

# What's That Doing in My Sandwich? Negligence and Food

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Negligence and harmful food have a long history. For as long as people have sold food, contamination and foreign objects have been a problem, with the culprits ranging from something as innocuous as water in milk to things as repulsive as vermin in food. To protect people, the government has enacted laws prohibiting the sale of questionable and contaminated food, as well as allowing for the prosecution of offenders under the civil doctrine of negligence.

As with anything with the law, the criteria for deciding whether the facts add up to negligence vary from case to case. Sometimes the criteria are simple and merely call on one to employ a little common sense. For example, in Ritchie v. Sheffield Farms Co., 129 Misc. 765, 222 N.Y.S. 724 (Municipal Ct. NY County, 2nd Dist. 1927), the plaintiff drank from a bottle of milk that had a dead mouse in it. Because witnesses proved that the milk bottle had to be opened with a pick, the court decided that the mouse could not have entered the bottle between the time the milk was bottled and the time the plaintiff opened it. This proved that the mouse must have found its way into the milk during the milk's "preparation," when the bottler was responsible for keeping contaminants out, and therefore the bottler was negligent.

The court's verdict was similar in Vamos v. Coca-Cola Bottling Co. of New York, Inc., 165 Misc.2d 388, 627 N.Y.S.2d 265 (Civil Ct., NY County 1995), in which the plaintiff suffered stomach upset after drinking from a sealed bottle of Coke that contained two batteries. The court found that the "presence of [a] noxious or revolting foreign substance [the batteries] in [a] sealed container [was] sufficient to warrant inference of negligence" because it was impossible for the sealed bottle to have been tampered with after leaving the Coca-Cola bottling facility. *Id* at 388. The court failed to mention specifically if they found it to be statutory or common-law negligence, instead hinging its decision for the plaintiff on a manufacturer's duty to their customers. Still, the court stated that Coca-Cola violated their "duty to adequately prepare, inspect, and package its product, and failure to take these precautions constitutes or may constitute negligence," which could be construed as common-law negligence. *Id* at 389. Although it was not stated explicitly, the court was referring to the reasonable care doctrine, the backbone of food-and-common-law negligence litigation.

Stark v. Chock Full O'Nuts, 77 Misc.2d 553, 356 N.Y.S.2d 403 (1st Dep't 1974) clearly defined the reasonable expectation doctrine: "The 'reasonable expectation doctrine'...requires that a restaurant owner use ordinary care to

remove from food, as served, such harmful substance as consumer would not ordinarily anticipate. Uniform Commercial Code, § 2-315.” *Id* at 553. Here, a diner allegedly damaged her tooth when she bit into a “nutted cheese” sandwich and encountered a “large, hard walnut shell,” not something she expected to find in her sandwich. *Id* at 553. The appellate court upheld the decision that the reasonable care doctrine was the proper doctrine to apply to the facts, despite the fact that the plaintiff was the sole witness to the incident.

Vitiello v. Captain Bills Restaurant, 191 A.D.2d 429, 594 N.Y.S.2d 295, 20 UCC Rep.Serv.2d 894 (2nd Dep’t 1993) was another example of a case where the reasonable expectation doctrine was used, but here it worked against the plaintiff. The plaintiff was injured by a bone in a piece of fish served by the defendant, and claimed that the restaurant had not “used ordinary care” in boning the fish and was therefore guilty of common-law negligence. Even though the piece of fish was a fillet, as the court quoted from Yong Cha Hong. v. Marriot Corp., 656 F. Supp. 445 (D. M.D 1987), “Everyone knows that tiny bones may remain in even the best fillets of fish.” *Id* at 449. Because the restaurant was only required to use reasonable care to remove substances that the customer would not expect, and the plaintiff had no right to expect a completely boneless piece of fish, the defendant restaurant was not found guilty of negligence and the plaintiff was not entitled to recover damages.

This doctrine of reasonable care was also the focal point of Rudloff v. Wendy’s Restaurant of Rochester, Inc., 12 Misc.3d 1081, 821 N.Y.S.2d 358 (City Ct. Buffalo 2006), in which the plaintiff was harmed by a sharp object in a Wendy’s hamburger. The court broke down its version of a reasonable expectation test into seven aspects, looking at:

- 1) the nature or size of the object, or both,
- 2) the type of food involved,
- 3) the way in which the food was inspected, processed and prepared...
- 4) the type of establishment where the food was purchased,
- 5) whether the food needed further preparation before consumption,
- 6) what type of opportunity the consumer had to protect him or herself from the alleged defect (i.e., how the item is traditionally consumed), and
- 7) what steps, if any, must a reasonable consumer take to inspect his or her food prior to consumption (*id* at 360)

*Rudloff* is a long, detailed case, but the negligence aspect of it boiled down to the idea that, unlike with fish, one does not reasonably expect to find bones or other hard objects in ground and processed meat like hamburger (#2 and #3 above) and the fact that one usually bites into a hamburger and does not nibble at it carefully, which would preclude chewing foreign objects (#6 above). Still, because what is reasonable for one person is unreasonable for another, the court decided that when someone is injured by an object in their food, questions of whether they should have reasonably anticipated it being there are up to a jury to decide, not a judge, and denied the defendant’s motion for summary judgment.

