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COW 54, WHERE ARE YOU? PRODUCER LIABILITY AND THE NATIONAL ANIMAL IDENTIFICATION SYSTEM

*Jackson W. Adams**

INTRODUCTION

Americans love meat.¹ Consumption of beef, poultry, and fish has risen nearly ten percent in the past thirty years, to the point where the average consumer now devours over 200 pounds annually.² Like a teddy bear full of dynamite, our love of meat carries within it the seeds of our own destruction. Delicious as a steak or pork chop may be, not too long ago it was living animal tissue. As such, meat is prone to disease, contamination, infection and any number of microbial agents, all of which may find their way into our bloodstream. Government regulation, producer co-operation, and consumer education have come together to improve the safety of America's meat supply, but perfection has been elusive. When the best efforts of America's meat industry fail, the result is foodborne illness.

Foodborne illnesses puts every man, woman and child in the world at risk.³ In the United States alone, seventy-six million cases of foodborne illness are estimated to occur each year, with 325,000 leading to hospitalization and 5,000 resulting in death.⁴ Contaminated

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1. Sherri Day, *Mad Cow Raises Worries in United States*, N.Y. TIMES, May 21, 2003, at A5 (quoting John McMillin, Prudential Securities analyst).

2. Economic Research Center, U.S. Dep't of Agriculture, *Food Consumption*, Aug. 23, 2004, <http://www.ers.usda.gov/Briefing/Consumption/>.

3. World Health Organization, *Food Safety and Foodborne Illness*, Jan. 2002, <http://www.who.int/mediacentre/factsheets/fs237/en/print.html> ("In industrialized countries, the percentage of people suffering from foodborne diseases each year has been reported to be up to 30% While less well documented, developing countries bear the brunt of the problem due to the presence of a wide range of foodborne diseases, including those caused by parasites.").

4. Jean C. Buzby et al., *Product Liability and Microbial Foodborne Illness*, Economic Research Service, USDA, at 1-3 (2001) ("Foodborne illnesses account

food is responsible for more deaths than all products regulated by the United States Consumer Product Safety Commission combined.⁵ In a litigious society, so many preventable illnesses would appear to be an excellent, never-ending source of litigation. However, relatively few instances of foodborne illness lead to litigation, and only a third of those that reach the courtroom result in damage awards.⁶

When a consumer is injured by food, he may pursue a remedy premised on any of several substantive legal theories. Contract law may imply warranties, creating a breach in the consumer's sale agreement.⁷ Tort negligence is also available when a producer or seller owes a duty of reasonable care to a consumer and fails to meet that duty.⁸ Finally, strict liability may be applied in products liability actions against anyone who produces a defective product.⁹ One of the reasons that few foodborne illness cases reach the courtroom is the difficulty of establishing exactly who is a proper defendant. Throughout the day, a typical consumer is likely to eat foods from several different sources: grocery stores, fast food eateries, and restaurants. Identifying possible defendants and proving fault in the face of so many possibilities is a daunting task.

On April 27, 2004, the United States Department of Agriculture announced a plan that could unintentionally make this process easier.¹⁰ The National Animal Identification System (NAIS) was created as a response to consumer concerns following the appearance of mad-cow

for about 1 in every 100 U.S. hospitalizations and 1 of every 500 U.S. deaths.”), available at <http://www.ers.usda.gov/publications/aer799/>.

5. *Id.* at 1.

6. *Id.* at 2.

7. See U.C.C. § 2-214 (2000). (There is an implied warranty that all goods that are sold must be merchantable, holding sellers to several different standards, including passing without objection in the trade and be suitable for the ordinary purpose such goods are used.)

8. RESTATEMENT (SECOND) OF TORTS § 282 (1965) (“Negligence is conduct which falls below the standard established by law for protection of others against unreasonable risk of harm.”).

9. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 1 (1998) (“One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”).

10. United States Animal Identification Program, *Frequently Asked Questions on the U.S. Animal Identification Program (USAIP) / National Animal Identification System*, <http://usaip.info/faqprint.htm> (last visited Mar. 9, 2006) [hereinafter *USAIP FAQ*].

disease in the United States.¹¹ The NAIS will be able to identify all premises and animals that have been in contact with a diseased animal, preventing further consumption of tainted products and spread of disease.¹² Due to NAIS procedures, proving the chain of handling and production in a case of foodborne illness will be much easier. With the advent of the NAIS, a plaintiff may be able to trace a piece of tainted meat from the field to the fork.¹³

The ability to establish proof of identity will create a new source of liability. Producers of livestock, especially farmers and feedlot operators, will now be exposed as part of the chain of production; in the past they were protected by anonymity. In a strict products liability action, the plaintiff will only have to prove a defect, identify the parties responsible for the product, and demonstrate that the product went from the defendant to the plaintiff substantially unaltered. This method leaves producers especially vulnerable since plaintiffs will not have to prove any negligent act. While extending strict products liability to producers will undoubtedly be attractive to plaintiffs and may seem like a natural advancement of the law, the underlying policy decisions behind product liability law make a strong argument for producer protection. As the difficulty in proving identification diminishes, negligence law will better serve to compensate injured parties while holding producers liable only in situations that include a culpable act.

SCOPE

This comment is divided into four parts. Part I will explore the nature of foodborne illness, as well as the “field to fork” journey of livestock. Part II will show how the livestock industry and the United States Department of Agriculture implemented the NAIS as a

11. Western Extension Marketing Committee, *U.S. Livestock Identification Systems: Risk Management and Market Opportunities*, Fall 2004, p. i, available at <http://www.lmic.info/memberspublic/animalID/cover&intro.pdf>.

12. USAIP FAQ, *supra* note 10.

13. The USDA has stated that all information will be kept in strict confidence, and has attempted to address the concerns producers have regarding this system. See U.S. Dept. of Agriculture, Animal and Plant Health Inspection Service, *Questions and Answers on the National Animal Identification Program*, Sept. 2004, http://www.aphis.usda.gov/publications/animal_health/content/printable_version/fa_q_ah aids.pdf (“FOIA [Freedom of Information Act] can be used to obtain information from a Federal agency when that agency has custody and control of a record. USDA is very much aware of producers’ concerns about the confidentiality of information collected as part of the NAIS . . .”).

response to the discovery of mad-cow disease, or Bovine Spongiform Encephalopathy (BSE), in the United States.¹⁴ With this foundation laid, Part III will address current foodborne illness law, which will demonstrate both the difficulties injured consumers face in proving their cases and the potential impact of the NAIS on these cases. The function of both negligence and strict liability standards will be given special attention and, in Part IV, be applied to theoretical circumstances that may arise post-NAIS. The public policy motivations behind both standards will be examined, and support the conclusion that negligence, and not strict liability, should govern cases involving producers and victims of foodborne illness.

BACKGROUND

I. From Pathogens to Pork Chops: How Microbial Agents Reach the End Consumer

Foodborne illnesses are defined as “diseases, usually either infectious or toxic in nature, caused by agents that enter the body through the ingestion of food.”¹⁵ There are forty identified microbial pathogens that are known to cause illness in humans.¹⁶ Among those are bacterial pathogens like *Campylobacter*,¹⁷ *Clostridium botulinum*,¹⁸ *Escherichia coli*,¹⁹ *Salmonella*,²⁰ and *Staphylococcus*²¹ as well as parasitic

14. Press Release, USDA, Veneman Announces Framework and Funding for National Animal Identification System (April 27, 2004), *available at* <http://www.usda.gov/Newsroom/0170.04.html>.

15. World Health Organization, *supra* note 3.

16. Buzby, *supra* note 4, at 3.

17. Dept. of Health and Human Services, Center for Disease Control, *Foodborne Illness Frequently Asked Questions*, Jan. 10, 2005, http://www.cdc.gov/ncidod/dbmd/diseaseinfo/files/foodborne_illness_FAQ.pdf (“*Campylobacter* . . . causes fever, diarrhea, and abdominal cramps. It is the most commonly identified bacterial cause of diarrheal illness in the world [M]ost raw poultry meat has *Campylobacter* on it. Eating undercooked chicken, or other food that has been contaminated . . . is the most frequent source of this infection.”) [hereinafter *Foodborne Illness FAQ*].

18. *Id.* at 2 (“[T]he bacterium *Clostridium botulinum* grows and produces a powerful paralytic toxin in foods. These toxins can produce illness even if the microbes that produced them are no longer there.”).

