

Listeria

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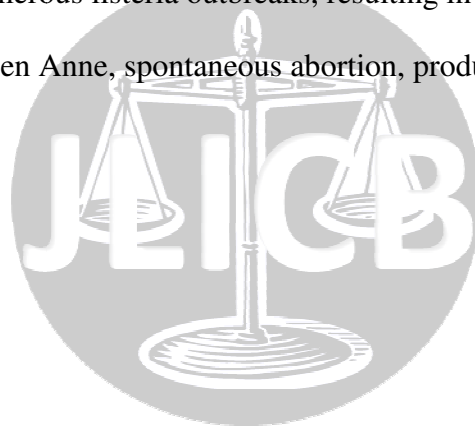
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ABSTRACT

This paper will investigate the legal implications of listeria lawsuits. A brief review of the medical implications of listeria will be identified followed by a focus on the past, present and future legal ramifications. The medical research surrounding listeria is uncertain due to other factors that may be the cause of listeria-like symptoms. In the last year, there have been numerous listeria outbreaks, resulting in numerous court cases.

Keywords: Listeria, Queen Anne, spontaneous abortion, product liability, privity.



INTRODUCTION

“Listeriosis is a food poisoning caused by eating foods contaminated with the *Listeria monocytogenes* (*L. monocytogenes*) bacterium” (WebMD, 2011). There are an estimated 2,500 cases in the United States of listeriosis, which mainly affects pregnant women, newborns, the elderly, and adults with impaired immune systems. (WebMD, 2011) *Listeria* is normally found in water or soil and is transmitted from those sources to vegetables and the food supply. In some cases, animals carry the bacteria, which become a contaminant in the water and soil.

The first documented case of *Listeria* was in 1924, when two researchers independently identified *Listeria monocytogenes* from animal outbreaks. (Wikipedia, 2012) The two researchers proposed the name genus *Listerella* after Joseph Lister, a surgeon and early antiseptic advocate, but that name was already being used. (Wikipedia, 2012) This resulted in the researchers having to come up with another name. “Eventually, the genus *Listeria* was proposed and accepted” (Wikipedia, 2012).

There are many symptoms of listeria including fever, muscle aches, and nausea or diarrhea. (WebMD, 2011) The infection can also spread to the nervous system with symptoms of headaches, stiff neck, confusion, loss of balance, or convulsions. (WebMD, 2011)

There have been numerous listeria outbreaks. A well-known cantaloupe outbreak at Jensen Farms near Holly, CO in late September 2011 resulted in the FDA recalling the cantaloupe grown on the farm after connecting it with a deadly listeria outbreak. (NPR – The Salt, 2011) According to the CDC, 109 confirmed sicknesses and 21 deaths occurred as the result of this widespread outbreak. Multiple lawsuits are now pending.

Generally, the outbreak will last longer than expected because it takes approximately two weeks for the bacteria to manifest itself. If you store the contaminated vegetables or fruits in a colder environment, like a refrigerator, the longevity and potency will increase. With all of the recent listeria outbreaks some lawsuits have been brought against the companies responsible for these outbreaks. This paper will review some of these law suits.

LITERATURE REVIEW

Listeria is a group of bacteria capable of causing illness including potentially fatal infections in the elderly, newborns, pregnant women, and persons with a weakened immune system ("Definition of listeria," 2011). *Listeria* is a rare disease, but it is more deadly than well-known pathogens like salmonella and *E. coli*, killing up to one in five people it affects (Freeman, 2011). Anyone can be affected by listeria. However, it primarily affects older adults, pregnant women, newborns, and adults with weakened immune systems ("Listeriosis (listeria infection)," 2011). The main symptoms of someone who has listeria are fever and muscle aches, sometimes preceded by diarrhea or other gastrointestinal symptoms ("Listeriosis (listeria infection)," 2011). *Listeria* can be found practically everywhere in the air, on the ground, in water, in soil and even on people (Weise, 2011). Even though listeria can be found pretty much everywhere there are only certain ways it can be transferred. *Listeria* infection may be spread through different methods including direct contact with infected lesion, food-borne transmission,

and passage from mother to fetus in pregnancy or to the infant during birth ("Definition of listeria," 2011). While healthy people usually recover quickly and fully from exposure to *Listeria*, individuals with weakened immune systems often are not so lucky (Weese).

