"Natural" food and artificial injustice

Where should a fair food-liability standard rest? The author says "with a jury"

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Plaintiff Jack Clark ordered a chicken enchilada at The Mexicali Rose restaurant. (*Mexicali Rose v. Sup. Ct.* (*Clark*) (1992) 1 Cal.4th 617, 620.) He sustained throat injuries when he swallowed a one-inch chicken bone in his entrée.

Mr. Clark's complaint pleaded causes of action for negligence, breach of implied warranty, and strict liability. He alleged that the food was unfit for human consumption, because he did not anticipate it would have contained a bone.

The superior court overruled the restaurant's demurrer to the complaint. However, the Court of Appeal for the First District issued a writ of mandate directing the superior court to sustain it. Under *Mix v. Ingersoll Candy Co*. (1936) 6 Cal.2d 674, no tort or implied warranty causes of action would lie against a restaurant when a customer incurred injury from a chicken bone served in a chicken pie. (*Mexicali Rose* at 619.) The *Mix* court reasoned that "bones . . . are natural to the type of meat served," so a "consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones." (*Mix* at 682.)

The California Supreme Court granted review in *Mexicali Rose* to address whether *Mix* could continue to bar tort and implied warranty personal injury claims caused by a substance that was "natural to the food served." (*Mexicali Rose* at 619.)

The Mexicali Rose Rule:

"Natural" cause for injury = Negligence claim only

A divided California Supreme Court partially overruled *Mix*. A negligence claim would now lie for injuries arising out of a substance that was "natural to the preparation of the food served." (*Mexicali Rose* at 633.) Consumers should

"reasonably expect [ ]" that food (here, a chicken enchilada) could "natural[ly]" contain chicken bones, which did not render it "unfit or defective." (*Mexicali Rose* at 633.) Accordingly, bones "cannot *legitimately* be called a foreign substance." (*Mexicali Rose* at 623 (quoting *Mix* at 682; emphasis added).)

A restaurant "owe[s] no duty to provide a perfect enchilada." (*Id.* at 632.) The restaurant's duty is limited to serving food that is "reasonably fit for human consumption." (*Mexicali Rose* at 622.) The only issue in such a case was whether the restaurant "fail[ed] to exercise due care in food preparation." (*Id.* at 633.) Strict liability and breach of implied warranty claims remain barred. (*Ibid*.)

However, for injuries caused by a "foreign" substance in a food, a plaintiff could continue to state negligence, strict liability, and breach of warranty causes of action. (*Mexicali Rose* at 631, 633.) The court reasoned that commercial food preparers had a duty to inspect food for "foreign" objects like glass to make the food "*safe* for human consumption," because the customer had no means to prevent the injury, and the seller could have prepared the food to have "made the injury to the customer impossible." (*Mexicali Rose* at 622 (citing *Goetten v. Owl Drug Co*. (1936) 6 Cal.2d 683, 687 (emphasis added).)

"Natural" bar to non-negligence claims

The *Mexicali Rose* court did not identify any principled distinction between "foreign" and purportedly "natural" injury-causing substances in food. It did not even attempt to define the "natural to the preparation" test, identify factors restaurants could use to manage their risks, or provide any guidance for lower courts to make this determination as a matter of law. (See *Mexicali Rose* at 635 (Mosk, J., dis. opn.).)

The measure of justice for injured consumers (and protection for restaurants against dishonest claims) should not depend on judicial fiat. The subjective, fact-based, and individualized foreign vs. natural inquiry almost always requires a jury determination, so a person suffering a food-related injury should not be limited as a matter of law to stating a negligence claim. There are three reasons for this:

What is "Natural"?

