

FOOD FIGHTS

by Hannelore Sudermann

photography by Bruce Andre and Robert Hubner

**The nation's
leading food-
borne illness
attorney
tells all.**

BRUCE ANDRE



ON A FALL DAY IN 1984, A KEEN YOUNG LAW CLERK TOOK OFF ALONE ON AN ERRAND TO COLLECT EVIDENCE FOR A CASE.

Since his destination, the Swedish Medical Complex, was perched just up the hill from the Seattle firm where he worked, Bill Marler decided to walk.

In his mid-20s, Marler wasn't going to be a clerk for long. He had plans to climb the ranks of the city's litigators and, eventually, run for public office. As the first Washington State University student ever to sit on Pullman's city council, he had already developed a taste for politics.

On the day of his walk, Marler's firm was defending a company against charges of selling asbestos products in the 1950s, knowing that they were hazardous. A man named William Kinsman had died of pleural mesothelioma, an asbestos-triggered cancer of the thin layer of tissue that lines the chest cavity and covers the lungs. The disease can remain latent for decades and then spring into a virulent form, bringing shortness of breath, pain under the rib cage, a dry cough, and then blood, signs that the cancer is spreading into the lungs. Kinsman had been exposed, according to the suit, while working in the Bremer-ton shipyards. Marler knew the site, since he grew up on a small farm just 10 miles away.

As he hiked up Madison Street, he felt pleased with his life. He was sailing through law school and had plans to build a great career. He breezed into Swedish and asked for the Kinsman evidence.

To his bewilderment, he was handed a human lung—a pink and grey organ clearly visible inside a thick plastic pouch. “No one told me to bring something to carry it in,” he says.

As he walked back down the hill, gingerly carrying the lung that for six decades had given life and breath to Mr. Kinsman, a single thought buzzed through his head: “I don't want to do this.” With great relief, he delivered the specimen to the firm's medical expert and then tried to wipe the wonder from his mind. He knew that companies like the one his firm was defending deserved competent legal representation. And he knew that good lawyers, no matter which side they were on, were what made the system work.

He watched the firm's attorneys depose the victim's widow later that day, and heard her tearfully describe the agony of

her husband's demise. “I'm sitting across the table from someone who had been married to a guy for 40 years,” says Marler, recalling the scene. “He retires, and two years later he's dead.”

Marler knew the answer to his quandary then: this was the wrong side for him.

IF YOU EVER WORRIED ABOUT GETTING SICK FROM FOOD YOU ATE

at a restaurant, about *E. coli*, *Salmonella*, hepatitis, undercooked meat, tainted spinach, unpasteurized fruit juice, or even toxic peanut butter, you've been in Marler's world. Remember Jack in the Box, source of the nation's first modern food-borne illness epidemic? In 1993 sick children filled Seattle's hospitals, and the city ran short of life-support equipment. The family of a very sick 10-year-old girl hired Marler. Amid the seizures, strokes, and organ failure she was suffering, her doctors said that she only had days, at times just minutes, to live.

Marler, at this point 36, had moved to a firm that let him develop a practice litigating for plaintiffs, though the partners didn't think much money could be made in that direction. On the day Brianne Kiner's family retained him, he drove to the University of Washington Medical School and asked for everything the library had on *E. coli* O157:H7. He pored over the details of the deadly bacterium that can trigger a reaction

shutting down the kidneys, the pancreas, and the brain. This was one of the worst cases of food poisoning in U.S. history. None other in recent history had affected so many people so violently, and so quickly.

“It was all happening here in Seattle. The hospitals were like war zones,” he recalls. “Kids lined up in the hallways sharing dialysis machines.” When Bill got the case, he didn't even know how to say *E. coli*. After filling his head with the medical details of the disease, he knew more than any other attorney in Seattle. He filed a lawsuit on behalf of the Kiners, who had no means of paying their enormous medical bills. Using the media savvy he had developed on the Pullman city council, he called a television station to announce what he had done. Brianne became the public face of the *E. coli* outbreak, and within weeks his client list grew to more than 200.



In 1993 Bruce Clark worked on the other side of the Jack in the Box cases representing Foodmaker, the restaurant chain's parent company. He quickly noted how Marler stood out from the other plaintiffs' attorneys. "You sort out pretty quickly who is doing the work and who is along for the ride," says Bruce. "Bill was, probably more than any other attorney, a go-getter in terms of advancing the case." He was out visiting clients and doctors, understanding the fast food industry, studying up on the disease and the laws, trying to absorb it all. "Most of the plaintiff's attorneys to some extent were just lining up to enjoy the benefits of the ground that had been tilled before. Marler was actually out behind the plow." Marler also freely shared his findings and advised other attorneys on negotiating settlements.