19. *Id.* at 1 (“*E. coli* O157:H7 is a bacterial pathogen that has a reservoir in cattle and other similar animals. Human illness typically follows consumption of food or water that has been contaminated with microscopic amounts of cow feces.

pathogens like *Toxoplasma gondii*²² and *Trichinella spiralis*,²³ naturally occurring marine biotoxins,²⁴ and viral agents like the calicivirus²⁵ and

The illness it causes is often a severe and bloody diarrhea and painful abdominal cramps.”).

20. *Id.* at 1 (“*Salmonella* is also a bacterium that is widespread in the intestines of birds, reptiles and mammals. It can spread to humans via a variety of different foods of animal origin. The illness . . . typically includes fever, diarrhea and abdominal cramps It can invade the bloodstream and cause life-threatening infections.”).

21. *Id.* at 2 (“[T]he bacterium *Staphylococcus aureus* can grow in some foods and produce a toxin that causes intense vomiting.”).

22. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, *Toxoplasma Infection: Fact Sheet for the General Public*, Sept. 24, 2004, at

1, http://www.cdc.gov/ncidod/dpd/parasites/toxoplasmosis/2004_PDF_Toxoplasmosis.pdf (“A single-celled parasite called *Toxoplasma gondii* causes a disease known as toxoplasmosis Of those who are infected, very few have symptoms However, pregnant women and individuals who have compromised immune systems should be cautious; for them, a *Toxoplasma* infection could cause serious health problems.”).

23. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, *Trichinellosis: Fact Sheet for the General Public*, Sept. 24, 2004, at 1, http://www.cdc.gov/ncidod/dpd/parasites/trichinosis/2004_Trichinellosis_FS.pdf (“Trichinellosis, also called trichinosis, is caused by eating raw or undercooked meat of animals infected with the larvae of a species of worm called *Trichinella*. Infection occurs commonly in certain wild carnivorous (meat-eating) animals but may also occur in domestic pigs.” Symptoms include: “Nausea, diarrhea, vomiting, fatigue, fever, and abdominal discomfort Headaches, fevers, chills, cough, eye swelling, aching joints and muscle pains, itchy skin, diarrhea, or constipation follow the first symptoms In severe cases, death can occur.”).

24. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, *Marine Toxins*, Oct. 12, 2005, http://www.cdc.gov/ncidod/dbmd/diseaseinfo/marinetoxins_g.htm. (“Marine toxins are naturally occurring chemicals that can contaminate certain seafood. The seafood contaminated with these chemicals frequently looks, smells, and tastes normal. When humans eat such seafood, disease can result.” The most prevalent examples in the United States are “scombrototoxic fish poisoning, ciguatera poisoning, paralytic shellfish poisoning, neurotoxic shellfish poisoning and amnesic shellfish poisoning.”).

25. *Foodborne Illness FAQ*, *supra* note 17 at 2. (Calicivirus, also known as Norwalk-like virus, “is an extremely common cause of foodborne illness, though it is rarely diagnosed It causes an acute gastrointestinal illness, usually with more vomiting than diarrhea, that resolves within two days. Unlike many foodborne pathogens . . . it is believed that Norwalk-like viruses spread primarily from one infected person to another.” Because of its unique method of transfer,

Bovine Spongiform Encephalopathy.²⁶ Despite the best efforts of the medical community, the Centers for Disease Control estimate that eighty-one percent of foodborne illnesses in America are caused by unknown, unidentifiable pathogens.²⁷

There are various ways in which these pathogens enter the host animals. Toxins may be present naturally in their environment. Microbial agents can be present in healthy animals, they can be passed to the animal through their feed, or they can be introduced by cross-contamination.²⁸ Once present in the host animal, other food-handling errors usually must occur for the pathogens to survive. Such errors include poor hygiene of food handlers, mistakes in cleaning equipment, failing to cook or reheat food properly, storing food at improper temperatures, long periods of time between preparation and consumption, and insufficient storage or preservative practices.²⁹

“[i]nfected kitchen workers can contaminate a salad or sandwich as they prepare it, if they have the virus on their hands. Infected fishermen have contaminated oysters as they harvested them.”).

26. Dep’t of Health and Human Services, Center for Disease Control, *Questions and Answers Regarding Bovine Spongiform Encephalopathy (BSE) and Variant Creutzfeldt-Jakob Disease (vCJD)*, June 29, 2005, <http://www.cdc.gov/ncidod/dvrd/vcjd/qa.htm>. (“Strong evidence indicates that BSE has been transmitted to humans primarily in the United Kingdom, causing a variant form of Creutzfeldt-Jakob disease (vCJD). . . . As of June 2005, a total of 177 cases of vCJD had been reported worldwide; of these, 156 had occurred in the United Kingdom.”).

27. Buzby, *supra* note 4, at 3.

28. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, Division of Bacterial and Mycotic Diseases, *Foodborne Illness*, Oct. 11, 2005, http://www.cdc.gov/ncidod/dbmd/diseaseinfo/files/foodborne_illness_FAQ.pdf.

Many foodborne microbes are present in healthy animals (usually in their intestines) raised for food. Meat and poultry carcasses can become contaminated during slaughter by contact with small amounts of intestinal contents. Similarly, fresh fruits and vegetables can be contaminated if they are washed or irrigated with water that is contaminated with animal manure or human sewage. Some types of *Salmonella* can infect a hen’s ovary so that the internal contents of a normal looking egg can be contaminated with *Salmonella* even before the shell is formed. Oysters and other filter feeding shellfish can concentrate *Vibrio* bacteria that are naturally present in sea water, or other microbes that are present in human sewage dumped into the sea.

29. Buzby, *surpa* note 4, at 4.

Food-handling errors have been responsible for many of the most publicized outbreaks.³⁰

Potential errors can arise at any point in the production process of meat. A farmer could give tainted feed to an animal.³¹ During the slaughter process, meat could come into contact with offal, such as intestine or fecal matter. Once meat arrives in a consumer's home, he might undercook the meat, or place cooked meat on a plate that had previously held raw meat. Some foods, like steak tartare or raw oysters, are inherently risky.³²

Perhaps to best understand the potential for errors, it is helpful to consider the production cycle from livestock to finished meat product. Practices vary across industries, so there is no single model. Even within one company, many production models are used to meet both modern industry requirements and traditional farming practices.

A. Vertical Integration and Poultry

Poultry production follows a model reminiscent of the vertical integration of early American economic powerhouses like U.S. Steel.³³ Large corporations like Tyson,³⁴ Goldkist,³⁵ and Perdue³⁶ use the vertical integration model to oversee every aspect of the production process. The process begins with the breeder stock. Through selective breeding, traits can be emphasized or minimized to create an animal better suited to specific consumer group demands.³⁷ For example, American consumers generally prefer white meat; this preference is

30. See Bud Hazelcorn, *Poultry Plant Slow to Report Sharp Increase in Bacteria*, N.Y. TIMES, Dec. 21, 2002, at A16; Cf. Pam Belluck, *Juice Poisoning Case Brings Guilty Plea and a Huge Fine*, N.Y. TIMES, Aug. 24, 1998, at A12.

31. See *Trichinellosis: Fact Sheet for the General Public*, supra note 23, at 2.

32. Buzby, supra note 4, at 5.

33. For an examination of the practice of vertical integration, as well as its compatibility with the Sherman Act, see *U.S. v. Columbia Steel Co.*, 334 U.S. 495 (1948).

34. See Tyson Foods, Inc., *Live Production Chicken*, <http://www.tyson.com/Corporate/AboutTyson/liveproduction/chicken.aspx> (last visited Mar. 6, 2006).

35. See Goldkist, *Poultry Operations*, <http://www.goldkist.com/company/poultry.asp> (last visited Mar. 6, 2006).

36. See Perdue Farms, *Who We Are*, <http://www.perdue.com/company/about/quality.html> (last visited Mar. 6, 2006).

37. See Tyson Foods, Inc., *Live Production Chicken*, <http://www.tyson.com/Corporate/AboutTyson/liveproduction/chicken.aspx> (last visited Mar. 6, 2006).

reflected in the shape and body composition of the chickens destined for the American marketplace.³⁸

With an established breeding stock, breeder birds lay eggs that are quickly sent to a hatchery. At the hatchery, eggs are placed in incubators that carefully regulate environmental conditions like temperature and humidity.³⁹ A few days prior to hatching, the eggs are vaccinated.⁴⁰ Once the chicks hatch, they are again medicated to prevent respiratory problems.⁴¹ The newly hatched chicks are then loaded into trucks and sent to farms.