First, with few exceptions, the foreign vs. natural test is essentially an updated variation of Justice Stewart's "I know it when I see it" obscenity test. (*Jacobellis v. Ohio* (1964) 378 U.S. 184, 197.) Metal and glass are clearly foreign objects, because they are not animal products. However, determining that an injury-causing substance is "natural" requires more than asking whether it is animal-derived:

> The majority . . . insist [ ] that a cow's eye is not 'natural to the preparation' of a hamburger . . . . Is a chicken beak 'natural to the preparation' of a chicken enchilada because the preparation process begins with a whole chicken? It is the absence of any principled articulation of what, if anything, distinguishes these two examples that demonstrates the irrationality of the foreign-natural doctrine and illustrates the difficulty courts will face in attempting to apply this artificial distinction.

(*Mexicali Rose* at 645, fn. 1 (Arabian, J., dis. opn.) (citation omitted).)

Processed food is a commodity

Second, *Mexicali Rose* reflects a romanticized understanding of food preparation, in which chefs debone a single chicken to cook an entrée to order. A "restaurant operator's duty in selecting, preparing and cooking food for customers is the same as that which a reasonably prudent man skilled in the culinary art, would exercise in the selection and preparation of food for his own table." (*Mexicali Rose* at 627 (quoting *Musso v. Picadilly Cafeterias, Inc*. (1964) 178 So.2d 421, 427 (discussing negligence liability for restaurateur who allowed injury-producing elements "natural to the . . . product *to remain in the food*") (emphasis added)).

The *Mexicali Rose* decision does not address the "changing realities of the consumer marketplace." (*Mexicali Rose* at 642 (Mosk, J., dis. opn.)) (citation omitted). In many ways, the modern retail foodservice industry sells commodities manufactured like many other consumer goods. Even in France, many restaurants that were renowned for their house-made, artisanal cuisine now serve glorified TV dinners "assembled and cooked on a production line in a distant suburban factory, that . . . were quick-frozen and trucked to the restaurant . . . and then microwaved for unsuspecting" customers. http://www.washingtonpost.com/world/europe/french-restaurants-acknowledge-serving-factory-frozen-food/2013/07/09/9857b69a-dda2-11e2-b797-cbd4cb13f9c6_story.html (visited July 12, 2013).

Why should foodsellers evade the strict liability and breach of warranty claims for which vendors of other commodities are held responsible? Ironically, the doctrine of strict liability arose out of authorities dating to 1266 that addressed food product liability claims, to protect the public against "victualers and cooks . . . selling corrupt food for immediate consumption." (*Mexicali Rose* at 635-36 (Mosk, J., dis. opn.) (citations omitted).) Similarly, the implied warranty theory of food liability arose out of the strong public policy of protecting public health. (*Mexicali Rose* at 636 (Mosk, J., dis. opn.) (citations omitted).

The foreign vs. natural distinction also fails to address the commingling of globally-sourced ingredients and high-volume throughput that are hallmarks of the modern food processing industry. Just one hamburger might contain meat from "a hundred different animals from four different countries." http://www.pbs.org/wgbh/pages/frontline/shows/meat/safe/o157.html (visited July 12, 2013); *cf. Mexicali Rose* at 625 (citing *Norris v. Pig'n Whistle Sandwich Shop* (1949) 79 Ga.App. 369 [53 S.E.2d 718, 723], for the premise that a meat product was not adulterated just because it contained bones "indigenous to the animal [singular] from which the food is derived").

In light of the current state of the food processing and foodservice industries, the foreign vs. natural test leads to an absurd and unjust result. Why is it "natural" for one hamburger to contain flesh (and possibly bones) from 100 cows from four countries? Should an injury-causing bone in a hundred-cow burger be deemed "natural," even though the ground beef factory could have easily and cheaply inspected for bones while it was already inspecting for metal? (*But see Mexicali Rose* at 627.) In light of the relatively low cost of safety equipment, there is no principled distinction between inspecting for foreign metal or purportedly natural bones. For both injury-causing substances, "as between the patron, who has no means of determining whether the food served is safe for human consumption, and the seller, who has the opportunity of determining its fitness, the burden properly rests with the seller, who could have so cared for the food as to have made the injury to the customer impossible." (*Cf. Mexicali Rose* at 622 (citation omitted) with Cal. Civ. Code, § 3511 ("where the reason is the same, the rule should be the same").)