Four children died in that outbreak. Brianne Kiner, Marler's client, survived, but only after spending six weeks in a coma and six months in the hospital. His efforts resulted in a \$15.6 million settlement for Brianne, the largest personal-injury settlement in the history of the state of Washington. The money is helping her recover—she had to learn to walk and read again—and will also pay for a lifetime of medical issues, including diabetes and kidney problems, resulting from her

E. coli poisoning. Marler also negotiated settlements of at least \$1.5 million for several other victims.

The mountains of work he had done with the Jack in the Box case made him an expert in food-borne illness, not only in terms of understanding *E. coli*, but the whole food production system. "This time I felt like I was doing the right thing," he says.

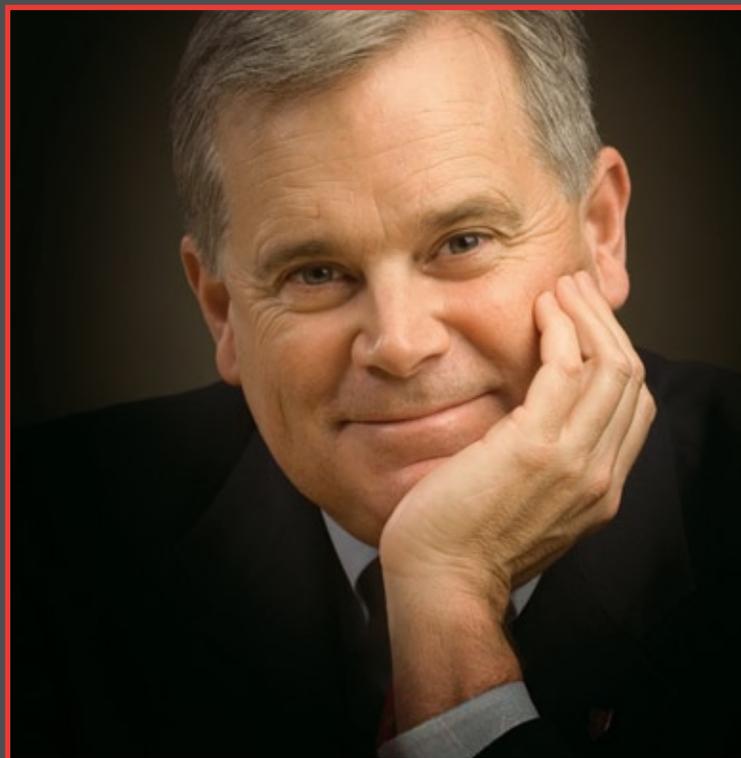
BILL MARLER WAS NOT THE EASIEST CHILD TO RAISE.

The second of three children, he always looked for his own way to do things. As a young teen in high school, when he wanted to eat off-campus, a

violation of school rules, he staged a "lunch-bag rebellion" and urged his classmates to join him in boycotting the cafeteria. At 16, in the summer between his sophomore and junior years, he ran away from home. One Saturday when his parents were out, he packed his duffle and left town, hitching a ride over the Cascades. He called his folks when he got to Bridgeport, nearly 300 miles away, and announced that he wanted to find a job picking fruit and wouldn't be back until the end of the season. They said, "OK. But call once in a while."

Most parents would have gotten in their car and dragged their kid home, he says. He asked them about it later, and they said they figured he had some level of responsibility and would survive the summer. "It was one of the best things

I did in my entire life," says Marler. "I had to get a job. I had to keep a job. And I had to work like I never worked in my life—and for almost nothing." Living and toiling alongside migrant workers, he got a sense of proportion, of society, and a better notion of what he wanted his life to be like. Bucking bales, thinning apples, picking peaches, picking cherries, and following the harvest season up into Canada, he got fired from jobs, kicked out of houses, and often



ROBERT HUBNER

went hungry when he ran out of money. "I came home and I was a completely different person," he says.

After high school, he worked odd jobs and signed up for junior college. His classmates were older students with jobs and kids, who were trying to improve their lives through education. One day one of them looked at him and asked, "What are you doing here? Why don't you go to a university?"

So he did. He loaded up his truck, collected copies of his transcripts, and made for Pullman. He came before being admitted—in fact, he hadn't even applied. To the shock of the admissions officer, he just walked in and said "Hi. I'd



like to go to WSU." Luckily, the administrator sent him up to see Lou McNew, a crusty, affable academic advisor. McNew handed him an application and scheduled him to take the Washington Pre-College Test. "It was a Saturday, and it was just me and two football players in the room," says Marler. After breezing through the exam, he was admitted.