The first possible outbreak of listeria was during Queen Anne's time. "Queen Anne had 17 recorded pregnancies, but failed to leave an heir to the throne. The first stillbirth may or may not be important. It is the 11 miscarriages and the two neonatal deaths that we must consider, and we must take into account the fact that her last 10 pregnancies did not produce a child who lived more than two hours" ("For the want of an heir," 1992). "The results of Queen Anne's pregnancies accord well with the clinical picture of listeriosis: habitual abortion (up to 11), stillbirth (at least one), immediate neonatal death (George and the second Mary), and postnatal meningitis marked by convulsions and residual obstructive hydrocephalus (William)" (Saxbe, 1972). The question that arises is how did Anne come to have listeria? "Her husband, Prince George of Denmark, was an avid horseman. Horses can harbor listeria silently or develop clinical listeriosis and the Prince might have brought the organism into his household. Furthermore, *L. Monocytogenes* may reside asymptotically in the genital tract of the male, and may be transmitted venereally, so that Anne and George might have shared an asymptomatic infection" (Saxbe, 1972). In summary, of the 17 pregnancies Queen Anne had no surviving children and the unfortunate results of her pregnancies are consistent with listeriosis in four of its manifestations: habitual abortion, stillbirth, neonatal death, and postnatal meningitis with residual hydrocephalus (Saxbe, 1972).

Since, Queen Anne's possible contraction of listeria there has been a few more outbreaks. There were two major outbreaks that happened in France. "The first outbreak was between October 18, 1999 and February 10, 2000. There were three pregnancy-associated cases, six cases in patients with an underlying medical condition, and one case in a previously healthy adult. Among the non-pregnancy-associated cases, three patients had central nervous system listeriosis and four had bacteremia. Two adults with an underlying medical condition and one infant died. Analysis of the first five available food questionnaires showed that all case patients reported having eaten "rillettes," a ready-to-eat pâté-like product. In January the manufacture recalled all of its products, rillettes and jellied pork tongue" (De Valk, Vaillant, Jacquet, Rocourt, Le Querrec, Stainer, Quelquejeu, Pierre, Pierre, Desenclose, & Goulet, 2001). "The second outbreak was between November 12, 1999 and February 28, 2000. In this case there were nine pregnancy-associated cases and twenty three adult cases. Of the adult cases, 11 had an underlying medical condition. Five adults, all with an underlying medical condition, died. The infection resulted in one spontaneous abortion and seven premature births. Four of the premature neonates died. The proportion of case patients reporting consumption of jellied pork tongue was constant throughout the outbreak. All 15 case patients who did not report having eaten jellied pork tongue had eaten either a type of pâté (one case patient) or ham (three case patients) or both (11 case patients). On February 17, 2000, meat processing and distribution professionals were informed of the outbreak and reminded of food hygiene precautions. On February 19, a press conference was organized informing the public of the occurrence of the outbreak" (De Valk, Vaillant, Jacquet, Rocourt, Le Querrec, Stainer, Quelquejeu, Pierre, Pierre, Desenclose, & Goulet, 2001).

Besides the outbreak in France there have been a few other cases of listeria. "An outbreak of listeria that occurred in California was linked to Mexican-style fresh cheese

resulting in some 86 cases. Many of the cases involved mothers and their young children and at least 29 deaths occurred” (Mullan, 2009). Between 1983 and 1987, Switzerland experienced a long-lasting outbreak of listeriosis, 122 cases, due to the contamination of a locally produced soft cheese, 31 were fatal (Mullan, 2009). France also had a few more outbreaks due to cheese. In 1995, there was an outbreak linked to the consumption of Brie de Meaux and in 1997 because of soft cheese (Mullan, 2009). In 2005, Switzerland had an outbreak due to tome cheese (Mullan, 2009). “Within a period of 7 weeks, 10 cases of listeriosis were diagnosed; four of the cases were in men and six were in women (two of which were pregnant). Three patients died and both pregnancies ended in septic abortion. Listeria was found in the cheese” (Mullan, 2009). In 2009, in Austria and Germany there was an outbreak of 14 cases because of ‘Quargel’ cheese (Mullan, 2009). “One of the largest listeriosis outbreaks in the United States occurred in 1998 when scores of people became ill after consuming Sara Lee Ball Park franks. At least 100 victims developed acute listeriosis with symptoms ranging from diarrhea and vomiting to fever, body chills and lethargy. Tragically, 21 people died due to fatal complications of listeriosis” (“Listeria,”). This resulted in the recall of more than 45-million pounds of hot dogs and processed luncheon meats (Weese).

