

INTRODUCTION

FREE SPEECH, ANIMAL LAW, AND FOOD ACTIVISM

By
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I never thought I would become involved in a high profile test of our right of free speech, especially one involving animal law and food activism. After over a million miles of travel and appearances on thousands of radio stations and hundreds of television stations, I do have a story to tell.

Little did I realize in the late 1970s that the first piece of the puzzle between my life and animal law had fallen into place. I was a fourth generation farmer-rancher-feedlot owner living on my great-grandfather's homestead south of Great Falls, Montana. At the time, I was feeding several thousand cattle in a confinement feedlot operation. During this period, part of my herd was infected with Thrombosis En Meningitis (TEM). The symptoms included a high temperature that left the animal physically healthy, but essentially brain dead. The infected animals did not know enough to eat or drink and soon died. I lost approximately ten percent of my herd before the problem dissipated. Financially, it was devastating to my operation.

In 1990, the second piece of the puzzle appeared. I was working in Washington, D.C. as a lobbyist for the National Farmers Union, representing small family farmers. I heard reports of a disease in England called Bovine Spongiform Encephalopathy (BSE). The press called it "Mad Cow Disease."¹ I thought at the time, if it was anything like the problem I had experienced with my herd, it could spell doom for American cattle producers.

I started to research everything I could find on BSE, which wasn't much. The disease was commonly thought to be a slow-growing virus or

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¹ Teilo Colley, *French Master Chef Defends British Beef*, 1990 PRESS ASS'N NEWSFILE, June 3, 1990, available in LEXIS, News Group File, Beyond Two Years File.

bacterial infection affecting the brain.² The British learned the infectious agent would routinely survive 340 degrees Celsius and seemed to have no RNA or DNA. With these properties, BSE did not conform to a viral or bacterial infection. Some researchers thought a prion, a type of abnormal protein, was causing the problem.³

After researching BSE, I started speaking about it to audiences in the United States as the director of the International Beyond Beef Campaign. Very few things were known about BSE. What was known was that brains affected by BSE had holes in it, much like Swiss cheese. Additionally, the disease had a very long incubation period. Many thought it was related to a disease in sheep called scrapie, apparent in England for hundreds of years, which did not seem to infect humans.⁴ At the time, both the United States and England were feeding the remains of sheep and other animals to cows.

The first case of BSE in English cows was identified in 1986. By 1990, it had become an epidemic. BSE was infecting over one thousand cows a week in England. In March 1996, the Minister of Health, Stephen Dorrell, announced to a stunned Parliament that the government could no longer assure the public that Mad Cow Disease could not be transmitted from cows to people.⁵ The announcement was an exploding keg of powder heard around the world.

I happened to be in England at that time to testify in the McLibel trial. At that point, I was the director of The Humane Society of the United States' *Eating with Conscience* campaign. While there, I did over seventy press events in nine days. The eyes of the world were focused on Mad Cow Disease. When I returned to the United States, I was contacted by Harpo Production to appear on the popular Oprah Winfrey for a segment of the show they were planning called, "Dangerous Foods—Could It Happen Here?"

By 1996, as the Mad Cow Disease epidemic was unfolding, thirteen states had passed legislation called Food Disparagement laws.⁶ This legis-

² D.J. Lanska, *The Mad Cow Problem in the U.K.: Risk Perceptions, Risk Management, and Health Policy Developments*, 1998 J. PUBLIC HEALTH POL'Y 160, available in LEXIS, Medical and Health Materials Combined, All File.

³ David Brown, *A Bizarre New Form of "Fatal Insomnia,"* WASH. POST, May 27, 1999, at A18.

⁴ Wendy E. Solomon, Preventing 'Mad' Sheep; Scrapie Brain Disease is Subject of New State Rules, MORNING CALL, Mar. 30, 1999, at D1.

⁵ Daniel Chan, *Likely Repercussion Around World of Britain's Mad Cow Disease Crisis*, NEW STRAITS TIMES, Apr. 8, 1996, at 14; Victoria MacDonald et al., *Focus Mad Cow Disease: Countdown to a Possible Catastrophe*, TELEGRAPH, Mar. 24, 1996, at 21; Texas Beef Group v. Winfrey, 11 F. Supp.2d 858, 860 (N.D. Tex. 1998).