Marler looked up some of the guys from Bridgeport, sons of the orchardists he had worked for. They urged him to join their fraternity. One night over beers at the Spruce in Moscow, a few of them let slip the details and rigors of fraternity initiation. No way was he going to do that, thought Marler. At the next pledge meeting, he spilled to his housemates, figuring if they all refused to take part, they could stop it. Instead, one of them informed on Marler, and he was asked to move out. "It was a good lesson in picking your battles," he says. "What you think is inappropriate, others might see as just part of the process." After he collected his belongings from the front lawn, he found an apartment and a summer job at the Bookie. Staying in town for the summer turned out to be a very good decision.

At the time, student-body president Mark Ufkes '77 and his friends were on a mission to increase student involvement in local politics. Realizing that the City of Pullman neglected the needs of the students, Ufkes wanted his classmates to vote, and even to join the ranks of the city officials. He decided to encourage two students to run for the city council that fall. It might have been a good idea, but it wasn't an easy one. The first of his hand-picked candidates backed out of the primary. The late withdrawal left Ufkes and his friends desperate for a candidate, and everyone had gone home for summer vacation. Then he spied the 19-year-old Marler and quizzed him about his concerns for the community. "I remember thinking, he's articulate,

he clearly wants to get involved," says Ufkes. One afternoon while sitting poolside at the North Campus Heights apartment complex, he urged Marler to run.

Marler didn't think about his age and lack of experience, or that he hadn't even lived in Pullman for a year. He borrowed \$12 for the filing fee and signed up. He survived the primary simply by being the only challenger to the incumbent, longtime Pullman resident Crista Emerson. But once his name went on the main ballot, he woke up. He knew he'd have the student votes, but that wasn't enough. He needed the support of the townspeople to win. "I realized I had a choice to make," he says. "I could do nothing and ignore it, or I could actually work at it." So he walked all over town, knocked on doors, pounded signs into yards, and handed out his home phone number so voters could share their concerns. He sought out debates and welcomed interviews. "Lo and behold, I was actually good at that," he says.

In the end, Marler didn't win the race. The incumbent lost it. Her disdain at having to run against a kid who came to debates in feathered hair and blue jeans worked against her, he says. Marler won the election by a 53-vote margin and became the first student to sit on Pullman's city council.



ROBERT HUBNER

"The thing about Bill, he wanted to do the right thing," says Ufkes. "From the beginning he had a passion for advocating for the community." First, with the help of council members Bill Gaskins '69 and Ken Casavant ('71 Ph.D.), he tackled a fair-housing ordinance to improve the quality of the town's rentals and to prevent landlords from discriminating based on race, religion, or sexual orientation. It had been an issue for the older students and a hotly contested concern for the Pullman community, and Marler grabbed it and ran with it.

"He was just a young college student at the time, but he had Pullman's interest at heart," says Gaskins, a professor

in WSU's pharmacy school. With Marler's help, the council became a progressive public body. Besides the fair housing ordinance, the council created the town's public bus system and reoriented the community to consider the concerns of the student population.

"I remember thinking, God, he's so young," says Ufkes. "But when he had an issue to decide, he went out and did the homework he needed to understand the situation."

Marler stayed an extra year in Pullman to complete his four-year term, something most of his fellow council members never thought a student would do, then moved on to law school at the University of Puget Sound before going to work at a large law firm in Seattle and becoming a trial lawyer.

IN 1996, JUST AS THE JACK IN THE BOX SUITS WERE WINDING DOWN, A NEW TOXIC FOOD CASE EMERGED.

Odwalla, a California-based company that billed its products as nourishing for the body as well as good for the earth, had sold fresh apple juice tainted with *E. coli*, the same deadly strain that nearly killed Brianne Kiner. The bacterium was traced to contaminated apples that had been collected off the ground. A 16-month-old child died, and 70 adults and children were sickened. Marler's phone started ringing. He thought Odwalla would take a lesson from Jack in the Box and mediate quick settlements instead of suffering the negative publicity of a lengthy dispute. He was wrong. The company and its attorneys wanted to fight, says Dennis Stearns, who met Marler through the Jack in the Box case. Marler had moved to a third firm, but his partners had no experience in food-borne illness, nor had they any interest in investing the firm's resources in it. Marler needed someone sharp like Dennis who knew the field and would share the burdens of research, brief writing, and fighting the case. Their joint efforts on the Odwalla case led to the idea of creating their own firm, one that focused on food cases.