Chicken farms are usually independently owned, but operate under exclusive contracts with a poultry company.⁴² The poultry company will not only provide birds, but food, managerial advice, and best practice information. Farms will keep the birds from four to six weeks, after which they will be sent back to the poultry company for processing. Once processed, the meat is ready for sale.

B. Cattle: Independent and Individual

The beef industry is quite different from the vertically integrated poultry industry. There are typically four stages in the development process. The first stage takes place on cow-calf breeding farms.⁴³ These are traditional ranches where a static breeding herd is maintained. Cow-calf ranchers are often independent; they do not deal exclusively with any beef company and choices like breed, feed, vaccinations and other practices are left to the individual rancher. A cow-calf operation will raise calves from birth until they have been weaned. A calf may be kept on the ranch, eventually to enter the breeding stock, or may be sold to a stocker, an operator at the next stage of production.

Stocker buy calves between six and ten months old and keep them until they reach a target weight of 600 to 800 pounds.⁴⁴ Once they have gained enough weight, the calves, now between eight and fourteen months old, are sent to feedlots. These “feeder cattle” are brought to

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*; see also Goldkist, *Poultry Operations*, <http://www.goldkist.com/company/poultry.asp> (last visited Mar. 6, 2006); Perdue Farms, *Who We Are*, <http://www.perdue.com/company/about/quality.html> (last visited Mar 6, 2006).

43. See Tyson Foods, Inc., *Live Production Beef*, <http://www.tyson/Corporate/AboutTyson/liveproduction/beef.aspx> (last visited Mar 6, 2006).

44. *Id.*

slaughter weight, approximately 900 to 1400 pounds, and move from the feedlot to the processors.⁴⁵ Once processed, the meat is ready to enter the consumer market.

C. Mixed Models in Pork Production

The pork industry uses a mixed model. Large corporations maintain vertically integrated lines of production similar to the poultry industry,⁴⁶ but significant numbers of independent producers also contribute to the market.⁴⁷ Breeder stock is carefully developed using ultrasound imaging and computer analysis to determine ideal body composition. Artificial insemination allows breeders to quickly establish herds from a small number of boars with the most desirable traits.⁴⁸

The process starts at a nucleus farm. These farms raise sows that will be sold to other farms as brood sows. A brood sow will stay on a farm and farrow, or give birth to, a litter of piglets. Three weeks after farrow the piglets will be weaned and moved to a nursery.⁴⁹ A few days after a litter is weaned, the brood sow is ready to be inseminated again. The piglets will stay in a nursery for about a month, then will be sent to a finishing house.⁵⁰ Finishing houses keep hogs for about four months, during this time they will grow from 35 pounds to nearly 250 pounds.⁵¹ Once the hogs have reached slaughter weight, they are sold to meat packers and processing plants, and made ready for consumers.

Including a wholesaler, a grocery store, and the end consumer, the product will change hands at least six times before it is consumed. This

45. *Id.*

46. See generally, Tyson Foods, Inc., *Live Production Pork*, <http://www.tyson/Corporate/AboutTyson/liveproduction/pork.aspx> (last visited Mar. 6, 2006); Goldkist, *Pork Production*, <http://www.www.goldkist.com/company/pork.asp> (last visited Mar. 6, 2006).

47. See Will Fantle, *Factory Hog Farms Stirring Controversy*, WISCONSIN STEWARDSHIP NETWORK, <http://www.wsn.org/factoryfarm/hogart.html> (last visited Mar. 6, 2006) (a discussion of the tension between independent hog farmers and so-called "factory farms").

48. See Tyson Foods, Inc., *Live Production Pork*, <http://www.tyson/Corporate/AboutTyson/liveproduction/pork.aspx> (last visited Mar. 6, 2006).

49. USDA Economic Research Service, *Briefing Room: Hogs Background*, <http://www.ers.usda.gov/Briefing/Hogs/background.htm> (last visited Mar. 6, 2006).

50. See Tyson Foods, Inc., *Live Production Pork*, <http://www.tyson/Corporate/AboutTyson/liveproduction/pork.aspx> (last visited Mar. 6, 2006).

51. *Id.*

creates six different parties who may be responsible for the food handling error that eventually causes injury. In the past, the farmers, breeders, and feedlots were usually kept out of this chain. Once an animal was sent for processing, it retained no connection to its previous locations. The NAIS, combined with other records a processor might keep, would pierce the anonymity created during the processing stage.

II. The NAIS

When mad-cow disease was discovered in an American cow on December 23, 2003,⁵² it shook the United States marketplace. Consumers became wary of a dietary staple.⁵³ Livestock prices fell drastically.⁵⁴ Foreign nations banned the importation of American beef.⁵⁵ Immediate concerns were voiced that an infected American herd could lead to an epidemic that would dwarf the British outbreak of the previous decade.⁵⁶ The American response was both legislative⁵⁷ and administrative. The United States Department of Agriculture, in promulgating the NAIS, undertook to create a nation-wide system capable of identifying every animal and premises that had contact with

52. Jennifer Bayot, *Mad Cow Disease in the United States: The Market*, N.Y. TIMES, Dec. 27, 2003, at A14.

53. Sherri Day, *A Time for Finesse: Marketing Beef After a Mad Cow Discovery*, N.Y. TIMES, Jan. 1, 2004, at C1.

54. Sarah Kershaw, *Mad Cow Disease in the United States: Ranchers; Beleaguered Cattle Farmers Prepare to Weather Another Blow*, N.Y. TIMES, Dec. 25, 2003, at A24.

55. Patrick E. Tyler, *Mad Cow Disease in the United States: Reaction; Long String of Countries Suspend Imports of American Beef*, N.Y. TIMES, Dec. 25, 2003, at A22.

56. U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *About BSE*, July 7, 2005, <http://www.cdc.gov/ncidod/dvrd/bse/> (BSE was first found in English cows in 1986. Research suggests that it originated in sheep infected with the condition known as "scrapie" and was transferred to cows by the practice of feeding sheep meat and bone meal to young calves. At the peak of the epidemic, 184,000 cases were diagnosed.).

57. Denise Grady & Donald G. MacNeil Jr., *Rules Issued on Animal Feed And Use of Disabled Cattle*, N.Y. TIMES, Jan. 27, 2004 at A12; see also *Baur v. Veneman*, 352 F.3d 625 (2nd Cir. 2003) (plaintiff alleged non-enforcement of U.S. laws prohibiting slaughter of so-called "downer" livestock, animals that appear to be sick, injured, or otherwise compromised, prevented him from eating beef for fear of contracting disease).

an infected animal within forty-eight hours of discovering the infected animal.⁵⁸

To achieve this goal, several steps have to be taken. First, every location holding livestock animals, hatcheries, farms, and feedlots among others, is assigned a premises identification number.⁵⁹ Once the locations are identified, a method must be implemented to uniquely identify each animal at every location.⁶⁰ The final step, tracing animal movement from premise to premise, is vital to the functioning of the entire system.⁶¹ If tracking data are not kept up to date, there is no way to identify contacts with infected animals.

How does the USDA propose to keep this information up to date? The initial plan was created with cooperation and input from both state agencies and industry groups with the hope of keeping the system voluntary.⁶² To that effect, several species-specific work groups are establishing standards that reflect the needs of each industry.⁶³ It is hoped that industries will incorporate NAIS data into their own management and performance recording systems, increasing the utility

58. U.S. Dep't of Agriculture, Animal and Plant Health Inspection Service, *National Animal Identification System: Goal and Vision*, Jan. 2005, http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/fs_ahnaispln.pdf.

59. *Id.*; see also U.S. Dep't of Agriculture, Animal and Plant Health Inspection Service, *About NAIS*, <http://animalid.aphis.usda.gov/nais/about/index.shtml> (last visited Mar. 6, 2006).

60. *Id.*

61. *Id.*

62. U.S. Dep't of Agriculture, Animal and Plant Health Inspection Service, *Questions and Answers on the National Animal Identification Program*, Jan. 2005, http://animalid.aphis.usda.gov/nais/downloads/faq_ahais.pdf [hereinafter *Questions and Answers*]; see also U.S. Dep't of Agriculture, Animal and Plant Health Inspection Service, *The Evolution of the National Animal Identification System in the United States*, Jan. 2005, http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/fs_ahnaisvo.pdf.

