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FOOD CONTAMINATION CASES IN ILLINOIS

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The number of food-borne pathogens has increased five-fold since 1942. In a September 1999 study by the Centers for Disease Control (CDC), it was reported that there were 76 million reported cases of food-borne illnesses in the United States every year. Additionally, there are a reported 325,000 hospitalizations and 5,000 deaths.

People rely on the skill and care of others to catch, grow, gather, preserve, prepare and provide much of the food and drink indispensable to survival. Because pure uncontaminated food is essential for survival, most people are extraordinarily dependent for their health and safety on the care and skill of food providers. As such, the rules that govern liability for selling defective food and drink have long stood apart from those concerning other types of products.

Many of the food borne illness cases come under the aegis of two federal agencies responsible for safety: the United States Department of Agriculture and the Food and Drug Administration. Their congressionally delegated responsibilities for our food safety are wide spread, their authority to enforce, when exercised, just short of absolute.

The great majority of defective food and drink cases involve claims that the foodstuffs contained "manufacturing" defects, such as hazardous objects, contaminants, and other deviations from the safe and wholesome condition intended by the seller and expected by the buyer. Three main theories of recovery are available to the injured plaintiff: Negligence, Warranty and Strict Tort Liability.

In order to prove a products liability case, the plaintiff is required to prove that the injury resulted from a condition of the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the control of the manufacturer or supplier.[1] These elements may be proven inferentially, by either direct or circumstantial evidence.[2] Circumstantial evidence is the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind.[3] To make out a case for the plaintiff in personal injury,

absolute, positive and ocular proof is not required.[4] Resort to medical testimony is generally necessary to prove causal connection between occurrence complained of and the injury or illness alleged to have resulted therefrom.[5] Further, an expert may be permitted to testify that the certain things might or could be caused by any given set of facts.[6] However, where the causal connection between the occurrence complained of and the alleged injury or illness is clearly apparent from the illness itself and circumstances attending it, it is not necessary to resort to medical testimony.[7]

Negligence

It is the duty of a manufacturer of food for human consumption to exercise at least reasonable care in the manufacture, preparation, inspection and packaging of its food product so that the product is free from any foreign objects not fit for human consumption.[8]

In cases where direct evidence of responsibility and fault is unavailable, but where circumstantial evidence points to the defendant's probable negligence as the cause of the defective food, plaintiffs in Illinois can invoke the doctrine of res ipsa loquitur. In such cases, the circumstantial evidence surrounding the accident leads to inferences that the food would not have been defective without the negligence of someone, that the defendant's exclusive control over the foodstuff at the time of preparation suggests that the negligence was that of the defendant, and the plaintiff did not contribute to the injury. Such inferences are strong in cases where the consumer is injured by a foreign object in a food or drink, particularly if it is found in a package or can sealed at the defendant's place of business.

Strict Tort Liability

Food processors and manufacturers are subject to the "reasonable expectation" test. The "reasonable expectation test" provides that regardless of whether the substance in the food product is natural to an ingredient thereof, liability will lie for injuries caused by the substance where the consumer of the product would not reasonably have expected to find the substance in the product.[9] Strict liability is intended to apply to all products placed in the stream of commerce regardless of whether they have undergone some processing or not.[10] With an awareness of the foregoing, the main question to ask is: Would a reasonable consumer expect that a given product might contain the substance or matter causing a particular injury?

Warranty

In cases involving food, as any type of product, warranty claims have the distinct advantage over negligence claims in that proof of the defendant's fault is not necessary. Express warranty actions are unusual in food cases because it is rare that the seller would put forth false affirmations of fact. More typical are claims for breach of the implied warranty of quality or wholesomeness. This latter form of warranty provides a strict, no-fault basis for liability. Where there is a breach of warranty, the strict tort liability analysis in the foregoing should be utilized.

Proving Defectiveness

To recover for injuries from ingesting food or drink, a plaintiff must establish that the food contained some dangerous element that rendered it unwholesome or "defective." The concept of defectiveness in food and drink is the same as in other contexts. Thus, a food or beverage item is generally defective, and a seller is generally subject to liability in negligence, warranty, and strict liability in tort for selling it, if the food product's condition is dangerous in a manner not intended by the seller *nor expected by the consumer*. The plaintiff must establish the food or drink was unwholesome, unfit for human consumption, adulterated, or contained a foreign or otherwise dangerous substance of a type that consumers generally do not expect.

