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ManagingRISK

Cases that are unfit for human consumption

My first piece of advice to you is to refrain from reading this article on your lunch break.

It examines the evolution of cases in New York addressing liability for the sale of contaminated food products. The "mouse in the soda bottle" case is not an urban myth. It and variations of it have appeared on court dockets regularly over the years. The law governing these matters, however, has changed over time.

By LOUIS B. CRISTO
Daily Record Columnist

Historically, the courts created a distinction in the resolution of these cases. It has been called the foreign/natural test. If an item found its way into a food product and it is inherently "natural" to the food itself, such as a fish bone in a canned fish product, courts were reluctant to impose liability upon the food purveyor.

On the other hand, the discovery of an item such as a piece of metal or wood triggered heightened scrutiny, see *Langiulli v. Bumble Bee Seafood, Inc.*, 159Misc. 2d 450. The courts theorized that one should anticipate the possibility of a natural component of the food source finding its way into the product, such as bones in hamburger or an olive pit in sliced olives.

The test was abandoned, however, in favor of the "reasonable expectation standard."

Under this standard, the courts treat all foreign objects alike. The law now requires a restaurant or food products purveyor to use ordinary care to remove such harmful substances as the consumer would not ordinarily anticipate, V*itiello v. Captain Bill's Restaurant*, 594 NYS 2d 295 (2nd Dept. 1993). The rule, however, is peppered with exceptions and judicial interpretations that muddle the rule rather than clarify it.

It appears that the more unusual or insidious the foreign substance or object may be, the stronger the likelihood that a court will impose liability upon the defendant for its presence. For example, one court was confronted with a case where the plaintiff bit into a piece of tree bark contained within her chicken and avocado wrap, *Califore v. Zone Enterprises*, 2007 WL 145 9252. That court, after much analysis, determined that the defendant was entitled to have a jury consider whether the tree bark actually rendered the food unfit for consumption.

At the other end of the spectrum is the case of *Vamos v. Coca-Cola Bottling Co. of New York, Inc.*, 527 NYS 2d 265. In *Vamos*, the plaintiff consumed his soft drink from a bottle containing two AA batteries. The court stated that "where the foreign substance found in food or drink is obviously revolting or noxious … independent proof of its unfitness for human consumption is not required".

The *Vamos* court acknowledged that food may be unfit because it is physically unsafe, but also because it may be "subject to social and psychological taboos." It offers, for example, that consumption of mouse flesh isn't necessarily dangerous to human health but it is repugnant enough to sustain a cause of action.

The courts have wrestled with the necessity of providing medical proof of a gastrointestinal condition in order to allow the plaintiff a recovery, with mixed results. In *Vamos*, supra, the court held the view that a chemical analysis of the offensive substance, while preferable, isn't necessary to support the claim.

In contrast, is *Ruggiero v. Perdue Poultry Co.*, 1997 WL 811530 (SDNY 1997), which involved packaged turkey containing feathers, grain and wood shavings. That court stated that the plaintiff's prolonged symptoms of nausea, vomiting and a rash of her torso required medical proof of a causal connection to the ingestion of the foreign matter.

A few interesting cases are offered simply to demonstrate as much the revolting things people choose to eat voluntarily as to illustrate what may be unknowingly contained within them.

In *Davila v. Goya Foods, Inc.*, 2007 WL 415147, the plaintiff purchased two cans of octopus and claimed he was injured by ingestion of glass fragments. He failed to link his stomach complaints to the existence of the glass when the only thing found in his stomach under X-ray examination were old bullet fragments.

In the case of *Johnson v. Epstein*, 1998 WL 166805, the plain-

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tiff ate canned mackerel but claims to have been sickened because it contained a "foreign crustaceous creature." The court allowed this case to proceed forward on motion. You simply can't make this stuff up.

Finally, for those of you who are fans of those little squares of deliciousness known as White Castle hamburgers, take note of the cases of *Laboy v. White Castle System, Inc.*, 2003 WL 22939689, and *Williams v. White Castle Systems, Inc.*, 4 AD 3d 161, where two courts denied recovery to individuals claimed to have been sickened by their White Castle experience.

In *Williams*, the plaintiff claimed a blood disorder arising out of a food-borne pathogen, and in *Laboy*, the plaintiff claimed to have developed paranoia and hallucinations from steroid treatment for an alleged bacterial condition. In each case the court viewed the medical evidence with suspicion, dismissing them. The lesson to be learned — eat up, whatever doesn't kill you makes you stronger.

Louis B. Cristo is president of Trevett, Cristo, Salzer & Andolina PC, a trial law firm in Rochester. He is a trial attorney whose practice includes the litigation of personal injury, product liability, commercial, environmental and insurance cases. Visit their website at www.trevett-law.com.