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What is "Fit to Eat" -- The Reasonable Expectation Test

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without compensation simply because the endeavor is one of a "great magnitude and general public interest."[28] There may be instances where the risk of damage to neighboring land from blasting may be outweighed by the social desirability of improving the land. But this is no justification for depriving the neighboring landowner of his property without compensation. Although the risks created may be incident to desirable social and economic activity, common notions of fairness require the defendant to make good for any harm that results.[29] Indeed, it is precisely this type of situation which gave rise to the doctrine of strict liability.[30]

Perhaps the reason why there were no prior Florida decisions in this area was because of Florida's agricultural background, sparse population, lack of extensive rock strata, basically flat terrain and the dearth of industrialization.[31] However, Florida's rapid industrial growth will make more commonplace the use of explosives, thereby increasing the risk of concussion and vibration damage to neighboring property.[32] The ruling in the instant case has extended the protection of the courts to the owners of such property.

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WHAT IS "FIT TO EAT"—THE REASONABLE EXPECTATION TEST

Plaintiff was injured while consuming a dish of maple walnut ice cream ordered in defendant's restaurant. The ice cream contained a concealed piece of walnut shell which punctured plaintiff's gums and fractured several teeth. Plaintiff sued, alleging a breach of implied warranty and negligence by the restaurant. The trial court granted defendant's motion for a summary judgment stating that the walnut shell was a natural part of the food product and its presence would not afford a basis of recovery. On appeal to the Fourth District Court of Appeal, *held,* reversed and remanded: The test to be applied is what is "reasonably expected" by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation, and the question of what is reasonably to be expected is properly left to the jury. *Zabner v. Howard Johnson's, Inc.*, 201 So.2d 824 (Fla. 4th Dist. 1967).

The duty of a restaurant to provide the public with food that is

28. *Id.* at 34, 156 N.W. at 192.

29. 2 HARPER AND JAMES, THE LAW OF TORTS, § 14.6 at 816 (1956).

30. *Id.* at 815.

31. Brief for Appellant at 13, Morse v. Hendry Corp., 200 So.2d 816 (Fla. 2d Dist. 1967).

32. It seems logical that this is what the court in the instant case had in mind when, in discussing the use of explosives, it said "[I]t is time we examine its use in light of the industrial development of this state." 200 So.2d 816, 817 (Fla. 2d Dist. 1967).

reasonably fit for human consumption is well-established in the law.[1] Traditionally, the so-called "foreign-natural" test[2] has been employed to determine the fitness of the food served. In applying this test, courts generally have ruled that as a matter of law a harmful substance which is natural to the food *at any stage in its preparation* will not afford recovery under either a warranty or a negligence theory.[3] Although the "foreign-natural" test still represents the viewpoint of an overwhelming majority of jurisdictions, the test has been severely criticized in recent years.[4]

Several courts have refused to adopt the "foreign-natural" test.[5] In these jurisdictions, the courts have declined to base liability on whether an object is foreign or natural to the food and have submitted the issue to the jury. Unfortunately, these decisions, with a single outstanding exception,[6] fail to clearly disclose the test that is to be employed. Ironically, it is probably this failure to adopt any specific test which ultimately gave rise to the "reasonable expectation" test. Since most complaints were drafted in negligence as well as warranty, the defendant was normally held to a duty of reasonable diligence in preparing the food.[7] Such a duty certainly would not be breached if the customer should have anticipated the presence of the substance and guarded against it. Thus, in determining the defendant's possible negligence, the jury must consider whether or not the presence of the substance in the food was to be reasonably expected by the plaintiff.

1. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949); Landfield v. Albiani Lunch Co., 268 Mass. 528, 168 N.E. 160 (1929).

2. A California appellate court employing the "foreign-natural" test noted that:

> [T]he criterion upon which liability is determined in such cases is whether the object causing the injury is foreign to the dish served . . . . A beef bone found in a steak or beef stew or a fish bone found in a fish dish does not render the food unfit for human consumption. Silva v. F. W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (1938).

3. Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in fish dish); Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936) (chicken bone in chicken pie); Silva v. F. W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (1938) (turkey bone in turkey dressing); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941) (sliver of bone in pork chop). For an amusing opinion including a complete recipe for New England fish chowder, see Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309 (1964) (fish bone in fish chowder).