Defectiveness could be clear, as where a soft drink contains slivers of glass.[11] Where the defectiveness is plain, unless the danger was so open and obvious that it should have been apparent to the consumer, its deficiency would render it defective by any standard. A plaintiff can establish that the food product really did contain an improper substance, a fact which the plaintiff's testimony may establish. However, the plaintiff's uncorroborated testimony that he or she swallowed a bug, for example, is not the strongest type of evidence, and so a plaintiff who swallows or otherwise disposes of the objectionable item may find the lawsuit difficult to maintain. As mentioned, even if the plaintiff has no direct evidence of a defect in the food, defectiveness may be properly established by circumstantial evidence and credible expert testimony that the defendant's food probably was defective.[12]

The Reasonable Expectation Test

Food processors and manufacturers are now subject to the "reasonable expectation" test in Illinois.[13] This test provides that, regardless of whether the substance in the food is natural to the ingredients thereof, such as a pecan shell in a pecan cookie, liability will lie for injuries caused by the substance where the consumer of the product would not reasonable have expected to find the substance in the product.[14] The Supreme Court of Illinois in 1992 declared that the "foreign-natural doctrine" is no longer applicable. The "foreign-natural doctrine" had been the law of Illinois since 1944.[15] The doctrine provides that the vendor of food is not liable for injuries due to unremoved but naturally occurring ingredients such as fruit pits or fish bones, but is liable for foreign objects in the food such as glass shards. The reasonable expectation test essentially provides that the vendor of a food product is liable for injuries caused by an ingredient whether natural or foreign whenever the consumer of the product would not reasonably have expected to find the substance in the product. There is a legitimate concern, as expressed by Justice Heiple that the reasonable expectation test will mean that every food-related injury in Illinois will be subject to a lawsuit to determine whether the consumer's reasonable expectation was violated.[16]

Storage Issues

An important issue that routinely arises in food product liability cases is what to do with the contaminated product after the claimant becomes injured. Many times, as mentioned above, the claimant will no longer be in possession of the unwholesome product. However, where the claimant does have possession of the unwholesome product, there is a noticeable lack of cases that specifically deals with the storage and inspection of allegedly contaminated or defective food products. As good general policy, one should consider the following packaging materials for the preservation of evidence: Polypropylene container, crush-proof box, dry ice, or a zip-lock bag. Further, if testing of any alleged foreign object is determined to be necessary, the chain of custody must be documented. A laboratory should be consulted specifically for the method in which the product is to be packaged for shipping. An immediate protective order should also be entered if a lawsuit is pending to prevent the claimant/plaintiff from performing any destructive testing. Further, the court should be asked to make an express order on the protocol for all destructive testing.

Damages

Damages vary greatly in food product liability cases due to the wide disparity of injuries and the effect of injuries. Most plaintiffs request special damages, which include medical expenses. It is very common to have a jury award money for pain and suffering as well. Attached to this memorandum are nine jury verdict reports. A significant reason for the lack of jury verdict reports on food product liability in Illinois is that, many times, the claim is brought as a personal injury claim for a specific injury such as a broken tooth and is not identified as being caused by a defective food product.

Recently, the 7th U.S. Circuit Court of Appeals held that under Illinois law, the economic loss rule precludes recovery on negligence claims by a manufacturer whose food products were contaminated by subcontractors' construction defects.[17] Additionally, recovery can not be had on duty to warn claims by the manufacturer against suppliers of the construction products that caused the contamination.[18] The court reasoned that the roots of the damages alleged were within contractual expectations which expressly provided that poisonous or dangerous chemicals be kept in a separate part of a warehouse. Therefore, the damages did not extend above and beyond the parties' commercial expectations. Accordingly the claim was barred.

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[1] Consolino v. L Karp & Sons, Inc., 127 Ill. App. 3d 31 (1st Dist. 1984)
[2] Id.
[3] Id.
[4] Duncan v. Matin's Restaurant, 347 Ill. App. 183 (1st Dist. 1952)
[5] Id.
[6] Id.
[7] Patargias v. Coca-Cola Bottling Co. of Chicago, 332 Ill. App. 117 (1st Dist. 1947)
[8] Paolinelli v. Dainty Food Manufacturers, Inc., 322 Ill. App.. 586 (1st Dist. 1944)
[9] Jackson v. Nestle-Beich, 147 Ill. 2d 408 (1992).
[10] Id.
[11] Warren v. Coca Cola Bottling Company of Chicago, 166 Ill.App.3d 566 (1988)
[12] See Patargias v. Coca-Cola Bottling Co. of Chicago, 74 NE 2d 162 (1947)
[13] Jackson, 147 Ill.2d 408 (1992)
[14] Id.
[15] Goodwin v. Country Club of Peoria, 323 Ill. App. 1 (1944)
[16] Jackson, 147 Ill.2d 409 (1992), *dissent*
[17] American United Logistics v. Catellus Development Corp., 319 F.3d 921 (7th Cir. 2003)
[18] Id.