In 2011, an outbreak of listeria happened in the United States. This is the largest recent listeria outbreak Frieden said (Weise, 2011). This outbreak happened through cantaloupe from Jensen Farms’ in Holly, Colorado (CARON, 2011). “This is the deadliest outbreak of a food borne disease that we've identified in more than a decade,” said Dr. Thomas Frieden, director of the CDC. “For the public, it's important to know that if you know the cantaloupe you have is not Jensen Farms, then it's OK to eat. But if you're in doubt, throw it out” (CARON, 2011). “Jensen Farms of Holly, Colo. recalled its cantaloupes Sept. 14 after the farm's melons were traced to the Listeria illnesses. The farm says it shipped cantaloupes to 28 states, though the FDA has said it may be more” (Freeman, 2011). “The agency said 30 people died, and a woman pregnant at the time of her illness had a miscarriage. A total of 146 people were sickened in 28 states. The contamination possibly came from pools of water on the floor and old, hard-to-clean equipment at the farm’s cantaloupe packing facility. Government investigators found positive samples of listeria bacteria on equipment in the Jensen Farms packing facility and on fruit that had been held there” (“30 dead in,” 2011).

There are a few ways to prevent listeria. One main way is to thoroughly cook raw food (“Definition of listeria,” 2011). Another way is for businesses to clean equipment properly.

With all of the listeria outbreaks some lawsuits have been brought against the companies responsible. “In the Sara Lee ball park franks outbreak many victims brought lawsuits against the company. The families of deceased victims filed wrongful death lawsuits and many of the surviving listeriosis victims brought forth personal injury suits. After more than two years of litigation, Sara Lee pleaded guilty to two misdemeanor charges and agreed to provide more than \$4 million in damages” (“Listeria,”). In 2008, Maple Leaf agreed to pay \$23 million in damages to listeriosis survivors and families of the deceased victims of their listeria outbreak (“Listeria,”). The outbreak of listeria in cantaloupe has also had some lawsuits. “Victims and families of victims in Colorado, Oklahoma, and Texas have filed at least five lawsuits against Jensen Farms. One lawsuit is also against Wal-Mart for allegedly being among the grocery stores selling the

cantaloupe. However, it's hardly a given that the plaintiffs will receive the compensation that lawyers tell them they deserve. This could be true because Jensen Farms is a local grower, a third-generation family farm, with limited capital. Jensen Farms is not a major corporation that has significant financial assets says Fred Pritzker" (Mach, 2011). While only five lawsuits have been brought against Jensen Farms more may come, especially since there were so many more victims.

LEGAL ASPECTS OF LISTERIA ILLNESS

The legal responsibility of a seller of a product is, in general, determined by the principles of product liability law, which is a part of tort lawⁱ. A food item that sickens someone who eats it is, in legal terms, defective. An agricultural product, such as cantaloupe, is, for purposes of product liability law, considered to have been manufactured by the grower. The grower, in turn, sells the cantaloupe to wholesalers who in turn sell to local retailers and they, finally, sell to the consumer. These intermediate sellers are "sellers" as that term is used in product liability law.

There are two major ways in which an injured person could precede against a seller: (1) negligence and (2) strict liability. A negligence claim requires that the injured person (plaintiff) show that the manufacturer, or an intervening seller, was negligent in their procedures in growing or handling the product. More specifically, that they failed to use due care by selling a product which they caused or allowed to be or become defective and that the breach of that duty was the proximate cause the injury. The plaintiff has to jump through a number of hoops along the road to a successful negligence claim. It is most often a very difficult burden to demonstrate that the seller failed in some respect to use reasonable methods to ensure that the product was safe and that the lack of due care was the direct cause of the harm to the plaintiff. In a strict liability claim, by contrast, the plaintiff has a much lower burden and has to show only that the product was defective and he or she was injured by the product; no matter how careful the seller was, the fact of the injury trumps everything else. For years, the law that has applied to strict product liability has been found in The Restatement of the Law (Second), Section 402A (hereafter, "402A") which puts forth a rather concise rule on strict liabilityⁱⁱ. This section, which dates from 1965, provides for strict liability and "applies although... the seller has exercised all possible care in the preparation and sale of his product"ⁱⁱⁱ. As a result, the plaintiff's legal weapon of choice is usually going to be strict liability under 402A, because all the plaintiff has to show is that he consumed the product and it made him sick; under 402A a seller of a product in a defective condition unreasonably dangerous to a user or consumer is subject to liability for physical harm caused to the user or consumer. This rule has been interpreted and applied by courts in all states in various ways, some more strictly than others, with varying results. Some states have codified the product liability provisions of 402A, e.g. Colorado §§ 13-21-401 et seq.