⁶ These states were: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, and Texas. ALA. CODE § 6-5-620-625 (1998); ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1998); COLO. REV. STAT. ANN. § 35-31-101 (West Supp. 1998); FLA. STAT. ANN. § 865.065 (1997); GA. CODE ANN. §§ 2-16-1 to 2-16-4 (Supp. 1998); IDAHO CODE §§ 6-2001 to -2003 (1997); LA. REV. STAT. ANN. §§ 4501-4504 (West 1997); MISS. CODE ANN. § 69-1-251 to -257 (Supp. 1998); OHIO REV. CODE ANN. § 2307.81 (West 1997); OKLA. STAT. ANN. tit. §2, §§ 3010-3012 (West Supp. 1999); S.D. CODIFIED LAWS §§ 20-10A-1 to -4 (Michie 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 96.001-004 (1997).

lation made it a punishable offense to say anything you knew to be false about a perishable commodity.⁷ These suits became known as “strategic lawsuits against public participation,” or SLAPP suits. Food Disparagement laws were a result of the Alar scare.⁸ Alar is a chemical used on apples to make them ripen longer on the tree before they fall off. As early as 1973, studies indicated that when Alar breaks down to a by-product called unsymmetrical dimethyl hydrazine (UDMH), it could cause cancer. Additional studies supported the early findings and by 1980, even the Environmental Protection Agency (EPA) was investigating Alar. After almost nine years without EPA action, Massachusetts and New York banned the chemical.⁹ On February 26, 1989, *60 Minutes* did an exposé on Alar which was the first part of a campaign by the Natural Resources Defence Council (NRDC) to ban the chemical.¹⁰ The ensuing debate was very disruptive to the marketing of apples; thus, on November 28, 1990, apple growers in the State of Washington filed a libel suit against CBS, NRDC, and Fenton Communications (NRDC’s public relations company).¹¹ The apple producers lost in court. Although they were able to show that the scientific evidence on the dangers of using Alar was inconclusive, they failed to show the information was wrong.¹²

Agricultural producers backed the enactment of SLAPP laws in hopes of scaring off activists concerned about product contamination. Knowing this, I agreed to appear on the Oprah Show in April 1996. It has become an event I will never forget.

The show was taped in Chicago, where I met Oprah Winfrey for the first time. I was seated on the stage with the grandmother of a young girl from England who was dying of the human form of a spongiform disease call Creutzfeld-Jakob Disease (CJD) and Dr. Gary Weber, a representative of the National Cattlemen’s Beef Association (NCBA). The show started with a review of the history of the disease in England. Oprah then turned to me and said, “Here’s a man who believes that within ten years we could have a disease that could make AIDS [Acquired Immune Deficiency Syndrome] look like the common cold.” I answered, “Absolutely.” Oprah replied, “That’s a strong statement.” I explained, “There are over 100,000 cows a year that are fine at night and are found dead in the morning. They are rounded up, ground up, turned into feed, and fed back to other cows.” I further explained that we are collecting road kill off the nation’s highways that is also rendered into feed. Euthanized pets, full of the chemicals

⁷ See, e.g., OHIO REV. CODE ANN. § 2307.81 (West 1997) (“Disparagement means the dissemination to the public in any manner of any false information that a perishable agricultural or aquacultural food product is not safe for human consumption.”).

⁸ David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 135 (1997).

⁹ Samuel P. Hays, *The Future of Environmental Regulation*, 15 J.L. & COM. 549, 582 (1996) (discussing state actions to the Alar scare).

¹⁰ Dan Seligman, *Environmental Cancer: A Political Disease; Review*, COMMENTARY, May 1, 1999, available in LEXIS, Magazine Stories, Combined File.

¹¹ Marian Burros, *Eating Well; Can a Raspberry Really Hurt a Cow?*, N.Y. TIMES, June 3, 1998, at F5.

¹² *Id.*

used to euthanize them, are sent to the renderers. Los Angeles alone sends two hundred tons of euthanized pets a month to become feed for our pets or food animals. We also know the euthanasia chemicals are not broken down in the rendering process.

Oprah was shocked as she turned to the representative from the NCBA and asked if cows are being fed to cows. Dr. Webber responded that a limited amount of this practice was occurring. This prompted Oprah to state, "that just stops me cold, I will never again eat a burger."

Oprah did not encourage her viewers to not eat a burger. She did not say she thought the meat was contaminated. She merely stated her opinion. During the show, I repeatedly called for an end to the practice of feeding cows to cows. I thought that if we continued the practice we could end up with the same problem as England's Mad Cow Disease epidemic.

During the taping of the show, the foremost expert on Spongiform Diseases from the United States Department of Agriculture (USDA), Dr. Will Hueston, was sitting in the front row. Oprah asked him if what I was saying was true. He stated, "Howard Lyman is what makes America great."¹³ At no time during the taping of the show did any of the representatives from the government or the NCBA claim what I had said was false. To the contrary, they admitted the practices were being used. During the taping, I never said anything I thought to be false. I was not concerned when the beef futures market went down after the show because it was headed in that direction before the broadcast.

The cattle industry, on the other hand, went ballistic after the broadcast, demanding Oprah allow them to set the record straight. To Oprah's credit, she allowed the cattlemen's representatives to return, without anyone from the opposition, to tout the safety of their product.