63. U.S. Dep't of Agriculture, *Cattle & Bison Producers: Questions and Answers about Cattle and the National Animal Identification Program*, http://animalid.aphis.usda.gov/nais/audiences/cattle_and_bison/cattle_qa_factsheet.shtml (cattle movements will be the responsibility of the receiving premise, but the initial identification number will be the responsibility of the first premises to possess the cattle); see also *Questions and Answers*, *supra* note 62 (stating that species-specific work groups will not implement methods contrary to traditional identification practices. The current work groups are: aquaculture, camelids (llamas and alpacas), cattle/bison, cervids (deer and elk), equine, goats, poultry, sheep, and swine).

of their private systems.⁶⁴ By maintaining a voluntary system, the USDA is also hoping that industries, not governments, will bear some of the costs of implementation.⁶⁵ Despite the federal government's predictions about industry enthusiasm and voluntary participation, the USDA remains prepared to make parts of the program mandatory.⁶⁶ Absent federal rulemaking, states are encouraged to take action.⁶⁷

As of this writing, the NAIS is not yet fully operational. Premises identification numbers are being assigned, with a mandatory compliance deadline set for 2008.⁶⁸ Field trials are underway in some areas. For instance, in Texas, Radio Frequency Identification (RFID) tags have been placed on cows and receivers have been installed in certain feedlots to evaluate the receivers' effectiveness and usefulness.⁶⁹

64. *Questions and Answers*, *supra* note 62; *USAIP FAQ*, *supra* note 10 (stating the information will improve production efficiencies and add value to the animals).

65. *Questions and Answers*, *supra* note 62.

66. U.S. Dep't of Agriculture, Animal and Plant Health Inspection Service, About NAIS, <http://animalid.aphis.usda.gov/nais/about/index.shtml> (last visited Mar. 6, 2006).

67. *Questions and Answers*, *supra* note 62 (citing the example of Wisconsin, which passed laws requiring certain parts of the program in areas it controls); see also KAN. STAT. ANN. § 47-674 (2004) (authorizing the Kansas Livestock Commissioner to implement programs in accordance with the NAIS); MASS. GEN. LAWS ch. 129 § 39E (2005) (requiring auction facilities to comply with Animal Identification Programs in order to be licensed); N.D. CENT. CODE § 36-09-25 (2003) (naming the North Dakota stockmen's association as the administrator for any relevant federal identification program); OKLA. STAT. ANN. tit. 2 § 4-20 (2004) (establishing the statewide identification program); TEX. AGRIC. CODE ANN. § 161.056 (2005) (establishing the Texas animal identification program).

68. See Ted McCollum, *The National Animal Identification System: Frequently Asked Questions About the Premises ID*, http://animalscience.tamu.edu/ansc/publications/beefpubs/animal_premises_id.pdf (the timeline for these programs, as declared by the USDA, is as follows: July, 2005- States must be capable of issuing premises ID numbers and animal ID numbers. April, 2007- Premises and animal registration alerts. January, 2008- premises registration and animal identification is required, January, 2009- reporting of defined animal movements required, all aspects of program mandatory); see also Wyoming Livestock Board, *Premises Identification Program*, <http://wlsb.state.wy.us/brands/Premises/FAQ.htm#last>.

69. "Real Life" Trials for Animal Identification Underway; *Livestock Owners: Get Your Premises Number Now*, News Release, Texas Animal Health Commission, http://www.taahc.state.tx.us/news/pr/2005/2005jul_Animal_ID.pdf (last visited Mar. 6, 2006).

III. Existing Foodborne Illness Law

A. Negligence

As of yet, the nascent NAIS has not been used in any type of litigation. There is, however, a wealth of prior law discussing both negligence and strict liability theories of tort law, yet none of it reaches beyond the processing stage. An examination of the precedents will produce mixed results. While foodborne illness and pure food laws have been litigated for centuries, standards appear inconsistent, results seem contradictory, and few unifying themes appear.

Modern law has created four elements in the tort of negligence: duty, breach, causation, and damage. A plaintiff must prove all of the elements in a successful tort action, while the defense may prevail by overcoming any one. First, a plaintiff must prove that he is owed a duty of due care from the defendant, and that the defendant breached that duty. This was often a difficult task.

In *Tavani v. Swift*,⁷⁰ the plaintiff was infected with *trichinae* after eating pork sold by the defendant. The defendant proved that no test was capable of guaranteeing the wholesomeness of pork,⁷¹ that they had complied with the government's requirements for the production of meat,⁷² and that the industry custom did not call for inspecting meat for *trichinae*.⁷³ With this proof made, the court found no breach of

70. *Tavani v. Swift & Co.*, 105 A. 55 (Pa. 1918).

71. *Id.* ("To establish its freedom from negligence, defendant produced evidence to the effect that parasites . . . are invisible to the naked eye and can be discovered only by microscopic inspection.").

72. *Id.*

[T]he United States government concluded an attempt to inspect all pork for trichinae would result in more danger to the public than no inspection, for the reason knowledge on the part of the public that an inspection had been made would lead to a false sense of security and induce consumers to omit taking proper precautions.

73. *Id.* ("It was also shown that . . . a custom existed in other packing houses to omit attempting to discover the presence of trichinae by inspection.").

duty.⁷⁴ Similar reasoning allowed defendants to escape liability for breach of warranty claims.⁷⁵

The difficulty in proving negligence in the sales of uncooked meat is reduced in cases involving purchases of cooked food. The case of *Bishop v. Weber*⁷⁶ involved a caterer whose food made several party guests ill. The court found all elements of negligence.⁷⁷ The court did not require actual knowledge of the injurious nature of the food, but simply said the caterer should have known it was improperly prepared.⁷⁸

Similarly, causation was, and remains, a difficult element to establish. A plaintiff must prove that the defendant's breach of duty lead to the injury suffered. In *Hairston v. Burger King Corp.*,⁷⁹ the plaintiff alleged that she developed gastroenteritis after eating a Whopper sandwich. The doctor who treated the plaintiff diagnosed food poisoning, but also stated that the condition could have been caused by anything eaten during the week prior to the development of symptoms.⁸⁰ The court refused to assume that because one event

74. *Id.* ("The action being in trespass for negligence and not for breach of warranty, the evidence was competent and sufficient to sustain the conclusion of the jury that defendant omitted no precaution or duty it owed plaintiff."); *see also* *Wiehardt v. Key Packing Co.*, 264 Ill. App. 504 (Ill. App. Ct., 1932) (stating that plaintiffs must prove by preponderance of the evidence some breach in the duty owed by the defendant).

75. *Cheli v. Cudahy Bros. Co.*, 267 Mich. 690, 696-697 (1934)

It seems to follow logically that it is unfair to impose the liability of an insurer upon the meat packer through the implication of a warranty that pork is fit for human consumption in a raw state. . . The warranty should be applied only to food used in the usual, rather than in the unusual and improper, manner.

Abrogated by *Hill v. Husky Briquetting, Inc.*, 393 Mich. 136, 136 (1974) (holding that while industry custom may be used as evidence of whether the standard of due care had been met, such evidence does not determine what the standard is).

76. *Bishop v. Weber*, 139 Mass. 411 (1885).

77. *Id.* at 418 ("[T]he defendant occupied such a relation towards the plaintiff that the law cast upon him the duty. They also sufficiently aver that the defendant neglected that duty, and that the plaintiff was injured by reason thereof.")

78. *Id.* at 418 ("It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appear that he ought to have known of it, and was negligent in furnishing unwholesome food, by reason of which the plaintiff was injured.")

79. *Hairston v. Burger King Corp.* 764 So. 2d 176,(La. Ct. App. 2002).

