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A Bone to Pick with Mexicali Rose v. Superior Court: Liability of California Restaurants for Injuries Caused by Substances in Food

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A BONE TO PICK WITH *MEXICALI ROSE v. SUPERIOR COURT*: LIABILITY OF CALIFORNIA RESTAURANTS FOR INJURIES CAUSED BY SUBSTANCES IN FOOD

I. INTRODUCTION

Imagine a woman entering a quaint restaurant on the California coastline. She decides to order the restaurant's specialty, chicken fricassee with dumplings. The dish is similar to stew, containing various fresh vegetables, dumplings, and two large fillet breasts of chicken.[1] As she slices off a portion from the middle of a breast and bites into it, she suddenly feels a hard object stabbing her throat. She tries to cough, to drink some water, but she cannot dislodge the object. Surgery reveals that this object is a chicken bone, one half-inch long and one half-inch wide. Her throat never completely heals, and she must live the remainder of her life with constant discomfort in her throat.[2]

Had this scenario occurred prior to the 1950s, the restaurateur who inflicted this lifelong suffering would have incurred no liability at all. At that time, most states followed the California Supreme Court's decision in *Mix v. Ingersoll Candy Co.*,[3] which established what is now referred to as the "foreign-natural" test.[4] Under this test, plaintiffs could not recover, as a matter of law, for injuries they received from "natural" objects in their food.[5] For a consumer to recover in either tort or warranty,

1. IRMA S. ROMBAUER & MARION R. BACKER, THE JOY OF COOKING 426 (1985).

2. This hypothetical is based on Jim Dandy Fast Foods, Inc. v. Carpenter, 535 S.W.2d 786 (Tex. Ct. App. 1976).

3. 6 Cal. 2d 674, 59 P.2d 144 (1936), *overruled by* Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992). Courts in Delaware, Georgia, Illinois, Iowa, New York, and North Carolina have all denied recovery to plaintiffs under the foreign-natural test for injuries caused by natural objects. *See* Rosenberg v. Wachter, 138 A. 273 (Del. 1925) (chicken bone in chicken noodle soup); Davison-Paxon Co. v. Archer, 85 S.E.2d 182 (Ga. Ct. App. 1954) (holding defendant liable but noting that defendant would not have been liable if injury-causing object in creamed turkey was identified as turkey bone); Goodwin v. Country Club, 54 N.E.2d 612 (Ill. App. Ct. 1944) (chicken bone in creamed chicken); Brown v. Nebiker, 296 N.W. 366 (Iowa 1941) (bone in pork chop); Courter v. Dilbert Bros., 186 N.Y.S.2d 334 (N.Y. Sup. Ct. 1958) (prune pit in prune butter); Adams v. Great Atl. & Pac. Tea Co., 112 S.E.2d 92 (N.C. 1960) (corn grain in corn flakes), *overruled by* Goodman v. Wenco Foods, Inc., 423 S.E.2d 444, 450 (N.C. 1992).

4. *Mix*, 6 Cal. 2d at 682, 59 P.2d at 148.

5. *Id.*; *see* Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 622, 822 P.2d 1292, 1296, 4 Cal. Rptr. 2d 145, 149 (1992).

the object that injured him or her must have been "foreign" to the food, such as a piece of glass.[6]

In 1993, however, the foreign-natural test is no longer the rule in many jurisdictions because most states that have considered the issue of objects in food have decided to abandon it in favor of the "reasonable expectation" test.[7] Under this test, liability is based not on whether the injury-producing object was foreign or natural, but instead on whether the consumer reasonably could have anticipated that object in the food.[8] Moreover, unlike the determination of whether an object is foreign or natural in the *Mix* test, the reasonableness of a consumer's expectations is a jury question.[9] Therefore, it is far more likely that our hypothetical plaintiff would recover for her injuries under the reasonable expectation test than under the foreign-natural test.[10]

Unfortunately, however, she was injured in California, one of the few states that does not follow the reasonable expectation test.[11] Although the California Supreme Court claimed to be adopting the reasonable expectation test in its recent decision *Mexicali Rose v. Superior Court*,[12] in reality, the court did no such thing. Rather, it ruled that a plaintiff injured by a *foreign* substance in food could sue the restaurateur for negligence, breach of the implied warranty of merchantability, or

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6. *See Mexicali Rose*, 1 Cal. 4th at 619, 822 P.2d at 1293-94, 4 Cal. Rptr. 2d at 146-47. The foreign-natural test is discussed in detail *infra* part III.A.1.

7. *See* Jackson v. Nestle-Beich, Inc., 569 N.E.2d 1119, 1121 (Ill. App. Ct. 1991), *aff'd*, 589 N.E.2d 547 (Ill. 1992); Stacy L. Mojica, Note, *Breach of Implied Warranty: Has the Foreign/Natural Test Lost Its Bite?*, 20 MEM. ST. U. L. REV. 377 (1990). Ms. Mojica noted that:

> Currently, twenty-three states and the District of Columbia have reported cases dealing with the issue of deleterious objects that can be classified in at least some sense as "natural" to the food consumed. Of those, twelve states and the District of Columbia have explicitly recognized the reasonable expectations test; three states have decided cases in a manner consistent with the test without clearly stating the reasons for the decisions; and three states have applied or referenced the test at some point but have applied the foreign/natural test in subsequent decisions.