Current food fraud and species substitution scandals demonstrate that this issue is more complex, and the *Mexicali Rose* decision is even more unjust, than Justice Mosk's dissent contemplated when he stated:

> …there is no difference to public health whether the consumer is injured by an unexpected bit of bone or an unexpected bit of wire. A *natural object may cause as much harm and be as unanticipated as a foreign object in food*, so that it is simply illogical to distinguish between the two solely on the basis of their provenance.

(*Mexicali Rose* at 638 (Mosk, J., dis. opn.) (citations omitted, emphasis added.))

Regarding public policy, is the public health impact any different from a hamburger containing a concealed cow bone or a hidden horse bone? See http://www.guardian.co.uk/uk/2013/may/24/horsemeat-beef-meat-dutch-factory (visited July 12, 2013). From the hamburger consumer's point of view, is there any comfort in knowing that an injury resulted from a cow bone instead of a horse bone (or a piece of rock)? (See *Mexicali Rose* at 638 (Mosk, J., dis. opn.).)

If the answers to the above questions are negative, why should a consumer be on guard against, and potentially obtain compensation for, an injury caused by one species of bone but not the other? (See *Mix* at 682; *Mexicali Rose* at 619.) Under *Mexicali Rose*, no strict liability or breach of warranty claim will lie as a matter of law for the cow bone, because it "cannot *legitimately* be called a foreign substance," (see *Mexicali Rose* at 623 (emphasis added)), even if it was in a hundred-cow burger, sourced from four countries and assembled at a modern meat factory. However, these claims are likely cognizable against a restaurant that sold the same hamburger that happened to contain a horse bone, which, like "rat flesh," is "not natural to the *preparation* of the product served." (*Cf. Mexicali Rose* at 630, fn. 5 (italics in original) with Arabian, J., dis. opn. at 649 ("when one eats a hamburger he does not nibble his way along hunting for bones because he is not 'reasonably expecting' one in the food").)

Reasonable expectation test

Finally, the reasonable expectation test allows the trier of fact to more effectively balance the parties' interests in light of changes in food processing and safety technology. This test "focuses not on the components of the dish, but on [1] the final item sold to the consumer and [2] the expectations that are engendered by [a] the type of dish and [b] the type of preparation used in making the dish." (*Mexicali Rose* at 631.)

Far more conservative jurisdictions than California have long understood that consumers do "not expect to find a bone in a package of hamburger meat," and "it is entirely possible that a natural substance found in processed food may be more indigestible and cause more injury than many 'foreign' substances." (*Mexicali Rose* at 639 (Mosk, J., dis. opn.) (citing *Ex Parte Morrison's Cafeteria of Montgomery, Inc*. (1949) 431 So.2d 975, 978.)) Consumer expectations should include "some consideration [of] the manner in which the food is normally eaten in determining if a person can be said to 'reasonably expect' an item in processed food." (*Mexicali Rose* at 649 (Mosk, J., dis. opn. (citing *O'Dell v. DeJean's Packing Co., Inc.* (Okla.Ct.App. 1978) 585 P.2d 399, 402.)) This is because the more a food is processed, the less likely a consumer will foresee an injury resulting from "natural objects" like bones. (*Mexicali Rose* at 639 (Mosk, J., dis. opn.).)

Summary

The *Mexicali Rose* decision allows plaintiffs to state some previously non-cognizable negligence claims against restaurants that serve injury-causing food. (*Mexicali Rose at* 621.) However, if the injury resulted from a substance that was "natural to the preparation of the food," then strict liability and breach of warranty claims remain barred. (*Id.* at 630.) In light of food processing and safety changes that have occurred since this 1992 decision, the artificial, vague and unworkable distinction between foreign and purportedly natural substances should be overruled. A fair measure of justice should be available for all consumers, based on their reasonable expectations for the food served.


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