80. *Id.* at 178 (The physician "testified that the cause of the food poisoning could have been anything Hairston ate from one hour to one week before she

followed the other, the prior event was the cause of the latter: "Hairston's testimony merely established she was having severe gastric problems and that she had eaten a Whopper . . . Hairston failed to prove a causal relationship between her gastroenteritis and eating the Whopper."⁸¹ Proof of causation does not require the plaintiff to eliminate every source of the injury save the defendant,⁸² but a plaintiff must offer more than the chronological progression of events.⁸³

Privity was also a difficult hurdle for early plaintiffs. In *Dressler v. Merckel, Inc.*,⁸⁴ the plaintiff, after contracting trichinosis, brought suit against the wholesaler that delivered the meat to the retailer. The wholesaler impleaded the retailer that sold the meat to the plaintiff, but the court dismissed the complaint against the impleaded defendant. Deciding against the plaintiff, the court stated "it could not reasonably be foreseen or anticipated in selling pork to a butcher in the ordinary course of business, that he would prepare and sell a product to be eaten without cooking' and further held that the liability of the defendant-respondent had not been established."⁸⁵

As rules of privity began to fall away,⁸⁶ plaintiffs were able to reach past the retail vendor to manufacturers⁸⁷ and establish a *prima facie*

started having problems. Additionally, there was no evidence that any of the other 800 people who consumed a Whopper that day developed food poisoning.").

81. *Id.* at 178.

82. *Lee v. Church's Fried Chicken, Inc.*, 396 So. 2d 374, 375 (La. Ct. App. 1981) ("The courts have never compelled a plaintiff to produce an actual analysis of the food consumed in order to establish its unwholesome condition. Rather, the courts have been willing to infer the deleterious nature of the food consumed from the circumstances surrounding the illness.").

83. *Id.* at 375

In all of the cases in which there has been successful recovery, the plaintiff has shown that the food was consumed by him, and that no other food which might reasonably be assumed to have caused the illness had been consumed within a number of hours before or after the consumption of the suspect product. The plaintiff has also had medical opinion to the effect that it was probable that his illness was caused by the consumption of the particular product involved. In addition, the successful plaintiffs in the above cases have been able to show some other independent circumstance, which tends to prove his case.

84. *Dressler v. Merckel, Inc.*, 272 N.Y. 574 (1936).

85. *Id.* (citing lower court decision in *Dressler v. Merckel, Inc.*, 284 N.Y.S. 697 (N.Y. App. Div. 1936).

86. *See Winterbottom v. Wright*, (1843), 10 M. & W. 109, (Exch. Div.) (holding that only the party who made a contract can sue for its breach).

case. The violation of pure food laws could be used to establish *per se* negligence.⁸⁸ In *Portage Market Co. v. George*,⁸⁹ a mother purchased veal, which she cooked and served to her family. When one of her children became ill, the mother brought suit against the retail merchant. Under Ohio law, anyone who sold unwholesome food would be liable for a fine of up to fifty dollars.⁹⁰ The plaintiff did not have to prove that the defendant knew of the unwholesome condition of the meat, and the lack of knowledge was not a valid defense.⁹¹ As long as the plaintiff did not commit an act of contributory negligence, violation of the statute amounted to negligence by the defendant.⁹²

Despite the hurdles a potential plaintiff faces, there are several situations that allow for a finding of negligence. The simplest strategy is to prove negligence *per se* by demonstrating the defendant has violated a relevant statute.⁹³ Courts have created precedents that allow a plaintiff to recover despite a defendant's compliance with statutes governing meat sales.⁹⁴ Even with pure food laws in most states,⁹⁵ negligence remains a difficult task to prove.

87. See *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 870 (8th Cir. 1903) (“[A]n act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence.”).

88. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 (Proposed Final Draft 2005) (“An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”).

89. *Portage Market Co. v. George*, 146 N.E. 283 (Ohio 1924).

90. *Id.* at 286.

91. *Id.*

92. *Id.* at 283 (“The violation of the pure food laws of this state by the sale of unwholesome meat is negligence *per se* . . . provided the user is not himself guilty of negligence in the care, preparation, cooking, or in any other manner which contributes directly to his injury.”).

93. *Catalanello v. Cudahy Packing Co.*, 34 N.Y.S.2d 37 (N.Y. App. Div. 1942) (stating salami packaged and sold with trichinae sufficient to render plaintiff ill was in violation of adulterated food law); *Troiette v. G.H. Hammond Co.*, 110 F.2d 135, 137 (6th Cir. 1940) (“We are of the opinion that pork that is infected with trichinella is diseased within the meaning of Ohio Pure Foods Law. [citations omitted] Its sale, even when the seller has no knowledge that it is diseased or infected, violates the statute and the seller is negligent in law.”).

94. *Catani v. Swift & Co.*, 95 A. 931, 933 (Pa. 1915) (“[A] *prima facie* case is made out by proof that the meat sold by defendant was diseased and caused the

B. Strict Liability

The elements required for a plaintiff to make the *prima facie* case are reduced in strict liability. No longer does a court consider duty or breach in the behavior of a defendant; when there is causation and injury and the defendant's behavior falls within recognized areas, strict liability will be imposed.⁹⁶ Strict liability was recognized by the American Law Institute's Restatement (Second) of Torts.⁹⁷ The cause of action developed out of food policy, which held sellers, at common law and through statute, to a high degree of responsibility for their products.⁹⁸

Even with this standard in place, it still remains difficult for consumers to prove their cases. Courts have resisted finding pork contaminated with *trichinae* to be unreasonably dangerous.⁹⁹ Many decisions have turned on the question of reasonable cooking practices. Two cases illustrate these differing standards.

In *Holt v. Mann*,¹⁰⁰ the defendant sold a ham to the plaintiff, which was cooked in accordance with the guidelines of a well-known cookbook. While *Holt* was decided on the basis of implied warranty, it set a standard that would be applicable in the strict liability context. The court noted that *trichinae* are killed at the temperature of 137 degrees Fahrenheit, but that ordinary household practices cannot

death of plaintiff's husband. It was not necessary to go farther and prove defendant knew the food was unwholesome. Defendant's duty was absolute.").

95. 40 CONG. REC. S. 895 (Special Sess. 1906) (statement of Sen. Heyburn) ("Nearly every State in the Union, Mr. President, has a pure-food law. The States have undertaken to legislate upon this subject, with, I believe, but one or two exceptions [A]s a rule, the States have enacted intelligent and appropriate legislation upon this question.").

96. Recognized areas where strict liability will be imposed include abnormally dangerous activities, injuries done by animals, and defective products. See *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969) (applying strict liability to blasting operations); see also *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (a celebrated opinion by Justice Cardozo that set the stage for strict products liability).

97. A seller is liable if its product was sold in an unreasonably dangerous and defective condition and it reaches the end consumer in a substantially unmodified condition, see RESTATEMENT (SECOND) OF TORTS § 402(a) (1965).

98. *Id.* at cmt. B (discussing early decisions that found food merchants liable despite the requirements of privity); see also, e.g. *supra* note 56.

99. *Scheller v. Wilson Certified Foods, Inc.*, 559 P.2d 1074 (Ariz. Ct. App. 1977).

100. *Holt v. Mann*, 200 N.E. 403, 404 (Mass. 1936).

guarantee that the entire piece of meat will reach such temperatures.¹⁰¹ The court decided that “[i]t could have been found that the ham was cooked as thoroughly as could be expected in a family, but without killing trichinae with which it was infested. The ham could have been found not ‘reasonably fit’ for the purpose for which it was bought.”¹⁰² This standard protects the consumer, provided they follow reasonable practices in the kitchen.¹⁰³

Other courts have been less generous to the consumer. In *Nicketta v. National Tea Co.*,¹⁰⁴ the plaintiff alleged that pork sold by the defendant made her and her family ill. The defendant moved for dismissal after the court took judicial notice “that a human being cannot contract or get the illness or disease known as trichinosis from eating pork which has been properly cooked.”¹⁰⁵ This standard asserts that if a person contracts trichinosis by eating pork, then the pork was not properly cooked; alternately, if a piece of pork is properly cooked, a person cannot contract trichinosis. To allege that the pork was properly cooked and that the pork caused them to fall ill is a “factual

101. *Id.* at 405.

102. *Id.*

103. Other cases applying this consumer protective standard include *Silverman v. Swift & Co.*, 107 A.2d 277, 281 (Conn. Sup. Ct. Err. 1954), which described the “Massachusetts Rule” of reasonable consumer practices thusly: “Raw pork . . . is fit for eating only after it has been cooked with the commonly used precautions prevailing among the general public.”; *Meyer v. Greenwood*, 124 N.E.2d 870 (Ind. App. Ct. 1955) (defining the phrase “properly cooked” as “mean[ing] cooked in a manner reasonably to be expected of a person charged with knowledge of the danger to health involved in eating underdone pork. In this sense the complaint does not count on a factual impossibility nor show contributory negligence as a matter of law.”); *Vaccarino v. Cozzubo*, 31 A.2d 316, 319 (Md. App. Ct. 1943) (stating “[I]n the case before us [the rule] was not that the sausage was wholesome and fit to be eaten either cooked or raw, but that it was wholesome and fit to eat after ordinary domestic cooking.”); *Adams v. Scheib* 184 A.2d 700 (Pa. Sup. Ct. 1962) (leaving for the jury the question of whether the meat was properly cooked).

