



Fair and Petting Zoo Liability

William Marler, Esq.

October 16, 2006

MARLER CLARK
ATTORNEYS AT LAW, L.L.P., P.S.

E. coli Illnesses at Fairs

- Over a dozen *E. coli* O157:H7 outbreaks associated with petting zoos and fairs reported since 1994
- Hundreds of illnesses and the development of HUS - Linked to human-animal contact, air, or dust-borne *E. coli* O157:H7



2002 – County Fair – Oregon

- Source - Dust contaminated with fecal matter
- Recommendations: Limit Airborne *E. coli* by 1) not moving soiled bedding during exhibit hours, 2) keep stall areas damp with an approved disinfectant



Prevalence of *E. coli* O157:H7

2003 Ohio Study – 29 County and 3 State Fairs



- *E. coli* O157:H7 found:
 - 13.8% in Beef Cattle
 - 7.0% in Pest Fly Pools
 - 5.9% in Dairy Cattle
 - 5.2% in Sheep
 - 3.6% in Pigs
 - 2.8% in Goats

Keen JE, Wittum TE, Dunn JR, Bono JL, Durso LM. "Shiga-toxicogenic Escherichia coli O157 in agricultural fair livestock, United States." *Emerg Infect Dis.* 2006 May;12(5):780-6.

2003 – County Fair – Texas



- Source – Rodeo and animal exhibits
- Recommendations:
 - Emphasize personal hygiene and hand washing

2004 – State Fair – North Carolina

- 180 reports of illness
- 15 children with Hemolytic Uremic Syndrome
- 33 fair attendees with identical strain
- 19 of 30 specimens obtained from petting zoo *E. coli*-positive, and PFGE match to ill patients



2004 – State Fair – North Carolina

- Recommendations:
 - Restrict direct contact with animals
 - Reduce fecal contamination
 - Reduce crowding in petting zoos



Selection bias due to recruitment of controls from a list of persons who purchased tickets online may have distorted findings if this group was different from cases. Misclassification bias may also have distorted findings due to including probable cases in the definition of cases in the case control study.

Although interviewers were instructed to prompt control respondents to try to recall with precision, recall bias may have differentially affected case-control study respondent's ability to provide specific answers to items. While age groups were appropriately matched, actual age distribution of controls and cases varied, particularly within the youngest age-group (0-5 y/o).

Cases may have valued animal contact more than controls, and this may have led them to practice more risk behaviors than controls. This was not fully explored in the case-control study. Both cases and controls reported that direct contact with animals was important to them. However, given their illnesses and because we did not ask how respondents felt about such contact specifically during their fair visit, case respondents may have underreported the importance of such contact given their illness experience. Cases may have sought contact more than controls, as evidenced by the finding noted above that cases spent more time in Crossroads Farm Petting Zoo.

Finally, further analysis may offer new or clarify existing findings.

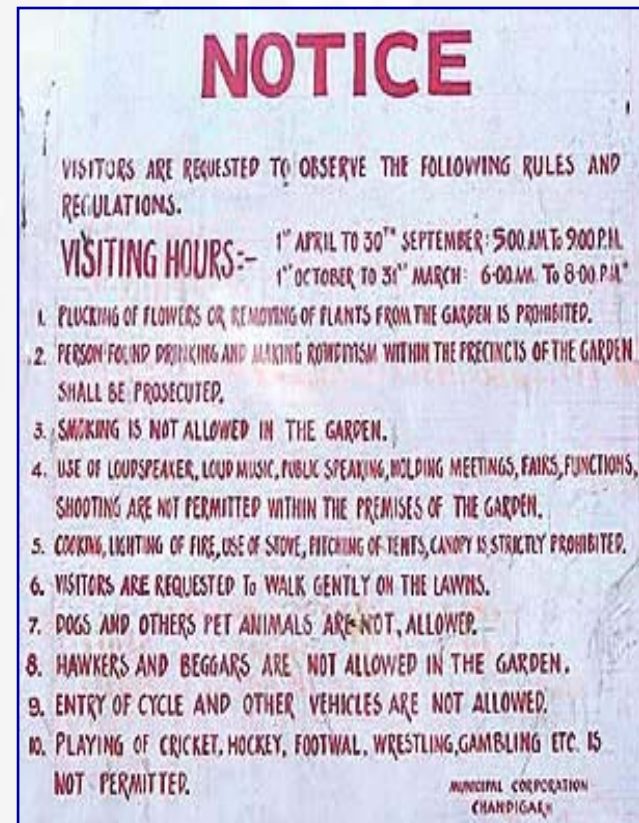
RECOMMENDATIONS

Many case-patients in this outbreak reportedly used hand-hygiene gels and nonetheless became ill. This suggests that fair managers and petting zoo owners should consider additional prevention and control measures at petting zoos to reduce risks of zoonotic disease transmission beyond providing hand-sanitizers. The following measures are provided to inform policy and practice for petting zoo exhibits. Evidence to support the recommendations are based on findings from this investigation as well as from the *Compendium of Measures to Prevent Disease and Injury Associated with Animals in Public Settings*, 2004 by the National Association of State Public Health Veterinarians (NASPHV), available at http://www.avma.org/publth/comp_animals_public_settings.asp. Findings have been reviewed and incorporated into the latest *Compendium* document, available at