The idea of being "unreasonably dangerous" is applied to manufactured products under the idea that an item's utility must outweigh the danger it presents. Clearly, a steak knife is a dangerous product, but dull steak knives would have no utility, so sharp steak knives are not unreasonably dangerous. A food product, on the other hand, is not subject to this type of analysis, and a food contaminated with a pathogen that can cause illness is in a "defective condition".

Since the liability is strict, there can be no issue or defense raised by the seller that either (a) they did everything possible to ensure the safety of the food, i.e., they were not negligent, or (b) that the consumer was by their own actions negligent and thus to some degree responsible for their own harm, e.g., they did not wash the cantaloupe, which would have removed the listeria bacteria.

LISTERIA LAWSUITS AND OTHER POTENTIAL LITIGATION

As of this writing, about eight suits have been filed arising out of the Jensen Farms cantaloupe listeria episode. Since none of these has gone to trial, let alone been reviewed by an appellate court, it is not possible at this time to tell what the courts will ultimately hold regarding liability of growers, packers, shippers and retail sellers of the cantaloupes or other tainted products resulting in listeria litigation. Since the suits are being filed in several different states, there may be inconsistent results in cases with similar facts.

The case of *Palmer v. Jensen Farms and Wal-Mart*, filed in El Paso County, Colorado, in September 2011^{iv} appears to be typical of what can be expected in listeria litigation. It contains claims for strict product liability under Colorado's products liability law and also claims for negligence and breach of warranty (a contract claim) and under the Federal Food Drug and Cosmetic Act. Charles Palmer and his wife are residents of Colorado, the same state where Jensen Farms is located and where Wal-Mart does business. The theory of the plaintiffs here is that not only is the producer liable, but so is the seller (Wal-Mart) even though Wal-Mart admittedly sold the cantaloupe whole, i.e., Wal-Mart did not process or do anything to the cantaloupe; it was sliced by Mr. Palmer. Palmer also lists several "John Doe" defendants and will doubtless add others by name as it becomes clear who handled the cantaloupe as it traveled from the farm to the store.

A similar suit was filed in Bernalillo County, New Mexico, District Court¹ by lawyers for 63-year old Rene Gaxiola, who consumed cantaloupe that was grown on Jensen Farms before he became sick. Mr. Gaxiola developed symptoms of listeria. On September 7, 2011 he got sicker and he went to Lovelace Hospital in Albuquerque, where his condition continued to deteriorate; he died in the hospital on September 10. The lawsuit alleges that blood samples tested positive for a strain of *Listeria* associated with the Jensen Farms cantaloupe outbreak.

The lawsuit also names distributor Frontera Produce plus Primus Labs and Bio Food Safety, food safety auditors, as defendants. This introduces another type of defendant into this case, since the suit alleges that they were negligent in giving the farm a high score on food safety. Any case against the auditors would have to be based in negligence, since they have no contractual relationship to the Plaintiff, and did not manufacture or distribute the product. Notably, the U.S. Food and Drug Administration (FDA) later issued a safety report of its own, citing unsanitary conditions and *Listeria* contamination inside the Jensen Farms packing facility. Unfortunately for Mr. Gaxiola, the FDA report came after he died.

Other plaintiffs may choose to sue Jensen in Colorado, or, more likely, will look to file suit in the plaintiff's home state and obtain jurisdiction over Jensen under the home state's long-arm statute. However, the diligent plaintiff's attorney will make a

Gaxiola v Jensen Farms, et al., docket no. D-202-CV-2011-12566, filed December 22, 2011

determination about where the most favorable law is before proceeding. Some states may allow liability against shippers and wholesalers, and others may not. Some jurisdictions will exempt an intermediary from strict liability if it merely passes the product along without any change, limiting claims against it to negligence. A party that puts its name on a product manufactured by someone else is opening itself up to liability. A party who allows the listeria bacteria to migrate onto the grower's land through water contamination or movement of animals may be held strictly liable in some states and not others.