104. *Nicketta v. National Tea Co.*, 338 Ill. App. 159, 168 (Ill. App. Ct. 1949).

105. *Id.* at 160. The appellate court summarized the trial court’s proceedings:

The court heard the arguments of counsel and, being fully advised in the premises, found that ‘it is a well established and irrefutable scientific fact, of which this court will take judicial notice, that a human being cannot contract or get the illness or disease known as trichinosis from eating pork which has been properly cooked.’ Thereupon, the court sustained the motion to dismiss and entered judgment against plaintiffs.

impossibility.”¹⁰⁶ Under this standard, “properly cooking meat” means cooking it to the point that pathogens are destroyed.¹⁰⁷

This jurisdictional split can be decisive in establishing the question of unreasonably dangerous defects. Under the Massachusetts rule of *Holt*, pork infested with *trichinae* is defective; the defendant must prove the plaintiff’s cooking practice fell below the ordinary standard. Under the Illinois rule of *Nicketta*, the plaintiff must overcome the assumption that, despite the presence of *trichinae*, properly cooked meat does not infect consumers.

When a consumer’s cooking methods are not at issue, there is still a question about the nature of the products. The test focuses on the expectations of consumers, asking if they understand the risks associated with their food. *Ayala v. Bartolome*¹⁰⁸ concerned a plaintiff who died after eating raw oysters. The trial court granted the defendant’s motion for summary judgment, which was reversed on appeal. In discussing strict liability, the court held a product to be unreasonably dangerous only when it was “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”¹⁰⁹ The court left to the jury the question of the extent of common knowledge, and thus the scope of the phrase “unreasonably dangerous.”¹¹⁰ This approach applies an

106. *Id.* at 168.

107. Other cases applying this rule include *Kobeckis v. Budzko*, 225 A.2d 418 (Me. 1967), which stated “[a]s of this date, authoritative sources are uniform in say [sic] that raising the pork or pork product to a temperature of 137 Fahrenheit kills trichinae and ‘proper’ cooking as used in this case means raising the temperature throughout the meat or meat product to a minimum of 137 Fahrenheit.” See also *Hollinger v. Shoppers Paradise of New Jersey, Inc.* 340 A.2d 687, 695 (N.J. Super. Ct. Law Div., 1975) (“To require proper cooking of raw pork by the consumer to eliminate trichinae and then to hold that such cooking need not in fact make the meat safe is anomalous; if not a ‘factual impossibility,’ as observed in *Nicketta*, this approach at least invites an illogical result.” [internal citation omitted]. In dicta, the Hollinger court stated this standard “is compatible with the doctrine of strict liability developed by our courts.”).

108. *Ayala v. Bartolome*, 940 S.W.2d 727 (Tex. 1997).

109. *Id.* at 732 (citing RESTATEMENT (SECOND) OF TORTS § 402(a), *supra* note 97).

110. *Id.* at 732 (“Whether such a danger would be contemplated by the ordinary consumer is a question of fact. [Defendant] argues that it is common knowledge to the public that the act of eating uncooked meat carries an element of danger, citing naturally-occurring bacteria such as salmonella, and parasites such as trichinosis. However, it is not common knowledge that eating raw oysters could be fatal.”).

assumption of risk to all consumers, disallowing this defense only when the risk was outside the scope of a reasonable consumer's contemplation.¹¹¹

C. Products Liability

Application of strict liability has been refined in the years following the publication of the Restatement (Second) of Torts. Section 402(a) still forms the basis of current standards, but has been modified significantly. The Restatement (Third) of Torts: Product Liability adopts a less stringent requirement.¹¹² A seller is responsible for injuries caused by a defective product; the previous requirement that there be an unreasonably dangerous defect is removed.¹¹³ There are three types of defects: manufacturing defects present despite all possible care, design defects that could have been avoided by a reasonable alternative, and defects that arise due to inadequate instructions or warnings.¹¹⁴

In determining whether there is a defect in a food product, the consumer expectation test was codified in the third Restatement.¹¹⁵

111. In a similar case, the Louisiana Supreme Court found the defect to be in the consumer, not in the product:

Based on the record, we are unable to say that raw oysters containing the vibrio vulnificus bacteria are unreasonably dangerous to the ordinary consumer. The evidence is uncontroverted that vibrio vulnificus bacteria in raw oysters poses little, if any, threat to a healthy person. The bacteria is only harmful to those persons with specific underlying disorders such as liver or kidney disease. Seen in this light, the "defect" is really found in the person rather than the product, much in the same way that sugar is harmful only when used by someone with diabetes.

Simeon v. Doe, 618 So. 2d 848, 851 (La., 1993); see also *Cain v. Sheraton Perimeter Park South Hotel*, 592 So. 2d 218, 221 (Ala. 1991) (stating "[t]his Court cannot conclude that, as a matter of law, a consumer should reasonably expect to eat a contaminated oyster. The question concerning the reasonable expectation of a consumer is usually a question for the jury, and we see no reason to depart from that principle in this case.").

112. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 1 ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

113. *Id.*

114. *Id.* at § 2.

115. *Id.* at § 7 ("A harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.").

Items like fish bones in a fillet¹¹⁶ or bacteria in raw shellfish¹¹⁷ have been held within the reasonable contemplation of a consumer, and thus not defects. Many courts eschew the reasonable expectation test and use a foreign or natural distinction for determining defects.¹¹⁸ In *Mix v. Ingersoll Candy Co.*, a chicken pie that contained chicken bones injured the plaintiff.¹¹⁹ Because chicken bones are natural to chickens, a consumer is charged with knowledge that a chicken pie may have pieces of chicken bone within.¹²⁰ Tort liability is only applied when the object causing the injury is foreign to the product. This distinction has fallen out of favor; courts have held that it unfairly and arbitrarily draws a line for a restaurateur's liability.¹²¹ Most courts now use the distinction to determine what standard ought to be imposed: negligence for a natural substance, and strict liability for foreign.¹²²

116. See *Morrison's Cafeteria of Montgomery, Inc. v. Haddock*, 431 So. 2d 975, 978 (Ala. 1983).

117. See *Clime v. Dewey Beach Enterprises*, 831 F.Supp. 341, 348-49 (D.Del. 1993).

118. See, e.g., *Title v. Pontchartrain Hotel*, 449 So. 2d 677 (La. Ct. App. 1984).

119. *Mix v. Ingersoll Candy Co.*, 59 P.2d 144 (Cal. 1936).

120. *Id.* at 148. The court, in evaluating the foreign-natural distinction held: It is sufficient if it may be said that as a matter of common knowledge chicken pies occasionally contain chicken bones. We have no hesitancy in so holding, and we are of the opinion that despite the fact that a chicken bone may occasionally be encountered in a chicken pie, such chicken pie, in the absence of some further defect, is reasonably fit for human consumption. Bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones. At least he cannot hold the restaurant keeper whose representation implied by law is that the meat dish is reasonably fit for human consumption, liable for any injury occurring as a result of the presence of a chicken bone in such chicken pie.

See also *Musso v. Picadilly Cafeterias, Inc.*, 178 So. 2d 421 (La. Ct. App. 1965) (finding cherry pits natural in cherry pie).

121. See *Mexicali Rose v. Superior Ct.*, 822 P.2d 1292, 1294 (Cal. 1992).

122. *Id.* at 1303. The California rule was described in detail:

If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory.

When discussing the liability of a seller of whole animals, like the breeder or feedlot owner, a threshold matter is whether the live animals constitute a product. There is no definitive rule on the status of live animals. In a few states, pets are considered products.¹²³ Other states have held that living creatures, as they are always developing and growing, cannot be a product.¹²⁴ The third Restatement also contemplates this issue, stating that a diseased animal that harms a person is a product.¹²⁵

D. Component Parts and Raw Material Suppliers

Of the cases finding that a live animal is a product, none have contemplated whether a live animal sold for the purpose of slaughter and processing that subsequently injures a person is a product.¹²⁶ The animals in this scenario are not sold for their qualities as live animals, but for their potential as food products. The sellers in this situation are not offering finished products; the animals are, quite literally, raw materials. Under the Third Restatement, the sellers of component parts are liable when the component is defective and the defect causes

If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective.

