do everything right, they’re fine. But if they screw up, and somebody gets sick as a result, then somebody like me will probably be waiting at their doorstep. And I will do my best to make it a very costly mistake.
But civil law, of course, has its own costs. Even if you run a flawless business and never poison anybody, you need to carry enough insurance to spread the risks and costs across your industry.

In the States, we’ve seen the evolution of a political system that is a mix of each of these elements. We have a market system that theoretically rewards farmers and producers who don’t take risks – or, at least, whose mistakes are not detected and traced back to the source. We have a regulatory system of food-safety laws and enforcement, though that system is, by almost any account, woefully inadequate to enforce the laws presently in force, let alone any new and tougher body of law. And we have civil laws that allow people to seek compensation for their injuries.

Whatever strategies we employ to prevent foodborne illness, the analysis should not be purely political or legal. We could criminalize food poisoning, employ thousands of inspectors, and impose stiffer penalties for people who produce tainted food. But ultimately, this is also a fundamental question of morality. As individuals and as businesses, do we subscribe to the Law of the Jungle? Or to the Golden Rule? If food producers put themselves in the position of food consumers, perhaps it would be easier for them to understand why consumers need to be able to trust their food supply. If dairy farmers could see what I’ve seen – two and three-year-old children hooked up to kidney dialysis machines and life support, or in their tiny coffins – it might change some attitudes about the importance of food safety.

If that were to happen, the food industry would profit, consumers would be safer, and lawyers like me would have to look for another way to make a living.

References:


