

Tracing Mad Cow Makes Litigation Unlikely

*By Dave Babcock and
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In recent years, “mad cow” disease has created considerable confusion for American consumers as it has grabbed headlines, thanks to several now infamous North American bovines. The question in many minds is whether litigation will follow.

Many Americans reflexively assume it will; after all, Products Liability 101 teaches that the manufacture and sale of bad food creates liability, and beef from “mad cows” is certainly bad food. From a litigation perspective, however, beef tainted with a potentially brain-wasting disease presents singular difficulties that more common bugs such as *Salmonella* and *E. coli* O157:H7 do not.

Bovine spongiform encephalopathy (“BSE”), better known as mad cow disease, was first diagnosed in 1986 by British doctors. Since then, the disease has been confirmed in more than 178,000 head of cattle in Great Britain alone, with a peak rate in January 1993 of 1,000 cases each week.

BSE is a degenerative nervous system disease that, unless something else does the job, will kill every cow that contracts it. Currently, we are without a test to detect BSE in a live animal. Veterinary pathologists confirm the disease posthumously through microscopic examination of brain tissue, which will appear spongy, or by the detection of the infectious protein structures known as prions (short for proteinaceous infectious particles and pronounced “pree-ons”).

BSE does *not* occur in humans. However, it can cause a similar disease called new variant Creutzfeldt-Jakob Disease (“vCJD”), a rare, degenerative and fatal brain disorder. As of December 1, 2003, a total of 153 cases of vCJD had been reported worldwide: 143 from the United Kingdom, six from France and one each from Canada, Ireland, Italy, and the United States. Nearly all cases had multiple-year exposures in the United Kingdom between 1980 and 1996, which roughly coincided with the large BSE outbreak among U.K. cattle.

Occurrence of vCJD in humans likely occurs by consuming BSE-contaminated cattle meat products. Knowledge of the specific foods that are associated with transmission is obscure at best — an unsettling thought given the ubiquitous nature of the cow and its constituent parts. Tests on experimentally infected cattle have confirmed signs of BSE in the brain, spinal cord, retina, dorsal root ganglia, distal ileum and bone marrow, suggesting that these tissues are associated with a heightened risk of transmission.

Many countries, particularly those in which an indigenous BSE case has occurred, have implemented control measures to prevent potentially BSE-infected tissues from entering the human food supply. These include increased herd surveillance, destroying

sick animals and banning the use of certain “high risk” cattle parts in human or bovine food.

The U.K., for instance, excludes from the human and bovine food supply the parts of all cows older than thirty months of age. Certain European countries require testing of almost every slaughtered cow. Loopholes do remain, however, and certain countries have been less pro-active. In many countries, there remains no prohibition against using poultry litter, cattle blood and restaurant leftovers in cattle feed, and all of these ingredients have roots in the high-risk cattle parts described above.

We do not plan to head any new-fangled ABA mad cow litigation section, not in the short term at least, and for two primary reasons. The first is that the disease is simply not currently prevalent in the United States. As noted above, only one case of BSE has ever been reported in the U.S.

The second problem is less about available markets, and more about causation and other law school basics. As with any foodborne-illness case, the science of the particular bug involved is critically important to the rights and remedies available to victims. More specifically, the incubation period — that is, the length of time between ingesting a pathogen and falling ill — helps to narrow the range of meals or specific food items that could have been the source of somebody’s illness.

For instance, a hamburger consumed 10 minutes before the onset of an *E. coli* O157:H7 illness cannot possibly have been the source of the infection because the average incubation period for *E. coli* O157:H7 is measured in days (typically between two and five), not minutes. The source of an *E. coli* O157:H7 illness must have been something eaten within the expected medical range prior to the onset of symptoms.

In stark contrast to *E. coli* O157:H7 and other more common foodborne illnesses, the incubation period for vCJD is extremely long, probably more than a decade. No one is going to recall sources of beef consumed years before, much less the more particular identifying information typically necessary to implicate a given defendant.

With other common foodborne pathogens, incubation periods range from a few hours to a couple of weeks. Once an individual tests positive for a pathogen like *E. coli* O157:H7, *Salmonella* or *Shigella*, for example, his or her recent food history can be identified with relative ease. Epidemiological investigation tools can then be used to conclusively establish a link to a particular product, even where there are no contaminated “leftovers.” With BSE-contaminated beef, however, the possible period for consumption is unknown, but is likely years and possibly decades in breadth. This severely limits the effectiveness of an epidemiological investigation.

Nevertheless, mad cow litigation cannot be discounted permanently on these bases. Not so long ago, even the more common foodborne diseases were more difficult to track, for lawyers and health departments alike. Scientific and technological advances have made for more sound conclusions. For example, we are now able to match the

DNA of a particular sample of *E. coli* O157:H7 or *Salmonella* — each of these bugs can be likened to a species with different subspecies, each having its own genetic profile — to another sample, thus creating more certainty that the samples had a similar source.

There are steps that the cattle industry can take to minimize the chances that beef from a BSE-infected cow will be transferred to a human in the United States. The industry can and should document where individual cows come from and where specific lots of meat are sold, thus allowing the companies that produced or sold contaminated meat a meaningful opportunity to recall the bad product and avoid injury. Given that, it is plausible to suggest that an enterprising attorney might have success with “enterprise” or “market share liability” theories against the cattle industry as a whole.

It is difficult, at least in part due to the lengthy incubation period of the disease, to accurately assess the threat that BSE presents both in the U.S. and globally. Litigation to address individual cases of BSE is not imminent, and frankly can only come too late for the individual involved. The responsibility for protecting the public lies with regulatory agencies like the USDA and the members of the cattle industry.

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