See also Title v. Pontchartrain Hotel, *supra* note 118 (The court describes the test as two-pronged: “If the harmful substance is foreign, the defendant is strictly liable and the analysis stops. If the substance is natural to the food, however, the analysis continues: the negligence of the defendant must be determined.”).

123. Beyer v. Aquarium Supply Co., 404 N.Y.S.2d 778, 779 (N.Y. Sup. Ct. 1977) (“There is no reason why a breeder, distributor or vendor who places a diseased animal in the stream of commerce should be less accountable for his actions than one who markets a defective manufactured product.”); *see also* Worrell v. Sachs, 563 A.2d 1387 (Conn. Super. Ct. 1989); Sease v. Taylor’s Pets, Inc., 700 P.2d 1054 (Or. Ct. App. 1985).

124. Anderson v. Farmers Hybrid Companies, Inc., 408 N.E.2d 1194, 1199 (Ill. App. Ct. 1980) (“Living creatures, such as the swine in the instant case, are by their nature in a constant process of internal development and growth and they are also participants in a constant interaction with the environment around them as part of their development.”); Blaha v. Stuard, 640 N.W.2d. 85, 89 (S.D. 2002); Latham v. Wal-Mart Stores, Inc., 818 S.W.2d 673, 676 (Mo. App. Ct. 1991).

125. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 19 cmt. B.

126. *Supra* notes 123-125.

harm.¹²⁷ Component sellers are not liable when the part is made defective by its integration into a finished product.¹²⁸ It has been established for tax purposes that animal feed becomes a component part of the animal.¹²⁹ Since no cases have decided the issue, it remains unclear whether a seller of a diseased animal has sold a defective product.

IV. History and Application of Liability Standards

A. Policy Considerations

The debate between proponents of strict liability and the proponents of negligence standards goes to the heart of tort theory: when should a defendant be liable for unintentional harm?¹³⁰ Common law courts have struggled with this issue for at least 500 years.¹³¹ The English Courts developed two writs to deal with harm under common law. The writ of trespass applied to harms caused by direct action of the defendant, while the writ of trespass on the case was used for indirect harms.¹³² Early in the development of American jurisprudence, the system of writs, or code pleading, was abolished as being too restrictive

127. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5; *but see* Sullivan v. Manhattan Market Co., 146 N.E. 673 (Mass. 1925) (holding baker liable for defective pie filling which was manufactured by a third party.)

128. Bond v. E.I. DuPont de Nemours & Co., 868 P.2d 1114, 1120 (Colo. Ct. App. 1993) (“There is little social utility in placing the burden on a manufacturer of component parts or supplier of raw materials of guarding against injuries caused by the final product when the component parts or raw materials themselves were not unreasonably dangerous.”); *see also* Cimino v. Raymark Industries, Inc., 151 F.3d 297, 333 (5th Cir. 1998).

129. Salt Lake Union Stock Yards v. State Tax Comm. of Utah, 71 P.2d 538, 539 (Utah 1937).

130. As Justice Holmes puts it: “The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not.” Oliver Wendell Holmes, *THE COMMON LAW* 79 (1881).

131. *See* The Thorns Case, Y.B. Mich. 6 Edw. 4, fol. 7, pl. 18 (1466) (discussing the requirement of intent for the writ of trespass); *see also* Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616) (finding trespass lies when a man injures another through his actions, regardless of intent).

132. Reynolds v. Clarke, 92 Eng. Rep. 410 (K.B. 1726). (“If a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case.”).

for plaintiffs.¹³³ With formal requirements for pleadings reduced, courts were faced directly with the issue of how and when to compensate the injured for unintentional harm.

Early American courts developed negligence as the standard for redressing unintentional harm.¹³⁴ Scholars have linked the development of negligence to the desire to protect nascent industries.¹³⁵ Foreseeable harms, those harms that are or should be within the contemplation of the actor, are compensated through negligence analysis. The unforeseeable harm falls outside the realm of negligence. There are two theories that support excluding the unforeseen harm.¹³⁶ The first theory implicates the elements of duty and breach; if the harm is unforeseeable, no duty of due care can arise and no breach can occur when the actor fails to prevent the harm.¹³⁷ The second theory

133. Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IALR 777, 793 (2004). See also FED. R. CIV. P. 2,7 (Rule 2 states "There shall be one form of action to be known as 'civil action.'" Rule 7 states which types of pleadings are allowed and disallows all others).

134. See, e.g., *Brown v. Kendall*, 60 Mass. 292 (1851) ("The defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless . . . it also appears . . . that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff . . . is not entitled to recover.").

135. See, e.g., Gregory, *Trespass, to Negligence, to Absolute Liability*, 37 VA. L. REV. 359 (1951); but see, Roberts, *Negligence: Blackstone to Shaw to ? : An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191, 205 (1965).

136. These competing theories are famously explored in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

137. For an elegant statement of this theory of liability, see *Christianson v. Chicago St. P., M. and O. Ry.*, 69 N.W. 640, 641 (Minn. 1896).

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the

applies foreseeability to the proximate cause issue. This theory posits that an unforeseeable harm is too attenuated from the act to satisfy the requirement of proximate causation.¹³⁸ This debate remains unresolved, due largely to the fact that both theories, when put into practice, do not find liability for unforeseeable harms.¹³⁹

Railroads, heavy industry, and other big businesses of the nineteenth century were able to avoid liability by relying on the negligence standard.¹⁴⁰ The renowned jurist Oliver Wendell Holmes, Jr. saw the purpose of tort law as the distribution of loss; he rejected a system of strict liability, seeing it as a form of mandatory insurance.¹⁴¹

Despite the prevalence of negligence in tort law, several traditional categories have maintained a strict liability standard. Conversion,¹⁴² live animals,¹⁴³ and storing material on property¹⁴⁴ all continue to

original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.

138. See *Palsgraf*, 162 N.E. at 104 (Andrews, J., dissenting).

The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space Clearly we must so consider, for the greater the distance either in time or space, the more surely do other causes intervene to affect the result.

139. *Id.* (neither Cardozo nor Andrews held the Long Island Railroad liable. Cardozo, in the majority, held that unforeseen harm cannot give rise to a duty of due care, while Andrews was concerned with the nexus of act and consequence).

140. See *Titus v. Bradford, B. & K. R. Co.*, 20 A. 517 (Pa. 1890) (stating that some occupations are inherently hazardous and businesses are not required to take special precautions not in common use); *New York Central R.R. v. Grimstad*, 264 F. 334 (2d Cir. 1920) (finding defendant not liable where a bargeman drowned despite not equipping defendant's boat with life buoys); *Ryan v. New York Central R.R.*, 35 N.Y. 210 (N.Y. 1886) (holding that sparks from a train that started a fire were too remote a cause to hold the railroad liable).

141. Holmes, *supra* note 130, at 96 ("Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but. . . to the still graver one of offending the sense of justice.").

142. See *Poggi v. Scott*, 139 P. 815 (Cal. 1914).

143. *Gehrts v. Batten*, 620 N.W.2d 775 (N.D. 2001).

impose strict liability. Relatively recent decisions have extended the standard to ultra hazardous or abnormally dangerous activities from storing gunpowder¹⁴⁵ to demolition blasting.¹⁴⁶ Products liability, as previously discussed, is another relatively new area where strict liability is applied.¹⁴⁷

Justice Traynor, in 1944, explained many of the justifications for strict product liability in his concurring opinion for *Escola v. Coca Cola Bottling Co. of Fresno*.¹⁴⁸ For Traynor, loss shifting should occur “wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.”¹⁴⁹ For the unprepared consumer (and what consumer buys a product prepared for it to hurt them?) an injury can be devastating. The manufacturer is in a position to know a certain number of its product will be defective, acquire insurance, and spread the cost out across its entire stock.¹⁵⁰

144. *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), available at 1868 WL 9885.

145. *Heeg v. Licht*, 80 N.Y. 579 (N.Y. 1880).

146. *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969).

147. See *supra*, Part III.C.

148. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944) (Traynor, J. concurring). In a later case, Justice Traynor’s concept of strict liability was adopted by the California Supreme Court, see *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963) (Now writing for the majority, Traynor deferred to his earlier concurrence to explain the rationale behind strict liability, stating, “We need not recanvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated.”).