Trembley v. Coca-Cola Bottling Co. 285 A.D. 539, 138 N.Y.S.2d 332 (3’d Dep’t 1955) is another case involving common-law negligence. In this case,

the plaintiff found a dead mouse in his bottle of Coke. Although Coca-Cola adhered to industry practices in bottling its product, it was still found to be negligent, as the jury decided that Coca-Cola's single inspection of the bottles after washing them was not good enough to prevent foreign substances due to mechanical or human error. Breach of the Agriculture and Markets Law § 200 was not even alleged, so Coca-Cola Bottling Co. was found guilty of common-law negligence in allowing the mouse to enter its bottles and cause damage to the plaintiff.

Things get more complicated in cases that do allege breach of Agriculture and Markets Law § 199-200. Section 199 prohibits the production and sale of adulterated food, while § 200 defines food adulteration. The current statute at its very simplest deems food to be adulterated "if it bears or contains any poisonous or deleterious substance which may render it injurious to health," and seems to have changed little, if at all, over the years. However, while everybody is in agreement that violation of this statute constitutes statutory negligence, there is still disagreement over what exactly amounts to a violation of the statute.

Alphin v. La Salle Diners, 197 Misc. 415, 98, N.Y.S.2d 511 (City Ct., Kings County 1950) takes a strict view of Agriculture and Markets Law § 200, stating that it creates an "absolute duty of manufacturer or seller for benefit of general public" (*id* at 415). Much as *Trembley* stated in regard to common-law negligence, *Alphin* suggests that even if the seller adhered to the usual standard of care in their industry, the fact that it still allowed a deleterious substance into its food means that, despite their care and perhaps inadvertently, they still violated the statute to serve unadulterated food. In this case, the plaintiff found a harmful piece of wire in his pie. Despite the fact that the wire would not have been visible during normal inspection and handling and its presence was not indicative of a lack of reasonable care on the part of the restaurant, the fact was that it was still there, and the defendants were found guilty of negligence as a matter of law.

In sharp contrast to the above decision, Piazza v. Fischer Baking Co., 197 Misc. 418, 98 N.Y.S.2d 508 (City Ct., Kings County 1950), a decision written a mere few months later in the same court and county, failed to follow *Alphin's* reasoning. In *Piazza*, the plaintiff found a screw inside his slice of bread, but this was not considered food adulteration because the screw was not a *part* of the bread. According to the court's viewpoint, foreign substances like tacks, broken glass, or stones, which are not finely ground up or thoroughly mixed with the food, do not become a part of the food and are not considered food adulteration, and therefore the defendant was not guilty of statutory negligence.

Why the *Piazza* court did not follow the interpretation of *Alphin*, in which a piece of wire was considered to be adulteration, is not explained. The court does concede that the screw "might be the result of negligence," just not statutory negligence, and decided in favor of the defendant. *Id* at 419. It also stated that the "evidence was insufficient to establish that [defendant] failed to use the maximum care which a reasonably prudent person is required to use," and so the defendant could not be found guilty of common-law negligence. *Id* at 418.

People v. Enders, 38 Misc.2d 746, 237 N.Y.S.2d 879 (1963) discusses negligence in regard to a different type of food adulteration than the above cases, that of debasing by “adding inferior materials or elements or make impure by admixture.” *Id* at 746. Here, the defendant, a butcher working at the supermarket of his fellow defendant, added edible beef blood to cheap hamburger meat to make it look juicier. The fact that the beef blood was added to make the hamburger look superior and more valuable than it really was caused the hamburger meat to fall “below the standard of purity, quality, and strength which it purported and was represented to possess” which created a violation of Agriculture and Markets Law § 200(11). *Id* at 746.

Although many cases of food adulteration deal with harmful or repulsive substances being added to food, in *Enders* the beef blood was not harmful, and even approved for human consumption by the United States Department of Agriculture. Still, as the court stated quoting a federal case regarding a violation of a federal law, in these cases:

The test of adulteration within the meaning of the Act [21 U.S.C.A § 342(b)(2)] does not turn upon whether the article is non-injurious and fit for human consumption. The Act was not intended to be confined to...the addition of adulterated substances deleterious to the health of consumers. It provides protection to the consumer from “economic adulteration” by which less expensive ingredients are substituted, or the proportion of more expensive ingredients is diminished so as to make the commonly identified article inferior to that which the consumer would expect to receive when purchasing it, although not in itself deleterious (*id* at 753).

Here, in addition to the lessening of the meat’s purity and quality, the blood that the defendant added made the meat weigh more when being weighed for purchase, cheating the customer just as much as if he had put his thumb on the scale like the proverbial dishonest butcher. The court found this to be a violation of Agriculture and Markets Law § 200(10), and found the defendants guilty of statutory negligence.

While the facts of the cases vary, there are two constants when dealing with food adulteration and foreign objects in food: Agriculture and Markets Law § 199-200 and the reasonable expectation doctrine. The reasonable expectation doctrine establishes that the test of common-law negligence revolves around whether or not the customer could have reasonably expected to find the deleterious object in their food, while Agriculture and Markets Law § 199-200 creates a statutory obligation to serve and produce unadulterated food. Either way, be it under the civil or statutory obligation to the public, it is clear that food producers and purveyors have an inarguable duty to present the public with pure, unadulterated food free of foreign objects.

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