At this time, the Texas Commissioner of Agriculture attempted to get the State Attorney General to sue all parties concerned under the Texas Food Disparagement law.¹⁴ The Attorney General stated he did not believe he had that power under the statute.¹⁵ His advice to the Commissioner of Agriculture was to forget about the issue so it would not become a big deal with the American public.¹⁶

I gave very little thought to this issue for several weeks, until I received a call from a national news television production. I was told a group of Texas cattlemen had filed suit against Oprah, Harpo Productions, myself, and the television company that carried the show in Texas. Upon receiving the call, I didn't think any court would proceed with a case that flew in the face of the First Amendment right of free speech.

In the year plus it took to prepare and schedule the case on the court docket, the action was moved from Texas State Court to Federal Court in Amarillo, Texas. During this time, USDA and the Food and Drug Adminis-

¹³ Texas Beef Group v. Winfrey, 11 F. Supp.2d 858, 863 (N.D. Tex. 1998).

¹⁴ Wire & Staff Reports, *Briefs*, J. Com., Apr. 29, 1996, at 7B, available in LEXIS, Newspaper Stories, Combined Papers File.

¹⁵ Ronald K.L. Collins & Jonathan Bloom, *Win or Lose, Dissing Food Can Be Costly*, NAT'L L.J., Mar. 8, 1999, at A21.

¹⁶ Aaron Epstein, *Ranchers Have Beef with Oprah*, ARIZ. REPUBLIC, Jan. 2, 1998, at A1.

tration (FDA) adopted regulations prohibiting the feeding of ruminant remains (cows, sheep, and goats) to other ruminant animals.¹⁷ This was what I had called for on the Oprah Show. Also during this time, the Nobel Prize was awarded to a scientist at the University of California, Dr. Stanley Prusiner, who first proposed the theory that abnormal proteins are the method of transmission of spongiform diseases.¹⁸ I felt sure the judge, knowing these facts, would quickly decide there was very little need for a trial. I was very wrong. She did remove the communication company as one of the defendants, but set a trial date for early February 1998.

What I learned about Amarillo was not good news for our defense. Twenty-five percent of all beef fed for slaughter in the United States comes from the Amarillo area. Over one hundred feedlots averaging 55,000 head of cattle surround Amarillo. The largest employer is the slaughter plant that kills beef for the U.S. market place. Subsequently, we requested a change of venue, but it was denied. The jury was drawn from surrounding rural counties steeped in the cattle culture. I felt we were in big trouble.

The jury was picked in one day. The plaintiffs took four weeks to present their case. When they rested, we moved for dismissal. The judge, much to plaintiff's surprise, set aside a day to hear arguments on both sides.

After hearing the arguments on dismissal, the judge ruled the jury would no longer consider the Texas Food Disparagement law because no animal, still living, could be considered perishable and thus cows were not covered by the law. She did allow the case to move forward under straight business disparagement theory, however.¹⁹

To prove business disparagement, the cattlemen needed to show the statements made by the defendants were directly aimed at the plaintiffs and the statements were made with reckless disregard for the truth. These requirements were such that the plaintiffs were unable to convince the jury the defendants were libellous. The jury cast a unanimous verdict for us.

At this point, I hoped the nightmare was over, but it wasn't. The case was appealed by the plaintiffs and on the last day of the statute of limitations, over one hundred additional ranchers filed almost the exact same suit forty miles away in Texas State Court in Dumas, Texas.²⁰ The rancher's lawyer stated, as one basis for the suit, that this other judge is up for election every four years; therefore, they believed he would not be influenced by the celebrity status of the defendants.²¹ Fortunately, this

¹⁷ Substances Prohibited From Use in Animal Food or Feed; Animal Proteins Prohibited in Ruminant Feed, 62 Fed. Reg. 30,935 (1997).

¹⁸ *California Professor Wins Nobel Prize*, ST. LOUIS POST-DISPATCH, Oct. 7, 1997, at 5A.

¹⁹ Collins & Bloom, *supra* note 15, at A21; *see also* Texas Beef Group v. Winfrey, 11 F. Supp.2d 858, 860 (N.D. Tex. 1998).

²⁰ Collins & Bloom, *supra* note 15, at A21.

²¹ *Id.*

case was also removed to Federal Court in Amarillo.²² Plaintiffs have appealed and oral arguments are scheduled for June 1999.

This case is a classic example of using the law to force activists to use their scarce resources in court to defend the right of free speech. The Supreme Court has ruled that we, as a society, should have open, vigorous debate on issues of contention.²³ When I appeared on the Oprah Show, I simply shared my opinion about a future event. The Supreme Court has always ruled that citizens have a right to their opinion and cannot be held libel for them, for there can be no facts about a future event.

This case was an attempt by people with too many dollars trying to control the discussion of the American people. It is my hope this never happens again. If it does, the losing plaintiffs should bear the entire court costs of the defendants.

Animal law is where we speak for those that have no voice. In a nation where over eight billion animals are killed every year, many under deplorable circumstances, there are many opportunities for us to raise our voices. Every day I try to make the world a better place to live for all, including those with no voice. Our health, the health of the planet, and our treatment of animals will depend on the actions of this generation. I hope we can be proud of what we do.

²² *Id.*

²³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).