149. *Escola*, 150 P.2d at 440; see also *Price v. Shell Oil Co.*, 466 P.2d 722, 725-26 (Cal. 1970) (“Essentially the paramount policy to be promoted by [strict liability] is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.”); *Becker v. Superior Ct.*, 698 P.2d 116, 123 (“The paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating . . . victims of manufacturing defects.”).

150. *Greenman*, 377 P.2d at 901 (“The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”); see also *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 342 (Wy. 1986) (stating “When a defective article enters the stream of commerce and an innocent person is hurt, it is better that the loss fall on the manufacturer, distributor or seller than on the innocent victim.” The court’s rationale was again loss-shifting. “This is true even if the entities in the chain of production and distribution exercise due care in the defective product’s manufacture and delivery. They are simply in the best position to either insure against the loss or spread the loss among all the consumers.”).

This regime of loss-shifting has gained widespread use in product liability cases.¹⁵¹

B. The Theoretical Case

Suppose now that an American consumer has contracted mad-cow disease. He has survived, and is trying to build a case against all possible defendants. He bought a steak from his local grocery store, and has identified the wholesale supplier. The wholesaler has named a meat packing company that exclusively supplies them with beef. Traditionally, this is where the identification would have ended. Now the meat packer, either through their own records or those kept by the NAIS,¹⁵² has identified the feedlot owner, stocker, and cow-calf operator.

The plaintiff now has six possible defendants. Bovine Spongiform Encephalopathy (BSE) usually enters a cow's bloodstream through food,¹⁵³ so all defendants that did not deal with the live animal should be able to avoid liability. With the list of possible defendants reduced to three, only those who dealt with the live animal, remain.

The plaintiff will want to plead as many theories of liability as possible. Those remedies available through warranty claims remain outside the scope of this inquiry, so only negligence and strict liability will be examined. The plaintiff would obviously prefer a strict liability standard. Here, under the product liability theory, the plaintiff would have to prove causation and damages.¹⁵⁴ The cow was infected with BSE, which was transferred to the plaintiff when eating the steak.

In making the case for negligence, four elements must be proved: duty, breach, causation, and damages. Establishing duty would be fairly straightforward, if it could be shown that a defendant violated a downer cow statute, a statute that prevents the slaughter and sale of injured, sick, or diseased livestock.¹⁵⁵ The violation of a relevant

151. See, e.g. *Southern Co. v. Graham*, 607 S.W.2d 677 (Ark. 1980); *Weber v. Fidelity & Cas. Ins. Co.*, 250 So. 2d 754 (La. 1971); *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976); *Webb v. Zern*, 220 A.2d 853 (Pa. 1966).

152. U.S. Dept. of Agriculture, Animal and Plant Health Inspection Service, *About NAIS*, <http://animalid.aphis.usda.gov/nais/about/index.shtml> (last visited Mar. 6, 2006).

153. Department of Health and Human Services, Center for Disease Control and Prevention, *About BSE*, July 7, 2005, <http://www.cdc.gov/ncidod/dvrd/bse/>.

154. See Restatement (Third) of Torts: Product Liability, *supra* note 9.

155. See, e.g., Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399; Federal Meat Inspection Act, 21 U.S.C. §§ 601-605. For a listing of state, county, and city level laws, see NoDowners.org, *State/Local Efforts*, <http://>

statute can serve as *prima facie* evidence of both a duty and breach.¹⁵⁶ If the cow was not a downer, but appeared healthy when slaughtered, the plaintiff must prove some act or omission to establish duty and breach. Did one of the producers feed the cow adulterated material? Was the cow kept in unsanitary conditions? Without the act or omission, no breach is proven, and negligence fails.

The strict liability standard would shift loss from the injured party to those who sold the defective cow, but does this standard satisfy Holmes' "sense of justice"?¹⁵⁷ No court has held that a living animal is a product¹⁵⁸ when sold for the purpose of slaughter and consumption, and some have held that a living animal is never a product,¹⁵⁹ as it is always in a state of change. A horse with a bad leg, when sold to someone under the representation that the horse was sound for riding, is more closely analogous to a product. Strict liability has traditionally applied to the actions of animals like biting a person or trampling crops,¹⁶⁰ but the passing of infection by being consumed after slaughter is not an animal's action.

A living animal is capable of creating a great number of risks a reasonable owner would not be able to foresee, prepare for, or prevent. Strict liability would hold the producer liable for such unpredictable actions. The risk is that an animal may acquire an infection. Several steps have been taken to mitigate that risk. Food laws, mandatory inspections, and other government-imposed requirements protect the interest of consumers during the early stages.¹⁶¹ Consumers also are capable of mitigating their risks by cooking food thoroughly and avoiding meat that has spoiled or expired. Despite the requirements, foodborne pathogens are still capable of entering the human bloodstream. Is the consumer aware of

www.nodowners.org/index_state.htm (last visited Mar. 6, 2006). See also Grady & MacNeil, *supra* note 57.

156. *Supra* notes 88-95. Negligence *per se* is proven by demonstrating the defendant violated a statute designed to prevent the type of harm that occurred and that the plaintiff was within the class of people the statute was designed to protect.

157. Holmes, *supra* note 104.

158. See *supra*, note 123 (stating that animals, when sold as pets, may be considered a product).

159. See *supra*, note 124.

160. See *Gerhts v. Bateen*, *supra* note 143 at 779 ("The overwhelming majority of states that impose strict liability for injuries caused by dogs have done so through legislative mandate.").

161. See discussion *supra* notes 93-95, 155.

this risk? Should the producer be required to take additional steps to prevent this harm?

Imposing the negligence standard would comply with the consumer's awareness of some risk in eating meat. When a producer does fail to meet the standards imposed on him, he will be liable. If he slaughters a downer cow and sells that meat, he has breached his duty of care. If a stocker feeds his sheep material that is adulterated, he breaches his duty of care. There is a culpable act that can be compensated. When there has been no breach of duty, and the injury occurs despite the internal controls of the producer, this falls within the reasonable expectations of someone eating the tissue of an animal.

Furthermore, negligence as a standard is better prepared to deal with problems of proximate causation. When a piece of infected meat is sold, there must usually be another error, possibly in the preparation of the meat, in order for harm to result. Systems that recognize proportionate liability or comparative negligence¹⁶² can shift loss in a way that best reflects the failure of the packer as well as the error of the cook. Strict liability in these instances would create the system of mandatory insurance to which Holmes was opposed.¹⁶³ State legislatures that have considered this dilemma have adopted negligence as the standard for injuries resulting from meat consumption.¹⁶⁴

CONCLUSION

Negligence as a scheme for loss shifting acknowledges situations that involve a culpable act while maintaining the assumption of risk every consumer accepts when eating meat. Negligence recognizes that some harms are unforeseeable and unavoidable, others known but reasonable, and that society must be prepared to accept those losses

162. See *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226 (Cal. 1975); *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973). Comparative negligence has been adopted by nearly all states either judicially or by statute.

163. See Holmes, *supra* note 104.

164. See KAN. STAT. ANN. § 65-6a57 (2004) ("In no event shall a producer of livestock in an action arising as a result of consumption of a meat food product be held to a standard higher than that of ordinary care if the livestock in question had been inspected and passed . . ."); OKLA. STAT. ANN. tit. 2 § 5-112 (2005) ("[T]here shall be a rebuttable presumption that the producer of livestock met the standard of ordinary care in the production of that livestock, so long as the livestock in question were inspected and passed in accordance with the provisions contained in the Oklahoma Meat Inspection Act . . .").

where they fall.¹⁶⁵ Strict liability places the entire risk on the producer, regardless of the culpability of his actions. The producer in a regime of strict liability is not only charged to operate with due care and in accordance with the law, but to insure against all harms its products may cause. Such an added responsibility will translate to higher production costs, which will be passed on as higher prices to consumers. Negligence is flexible enough to consider multiple causes of the harm and is able to apportion damages in accordance with those causes. Producers know what standards are expected of them, and any who fall below those standards operate at their own peril. These properties make negligence the just standard to apply in foodborne illness cases against producers.

165. See *Brody v. Overlook Hospital*, 317 A.2d 392, 397 (N.J. Super. Ct. App. Div. 1974) (“[T]he seller thereof is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.”).