Many case-patients in this outbreak reportedly used hand-hygiene gels and nonetheless became ill. This suggests that fair managers and petting zoo owners should consider additional prevention and control measures at petting zoos to reduce risks of zoonotic disease transmission beyond providing hand-sanitizers.

Pre-2005 CDC Recommendations

- Provide Information
 - Inform visitors of the risk for transmission of enteric pathogens from animals to humans and strategies for prevention of transmission
 - Train facility staff
 - Warn visitors that certain animals pose greater risk



Additional Pre-2005 Recommendations

- Source – Compendium of Measures to Prevent Disease and Injury Associated with Animals in Public Settings, 2004
 - Educate
 - Provide educational materials prior to contact
 - Train petting zoo staff
 - Allow contact with animals in controlled setting only
 - Design contact area to minimize risk and maximize hand washing



Additional Pre-2005 Recommendations, Cont.

- Give consideration to feces removal, waste runoff, and contact with humans
- Take extra precautions to reduce risk of disease transmission in settings where direct animal contact is encouraged
- Do not allow food or drink in animal contact area – no pacifiers, smoking allowed
- Promptly remove feces and animal bedding
- Closely supervise children less than five



Additional Pre-2005 Recommendations, Cont.



- Require staff to be in animal contact area to encourage proper hand washing
- Provide transition areas between animal and non-animal areas
 - Warn of risk of hand-to-mouth contact on entering
 - Warn on the need to wash hands on exiting

2005 Florida *E. coli* Outbreak



- Florida State Fair
- Central Florida Fair
- Florida Strawberry Festival

Common Factor: AgVenture Farms
Petting Zoo

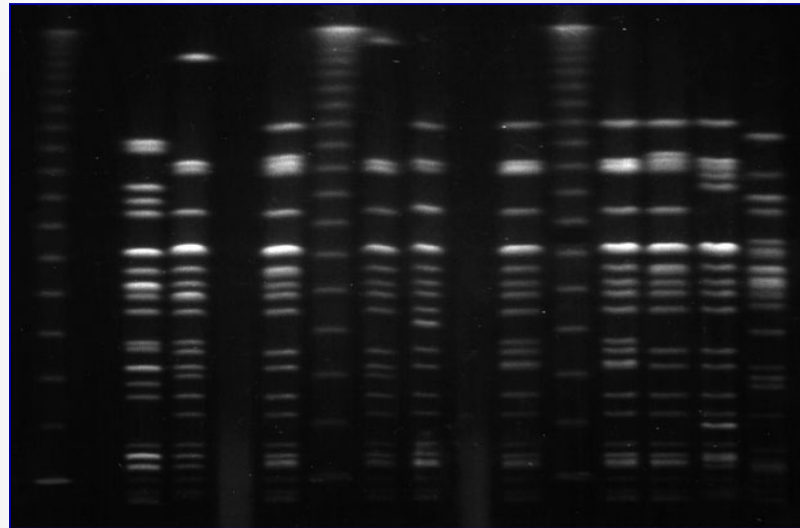
2005 Florida *E. coli* Outbreak

- First identified after cluster of HUS cases reported to health department
 - 22 confirmed
 - 45 suspect
 - 6 secondary
 - 12 cases of HUS



2005 Florida *E. coli* Outbreak

- *E. coli* O157:H7 recovered with matching PFGE in animal exhibit area of Central Florida Fair and Strawberry Festival and from AgVenture animals



AgVenture Farms Petting Zoo



- Did not:
 - Post warning signs regarding the potential risk created by contact with animals
 - Provide related information in any other way
 - Implement design features, physical steps, or active measures to minimize or prevent inappropriate contact between animals and fair visitors

In fact, kids were encouraged to feed grain to the animals, and were allowed to give animals hugs.

AgVenture Farms Petting Zoo

- Did not:
 - Provide hand washing stations
 - Provide signage regarding potential risk of not cleaning hands
 - Warn against or prohibit hand to mouth activities
 - Provide warnings regarding the higher risk of exposure to children and immuno-compromised persons
 - Suggest, provide, or require supervision at the site
- Did provide a few hand-sanitizers for 25¢ each



AgVenture Farms Petting Zoo

- However, AgVenture claims:
 - Signs, posters, etc. were the responsibility of the Fair/Festival
 - Signage was to be provided by the Fair/Festival
 - Hand washing facilities were to be provided and maintained by the Fair/Festival
 - Pre-exhibit and Post-exhibit site sanitation was the responsibility of the Fair/Festival



Central Florida Fair & Florida Strawberry Festival



- Did not:
 - Post warning signs regarding contact with animals
 - Implement measures to minimize or prevent inappropriate contact between animals and fair visitors

Central Florida Fair & Florida Strawberry Festival

- Did not provide:
 - Warnings or guidance to high-risk individuals
 - Training for staff or site supervision
 - Educational materials
 - Hand washing stations



What DID they do?