4. One legal writer has noted that: "Insofar as these cases rest on the notion of 'naturalness' in the sense that nothing that is an inherent part of the raw product itself can be a legal defect, they do not hold water." R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 4.2 (1951). For an equally strong criticism, see Note, *Products Liability—Restaurant Patron—Implied Warranty—Foreign-Natural Test*, 40 TUL. L. REV. 928 (1965).

5. Paolinelli v. Dainty Foods Mfrs., Inc., 322 Ill. App. 586, 54 N.E.2d 759 (1944) (chicken bone in infants' chicken soup mix); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942) (oyster shell in canned oysters); Wood v. Waldorf System, Inc., 79 R.I. 1, 83 A.2d 90 (1951) (chicken bone in chicken soup).

6. Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960). This opinion is well-reasoned and describes clearly the test which is to be applied.

7. Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N.E. 396 (1918); Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N.W. 812 (1893).

The "reasonable expectation" test was clearly established for the first time in the well-reasoned decision of *Allen v. Grafton*.[8] The plaintiff had been injured by a piece of oyster shell in a serving of fried oysters. In refusing to allow recovery, the Supreme Court of Ohio noted that the test to be applied is not whether the harmful substance was natural to the food, but rather whether the customer should have anticipated its presence and guarded against it.[9]

In the instant case, the Florida court clearly aligned itself with the holding in *Allen*. The court repudiated the "foreign-natural" test as being fallacious because:

> [I]t assumes that all substances which are natural to the food in one stage or another of preparation are, in fact, anticipated by the average consumer in the final product served.[10]

The validity of such a criticism is made abundantly clear when the "foreign-natural" test is applied to such substances as sand in fresh spinach. Here the sand is obviously a foreign substance, but its presence would be reasonably expected by any prudent housewife. And conversely, the struvite crystal[11] is a natural substance in such foods as crabs and shrimp. Yet, courts supposedly employing the "foreign-natural" test have allowed recovery for their presence on at least two occasions.[12]

The effect of the decision in *Zabner* is to reduce the "foreign-natural" test to an evidentiary capacity.[13] Implicit in the holding is the conclusion that the test may properly be included in the trial court's instructions to the jury as a relevant factor in determining whether or not the plaintiff should reasonably have expected the harmful substance to be present in his food. The test thus becomes but one factor in determining the liability of the defendant.

It is significant to note that the trial court in *Zabner* held that both the warranty and the negligence counts of the complaint "were controlled by the same principle of law."[14] In applying the "reasonable expectation" test the appellate court based its adoption of the test on the

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8. 170 Ohio St. 249, 164 N.E.2d 167 (1960).

9. *Id.* at 258, 164 N.E.2d at 174.

10. Zabner v. Howard Johnson's, Inc., 201 So.2d 824, 826 (Fla. 4th Dist. 1967).

11. Struvite crystals are very hard and often sharp-edged objects that are formed by the union of chemicals found *within the flesh of the crab or shrimp* if the meat is overheated during the canning process.

12. Gimenez v. Great Atl. & Pac. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); O'Hare v. Petersen, 174 Misc. 481, 21 N.Y.S.2d 487 (New York City Mun. Ct. 1940).

13. In Zabner v. Howard Johnson's, Inc., 201 So.2d 824 (Fla. 4th Dist. 1967) the court stated:

> [N]aturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of food served. *Id.* at 826.

14. *Id.* at 825.

foreseeability test of common law negligence.[15] The justification of the test, based on common law negligence principles, is well-reasoned and valid. However, no mention is made of the warranty count in the complaint. It should not be assumed that because a test is validly applicable in a negligence action, it will in all cases be equally applicable in a warranty action.[16]

Other jurisdictions, however, have tended to apply the test with equal validity to both negligence and warranty actions.[17] Such application would appear to be proper. It is settled that the sale of food by a restaurant creates an implied warranty of fitness for a particular purpose.[18] But the warranty does not apply to defects which the consumer knew or should have known were present in the food.[19] Thus if the consumer could have "reasonably expected" the harmful substance to be present, his warranty action would be defeated.[20]

In a special concurring opinion in *Zabner,* it is noted that the "foreign-natural" test would be valid if the "naturalness" of the harmful substance were determined with respect to the finished food product, rather than each of its ingredients at any stage in its preparation.[21] At least one other jurisdiction has followed this reasoning. In *Lore v. DeSimone Bros.*,[22] the plaintiff was injured by a sliver of bone embedded in a sausage. The court employed the "foreign-natural" test but allowed recovery holding that the bone sliver was not natural to "finely ground and processed meat encased in a skin."[23] When applied in this manner the "foreign-natural" test closely approximates the "reasonable expectation"

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15. Applying the test to the facts in the instant case the court stated:
> [T]he defendant is not an insurer but has the duty of ordinary care to eliminate or remove in the preparation of the food he serves such harmful substances as the consumer of the food, as served, would not ordinarily anticipate and guard against. *Id.* at 827.