One important issue, regardless of where suit is filed, is that the plaintiff must make a connection between the variety of listeria he has and what is found on the defendant's farm. Since, typically, the tainted cantaloupe is long gone due to the long incubation period of the listeriosis, this genetic link must be established through scientific analysis.

This is going to be a rapidly changing area of products liability as plaintiff's attorneys seek out new potential defendants from a rich array of companies that not only produce and sell the product, but also provide services to those who do.

Of significant concern to all handlers of these products from the growers to the ultimate seller is the potential of class actions. A class action is a type of [lawsuit](#) in which a great many plaintiffs bring a claim to court together (as a class) against a particular defendant. In the United States federal courts, class actions are governed by [Federal Rule of Civil Procedure](#) Rule 23 and 28 U.S.C.A. § 1332 (d). There are advantages to class actions because they bring together many individual claims into one lawsuit representing all persons who have similar claims. Two of those are as follows:

- 1) Class actions may result in lowering the costs to litigate because of a large number of
- 2) Individual cases being consolidated into one case.
- 3) Class action may serve as method for many plaintiffs who have small claims to pursue
- 4) Claims against [defendants](#) who engage in harmful activity where it would be, otherwise,
- 5) Not practical to do so. Therefore, it may serve to deter future wrongdoing.

One typical class action is the Maple Leaf Case from the Ontario Superior Court^v in which listeriosis contaminated processed meats sold by Maple Leaf Foods, Inc. The Court approved a settlement amount of between \$25 and \$27 million Canadian dollars to be paid out to a class of claimants who fell into twelve different classes of injuries. The court found that the settlement was an "excellent result" in part because it "aims to provide compensation commensurate with the genuine seriousness of the claimant's loss..."^{vi}. It is noteworthy that some of the claimants would be entitled to compensation of \$750.00 or less, well below the threshold that would interest any potential Plaintiff's lawyer.

CONCLUSION

As a general rule the right to initiate a law suit for breach of contract requires that the moving party have "privity". This term means that a party has a recognizable interest in the contract, which imposes liabilities and provides for benefits to that contracting party. A third party does not generally have the right to sue. In the arena of product

liability, however, not only can the company that produced, designed, or manufactured the defective product be held legally responsible, but every company in the chain of distribution from the producer, designer or manufacturer to the consumer may be held liable. That would include sellers of the defective product as well as wholesalers. Therefore, it is incumbent upon wholesalers and retailers (restaurants, grocery stores, hotels, etc.) to be cognizant of the fact that they may have more exposure to liability in a product liability suit, especially if they have in some way modified the product for resale. Individual lawsuits and, more significantly, class actions, can be extremely costly to defend, and in some instances lead to the demise of companies which become defendants against whom verdicts are rendered.

ⁱ A consumer could also precede on a breach of contract claim under certain circumstances, however, contract cases require that the plaintiff and defendant be in privity, i.e., they must have contracted with each other. Thus, a consumer would not have a claim against the manufacturer of a product, since there were other contracts that intervened between the two.

There are also potential claims under the Federal Food Drug and Cosmetic Act, which prohibits interstate commerce in “adulterated” food.

ⁱⁱ The Restatements of the Law are not actual statutes or common law, but are publications that are intended to set forth the state of the common law in various legal areas such as torts, contracts and others. The Restatements are published by the American Law Institute, a private body. In 1997 the Institute released the Restatement of Torts (Third) which reworded the concepts of strict liability. It may have gone beyond what the current state of the law is, but such variations concern chiefly issues regarding warnings, which may not be germane to this discussion of food products.

ⁱⁱⁱ 402A reads as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

^{iv} DISTRICT COURT, COUNTY OF EL PASO , STATE OF COLORADO **Plaintiffs:** CHARLES PALMER and TAMMY PALMER, husband and wife **Defendants:** JENSEN FARMS INC., a domestic corporation; WAL-MART STORES, INC. a foreign corporation; and JOHN DOES 1-10.

^v CEZANNE BILODEAU, et al. v. MAPLE LEAF FOODS, INC. et al. docket no. CV-08-361464CP, Ontario Superior Court of Justice (2009). Although this is a Canadian case, the principles of class action are the same as in the United States.

^{vi} Opinion of the Court, paragraphs 66 and 67,

<http://mapleleaffoodsclaim.com/doc/REASONS%20FOR%20DECISION%20OF%20PERELL%201%20%28MARCH%209,%202009%29.pdf>

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