Central Florida Fair

- Provided and maintained hand sanitation stations
 - 25¢ per use
 - In petting zoo area
 - Foaming hand sanitizer
- Made running water available



What DID they do?

Florida Strawberry Festival

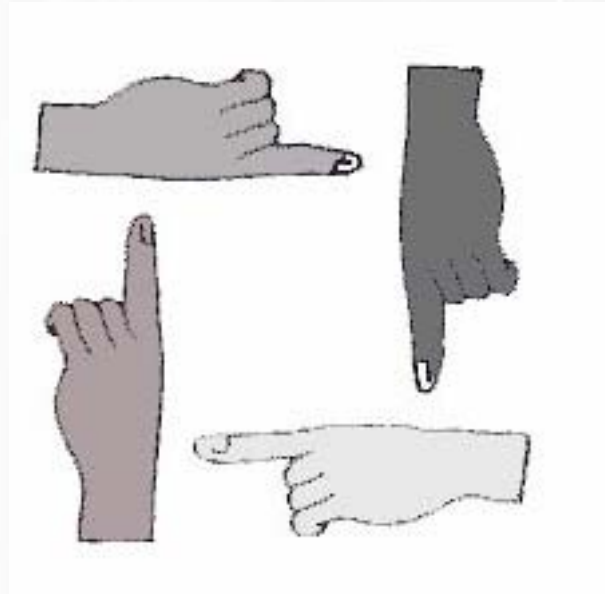
- Prohibited food, strollers & cigarettes in animal contact areas



Who is at fault?

Fair?

Petting Zoo?



State agencies?

Local agencies?

Definition of Invitee

UCJI No. 46.07

DEFINITION OF INVITEE

An invitee is one who goes on the premises of another at the other's invitation, either express or implied, and whose presence there is in the economic interest of the other.

An invitee is one who goes on the premises of another at the other's invitation, either express or implied, and whose presence there is in the economic interest of the other.

COMMENT: See *Reed v. Jackson County*, 105 Or App 24, 26-27, 803 P2d 1194 (1990), *rev. denied*, 311 Or 261 (1991), for possible additional "invitation" test.

9/93

Possessor's Duty to Invitee

UCJI No. 46.08

POSSESSOR'S DUTY TO INVITEE

It is the duty of the possessor of land to make the premises reasonably safe for the invitee's visit. The possessor must exercise reasonable care to discover conditions of the premises that create an unreasonable risk of harm to the invitee. The possessor must exercise reasonable care either to eliminate the condition creating that risk or to warn any foreseeable invitee of the risk so as to enable the invitee to avoid harm.

It is the duty of the possessor of land to make the premises reasonably safe for the invitee's visit. The possessor must exercise reasonable care to discover conditions of the premises that create an unreasonable risk of harm to the invitee. The possessor must exercise reasonable care either to eliminate the condition creating that risk or to warn any foreseeable invitee of the risk so as to enable the invitee to avoid harm.

Invitee's Duty

UCJI No. 46.09

INVITEE'S DUTY

The invitee is required to exercise reasonable care to avoid harm from a condition on the premises of which the invitee knows or, in the exercise of reasonable care, should know.

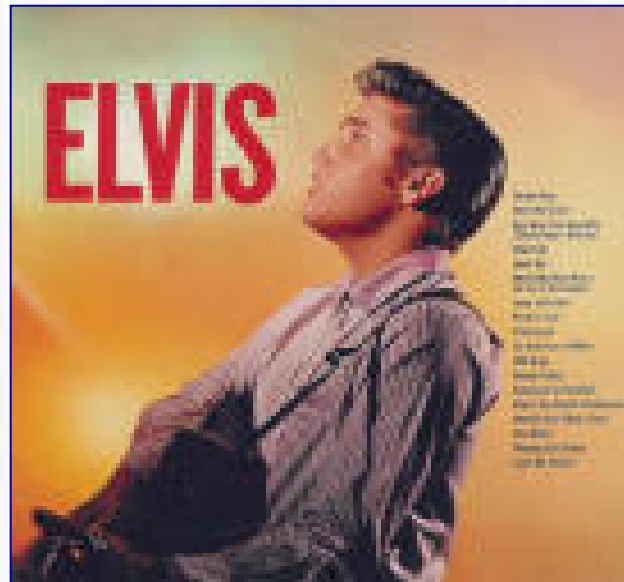
In determining and comparing negligence, if any, you must consider the obviousness of danger and the ease or difficulty with which harm to the plaintiff from that danger could be avoided by either party.