In 1998, when Odwalla wrapped up, bringing about \$12 million to the families of five small children who were poisoned, Marler and Stearns were itching to go into business for themselves. They brought Bruce Clark to their team and launched Marler Clark. Their mission: to be the nation's leading law firm litigating food-borne illness cases.

They struggled through a lean first year. Food-borne illness was still a fairly new field. Marler had to write personal checks to the firm so the staff could be paid and the partners could cover their mortgages. He took on a variety of personal-injury suits to cover the bills. "It was scary," says Dennis Stearns. "We had a pretty good book of business, but the nature of this business is you don't get paid until a case settles." That

Why Washington?

In the past two decades Washington has been a hotspot for food-borne illness. It started in 1993, when *E. coli*-contaminated meat from Jack in the Box put Seattle at the center of one of the worst food poisoning outbreaks the country has ever seen. A decade later news of a Washington cow infected with bovine spongiform encephalopathy, the first mad cow disease case in the country, again put Washington in the limelight for issues of food safety. And even in summer 2007, with the latest *E. coli* scare linked to beef from United Food Group, our state was one of several where people who had eaten the meat were diagnosed with *E. coli*.

Why is Washington at the forefront of food-borne illness?

"I think part of it is bad luck," says Bill Marler, whose years as one of the nation's leading food-borne illness litigators make him an expert in the matter. "It's a combination of bad timing and a good health department." Other people in other states get sick, but Washington is able to diagnose and pinpoint the sources of illness more effectively, he says.

How do you know if your food made you sick?

Diarrhea? Fever? Abdominal pain? It could be the flu. It could also be campylobacteriosis, the most common bacterial food-borne illness. Usually only 3,000 cases are reported to the Centers for Disease Control and Prevention annually, but many more exist. Estimates are that between two and four million cases occur in the United States each year. They could come from undercooked chicken, shellfish, mushrooms, or eggs. In most cases, the disease will take two to 10 days to show up, and should last no more than a week.

Though it's the most common, there are others to look out for, including *E. coli*, botulism, and *listeria*. These diseases can cause long-term complications, and sometimes even kill. If you see blood in your stool, have double vision, droopy eyelids, and/or trouble speaking or swallowing, seek help immediately.

If you think your food has made you or your family sick, the U.S. Department of Agriculture has this advice:

- 1. Save the evidence.** If a portion of the food is available, wrap it up and freeze it. Save all the packaging material and cartons. Note what type of food it is, the date, the time you consumed it, and when you started feeling sick.
- 2. Seek treatment.** If the ill person is a young child, elderly, pregnant, or has a weakened immune system, seek medical care immediately. Also, if the symptoms are severe or prolonged, contact a doctor.
- 3. Report the illness.** If you suspect the food served at a restaurant or large gathering was tainted, or if the tainted food is a commercial product, call the local health department or your county health agency. A list of Washington county agencies is available on the Washington State Department of Health Web site at: www.doh.wa.gov/ehp/sf/food/foodlocals.htm.

"Most people who get a food-borne illness never figure out what it is that made them sick," says Marler. Others who have their suspicions often fail to act. "The only way to change bad food-service behavior is to catch it," says Marler. "It's the only way to loop back to the company and say, 'You did a bad thing.'"



first year they won a \$4.6 million settlement against the Finley School District in the Tri-Cities, where 11 elementary school children contracted *E. coli* from undercooked taco meat. But the bulk of the award didn't come until 2003, when the school district finally exhausted its means of appeal.

Nowadays, business is on the rise. Marler points to the latest outbreaks of *E. coli* in fresh spinach, which has been linked to five deaths and more than 200 illnesses, and *Salmonella* in peanut butter, which affected more than 400 people in 44 states. Marler's days are lot like early Jack in the Box—so busy, so many victims.

Marler Clark dominates one-half of the 66th floor of the Columbia Center, Seattle's tallest office building. It's Friday, and Marler, in standard partner attire—shorts and a polo shirt—stands at the window with a phone in one hand and double nonfat latte in the other. He's up so high, he can stare the Olympic Mountains right in the face.

But he's focused on his call. He's talking about his trip to Georgia three days earlier to tour a ConAgra-owned peanut butter plant, the source of the Peter Pan and Great Value *Salmonella* outbreak reported last February. The plant officials thought he would send an employee to look around; instead, to their dismay, he showed up in person. During the tour, he noted where it looked like someone had shot BBs into the factory ceiling to drain rainwater from the insulation. He also wandered away from the tour and into a room where the walls had holes to the outside and raccoon tracks through the dust.