16. Keyser v. O'Meara, 116 Conn. 579, 165 A. 793 (1933); Ver Steegh v. Flaugh, 251 Iowa 1011, 103 N.W.2d 718 (1960); Holt v. Mann, 294 Mass. 21, 200 N.E. 403 (1936).

17. *Compare* Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942) (warranty) *with* Wood v. Waldorf System, Inc., 79 R.I. 1, 83 A.2d 90 (1951) (negligence).

18. *E.g.,* Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949); Schuler v. Union News Co., 295 Mass. 350, 4 N.E.2d 465 (1936); Sartin v. Blackwell, 200 Miss. 579, 28 So.2d 222 (1946).

19. The warranty will not apply under these circumstances in those jurisdictions where contributory negligence is regarded as a valid defense in a warranty action. *Cf.* Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955); Fredenhall v. Abraham & Straus, 279 N.Y. 146, 18 N.E.2d 11 (1938). In those states which refuse to allow contributory negligence as a defense the warranty should apply even if the plaintiff anticipated the presence of the harmful substance. *Cf.* Challis v. Hartlaff, 136 Kan. 823, 18 P.2d 199 (1933); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918).

20. Only, however, in those jurisdictions where the defendant may assert the plaintiff's contributory negligence as a defense in a warranty action.

21. Zabner v. Howard Johnson's, Inc., 201 So.2d 824, 828 (Fla. 4th Dist. 1967).

22. 12 Misc. 2d 174, 172 N.Y.S.2d 829 (Sup. Ct. 1958).

23. *Id.* at 176, 172 N.Y.S.2d at 831.

test in that any substance which is natural *to the finished food product* should be reasonably expected to be present in the food.[24]

While the "reasonable expectation" test is applied in only a small minority of jurisdictions, it appears to be the more logical of the two tests. The foreign-natural distinction is at best an artificial criterion which will achieve a just result in a majority of cases. But where the process of preparing the food for consumption results in a final product which is markedly different from the food in its initial raw state, the foreign-natural distinction loses its validity. The "reasonable expectation" test adopted by the court in *Zabner* provides Florida with a logical and practical test which may be validly applied in all similar cases regardless of the particular circumstances of the situation.

WILLIAM N. LOBEL

NEGLIGENCE—STANDARD OF CARE OF MINOR DRIVERS

The plaintiff, aged fourteen, sued the defendant for injuries sustained in a motor scooter-automobile collision. One of the defenses raised was contributory negligence. The plaintiff requested that the trial court charge the jury that in determining the issue of contributory negligence they take the plaintiff's age and experience into account. This request was refused; the jury found for the defendant, and final judgment was entered accordingly. The district court of appeal affirmed.[1] On appeal to the Supreme Court of Florida, *held,* affirmed: The conclusion is inescapable that the legislature in granting to a minor the privilege to operate his motor scooter upon public streets intended that he should assume the obligations and responsibilities imposed upon fellow travelers. Such a requirement is sound, logical and legitimate. *Medina v. McAllister,* 202 So.2d 755 (Fla. 1967).

Generally, minors charged with either negligence or contributory negligence are entitled to be judged by what is reasonably expected of children of like age, intelligence and experience.[2] The widespread use of automobiles by minors has brought about a split of authority as to the standard to be imposed when a child engages in an activity which normally is one for adults only.[3]

24. Although the two tests are substantially similar when viewed in this manner, there are still instances in which a different result could be reached under each test. For instance, struvite crystals would be considered "natural" to a crab or shrimp but their presence in the finished food product could be found by a jury to be not reasonably expected.

1. Medina v. McAllister, 196 So.2d 773 (Fla. 3d Dist. 1967).

2. City of Jacksonville v. Stokes, 74 So.2d 278 (Fla. 1954); *see generally* PROSSER, TORTS § 32 (3d ed. 1964); 2 HARPER & JAMES, THE LAW OF TORTS § 16 (1956).

3. In addition to automobiles, motorboats and airplanes are included in this general