The invitee is required to exercise reasonable care to avoid harm from a condition on the premises of which the invitee knows or, in the exercise of reasonable care, should know.

In determining and comparing negligence, if any, you must consider the obviousness of danger and the ease or difficulty with which harm to the plaintiff from that danger could be avoided by either party.

The doctrine of Sovereign Immunity Sometimes Protects States and their Agencies from Tort Liability

i.e., The King can do no wrong



But These Days, Usually Not...

The King is occasionally wrong



RCW 4.96.010, enacted in 1967, states that:

“All local governmental entities...shall be liable for damages arising out of their tortious conduct, or tortious conduct of their past or present officers, or volunteers...to the same extent as if they were a private person or corporation.”

The Role of the Inspector

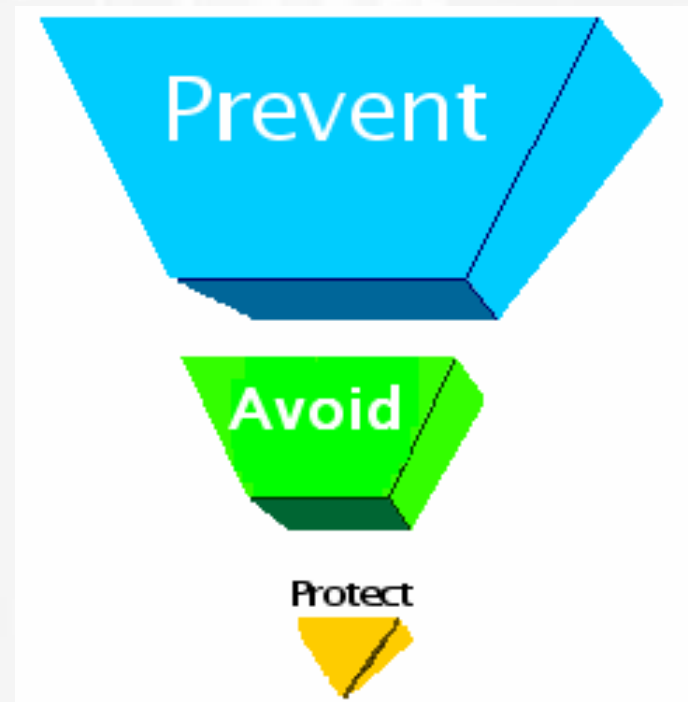
- Observe
- Educate
- Evaluate



And ENFORCE

Can a health inspector be sued for failing to discover or prevent a safety risk?

The answer is.....
IT DEPENDS



“Tortious Conduct” will usually mean Negligence

FOUR REQUIREMENTS

- DUTY
- BREACH
- CAUSATION
- INJURY



PUBLIC DUTY DOCTRINE

Protects the State, its
Agencies, and Its Agents
from Liability



“Under the ‘public duty doctrine, to recover from a [public agency] in tort a plaintiff must show the duty breached was owed to an individual and was not a general obligation owed to the public.” *Babcock v. State*, 144 Wn.2d 774 (2001).

A Duty Owed to All Is a Duty Owed to None.

Four exceptions to the Public Duty Doctrine In Washington:

- Legislative Intent creating a mandatory duty
- Failure to Enforce
- Rescue Doctrine
- Special Relationship

Exception #1: Legislative Intent



The rule of non-liability does not apply where a statute by its terms evidences a clear legislative intent to identify and protect a specific and limited class of persons.

Exception #2: Failure to Enforce

A general duty to the public can also be owed to an individual where:

[1] a government agent responsible for enforcing [2] possesses actual knowledge of a statutory violation, [3] fails to take action despite a statutory duty to do so, and [4] the plaintiff is within the class of people the statute is intended to protect.

Some Examples Where Washington Courts Have Upheld Liability:

- Plaintiff Who Was Hit By A Drunk Driver That A Police Officer Allowed To Drive Instead Of Arresting Him
- Woman Killed by a nonconforming underwater lighting system that inspector knew of but did not require to be corrected or removed
- Plaintiff Whose Property Was Destroyed While A Police Officer Stood By Doing Nothing

Exception #3: The Rescue Doctrine

Having once undertaken the rescue of a person in distress, the rescuer has an obligation to exercise reasonable care in conducting the rescue.

Exception #4: Special Relationship

A “special relationship” arises when there is

[1] direct contact between the public official and the injured plaintiff, [2] there are express assurances given by the public official, and [3] the assurance give rise to a justifiable reliance on the part of the plaintiff.

What will a Jury Think?

A Jury



12 Fairgoers