A few minutes after describing the scene in Georgia, Marler gets another call. This time it's from a family poisoned by the peanut butter. The wife has to have part of her lower intestines removed, and they don't have any money, says Marler, as he spies the phone number on his cell-phone screen. "I'm trying to get the ConAgra to advance them enough prior to the settlement to pay their hospital bills."

Now, instead of fighting for firm resources and struggling to convince the senior partners that his plaintiffs' cases are worth pursuing, Marler *is* the senior partner. Instead of waiting for the news to tell him about the outbreaks, he's out investigating for himself. Marler doesn't just go to the library to do his homework. He goes to Salinas Valley (where he and his investigator were able to trace the source of the spinach outbreak before the FDA even issued a consumer warning), and Georgia, and Oklahoma (where ConAgra is headquartered). His firm has an epidemiologist on staff who helps determine whether a client has a legiti-

mate complaint, and advises the lawyers on cases. And Marler has a friend, a former Lewiston journalist, whom he sends around the country to investigate when outbreaks happen.

Marler's firm also has a public-service mission. That first year, the partners formed OutBreak, a nonprofit consulting firm dedicated to training the food industry in how to prevent outbreaks. "Lawyers tend to take a lot of personal and political hits for being ambulance chasers ... money grubbers," he says. "I'm sensitive to that." By sharing cautionary tales of past cases, the partners hope to scare food producers into prioritizing food safety. Marler routinely challenges them to "put me out of business."

Right now our food-safety system works against food safety, says Dennis Stearns. For example, if restaurants had paid sick leave, more food workers wouldn't be passing illness on to customers. "Right now under some versions of the food code, managers at the beginning of each shift are supposed to go around and ask, 'Does anyone have diarrhea?' And

people are supposed to raise their hands," says Dennis. "Even if you're on your death bed, you're expected to find someone to work your shift. The whole thing is stacked against people staying home and not working."

By sharing their expertise, the lawyers are fully aware they are providing good PR for the firm. But they also hope to prevent bad food handling decisions. In April, Marler flew to Washington, D.C. to attend congressional hearings where some of his clients were testifying about the need for better inspections and more regulations, and to deliver writ-

ten testimony about the safety of our food supply.

Marler has never had a case where he could say it just happened. "There is always a situation where a company has made a decision not to do something or to do something, and now they have to deal with the consequences," he says. With Jack in the Box, the company had already heard customer complaints that the burgers weren't thoroughly cooked, and the Washington State Legislature had mandated cooking the meat to a higher temperature. But the company wouldn't let go of its quick-cook times. That was the mistake, says Marler. In the case of Odwalla, the company had heard from customers made ill by their juices. Even worse, after touring the California plant and citing plant sanitation concerns, the U.S. Army had rejected a proposal to sell Odwalla juice at its commissaries. All this happened prior to the outbreak, says Marler, but the company continued to sell juice to pregnant women and children.



"There's never a situation where some nice, decent businessman just got caught making a tiny error," says Marler. "They had the information. They didn't do anything. And people died."

DINNER IS A LIVELY TIME IN BILL AND JULIE MARLER'S WATERFRONT HOUSE ON BAINBRIDGE ISLAND. Their oldest daughter, Morgan, is away at a LaCrosse game. Their middle daughter, Olivia, shares in our conversation over generous plates of grilled salmon and asparagus. She tells

E. coli from a kiddie pool. He came home to find a note on the door that his wife and girls were taking advantage of a warm afternoon up at the neighborhood pool. "I ran up there as fast as I could and yelled 'Get out! Get out!'" says Marler, waving his arms for effect.

A smile flashes to Julie's face, then it fades a little. It doesn't make sense, she says. You try to do everything right. You give your kids exercise and food that's supposed to be good for them, but even then you may be placing them in danger.

We stop the conversation when the youngest Marler,



BRUCE ANDRE

about traveling to Washington, D.C., with her dad last year and sitting patiently while he told federal and state health inspectors about the value of their reports in helping the cases of severely infected victims and tracing chronic food-handling problems. The Marlers all talk about how much Bill is on the road, either chasing down the facts of an outbreak or speaking at food-industry meetings. Then Julie brings up the time a few years ago when Marler flew to Georgia to visit a water park where more than two dozen children caught

Sydney, flies through the living room with her jump rope. Marler praises her new skills.

"I'm not suing people for fingers in the chili or hot coffee in their lap," he says. "Most of the time now I'm representing kids and people who are really severely injured."

Money is a big part of it, he admits. "With money I can help change people's lives. I can assure their kids health care for the rest of their lives, a college education, an ability to pay for future complications. I can make sure that they're taken care of." ●