Id. at 394.

8. *See Mexicali Rose*, 1 Cal. 4th at 619, 822 P.2d at 1294, 4 Cal. Rptr. 2d at 147.

9. *Id.* at 631, 822 P.2d at 1302, 4 Cal. Rptr. 2d at 155.

10. A jury would be unlikely to conclude that a reasonable person expects to find a half-inch long bone in the middle of a chicken breast fillet because, by definition, fillets generally contain no bones. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY 850 (3d ed. 1976). The jury in Jim Dandy Fast Foods, Inc. v. Carpenter, 535 S.W.2d 786 (Tex. Ct. App. 1976), the case upon which this hypothetical is based, agreed. *Id.* at 789. Application of the reasonable expectation test is discussed in detail *infra* part III.A.3.

11. *See Mexicali Rose*, 1 Cal. 4th at 641, 822 P.2d at 1308-09, 4 Cal. Rptr. 2d at 161-62 (Mosk, J., dissenting).

12. 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

strict liability, but a plaintiff injured by a *natural* substance may only state a cause of action in negligence.[13]

This confusing ruling has two principle effects. First, it denies a plaintiff injured by a natural object in his or her food the opportunity to recover under implied warranty or strict liability principles. The court's rationale was that such natural objects should always be expected, and thus the food cannot be deemed unfit or defective.[14] Second, in predicating a plaintiff's recovery on the type of object which injured him or her, the court effectively rejected the reasonable expectation test it claimed to adopt,[15] and perpetuated the antiquated foreign-natural distinction it established fifty-seven years ago in *Mix*. By combining the foreign-natural test with the reasonable expectation test, the California Supreme Court created a hybrid test that is "bizarre," "irrational," and "unfair."[16]

This Note briefly discusses the *Mexicali Rose* decision and the court's analysis.[17] It then examines the tort theories of products liability—negligence, strict liability, and breach of implied warranty—and argues that plaintiffs injured by food served in a commercial restaurant should be allowed to recover under all three theories regardless of whether the object that injured them was "foreign" or "natural."[18] Next, this Note analyzes California's continued adherence, through its strange hybrid test, to the foreign-natural distinction in food cases, concluding that California's refusal to follow a pure reasonable expectation test defies statutes, case law, and common sense.[19] Finally, this Note urges the California Supreme Court to reconsider the issue of restaurant owners'[20] liability for natural injury-causing objects in food and reject its confusing hybrid test in favor of a pure version of the reasonable expectation test.[21]

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13. *Id.* at 633, 822 P.2d at 1303-04, 4 Cal. Rptr. 2d at 156-57.

14. *Id.* Plaintiffs' inability to recover under implied warranty and strict liability is discussed *infra* parts III.A.1 and III.A.2.

15. *See Mexicali Rose*, 1 Cal. 4th at 646-47, 822 P.2d at 1312-13, 4 Cal. Rptr. 2d at 165-66 (Arabian, J., dissenting).

16. *Id.* at 635, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157 (Mosk, J., dissenting).

17. *See infra* part II.A.

18. *See infra* part II.B.

19. *See infra* part III.

20. The court limited its decision in *Mexicali Rose* to commercial restaurants, excluding food manufacturers and wholesalers; the focus of this Note is the same. *See Mexicali Rose*, 1 Cal. 4th at 619 n.1, 822 P.2d at 1293 n.1, 4 Cal. Rptr. 2d at 146 n.1.

21. *See infra* part III.B.

II. BACKGROUND

A. Mexicali Rose v. Superior Court

Defendant Mexicali Rose owned and operated a Mexican restaurant.[22] Plaintiff Jack A. Clark entered this restaurant and ordered a chicken enchilada.[23] As he ate the enchilada, a one-inch chicken bone lodged in his throat, causing serious injuries.[24] Mr. Clark brought suit against defendant for damages based on theories of negligence, breach of implied warranty, and strict liability.[25] He alleged that defendant had negligently left the bone in the food, thereby rendering the food defective and unfit for consumption.[26] Mr. Clark claimed that he did not expect to find the bone and that it is not common knowledge that there may be bones in chicken enchiladas.[27] He also sought punitive damages based on his allegation that defendant initially refused to obtain medical assistance for him.[28]

Defendant filed a demurrer which was denied by the trial court.[29] The court of appeal, however, issued a writ of mandate which directed the trial court to sustain the demurrer as to all of Mr. Clark's causes of action.[30] The court of appeal reasoned that it was compelled by principles of stare decisis to follow the rule set forth in *Mix* over fifty years earlier.[31] Mr. Clark appealed the issuance of the writ of mandate and the California Supreme Court agreed to review the case.[32]

In its review of the case, the California Supreme Court held that a plaintiff injured by a natural object in food could recover only under a negligence theory, with no cause of action in either implied warranty or strict liability.[33] Only if the injury resulted from a foreign object could a plaintiff sue under implied warranty or strict liability.[34]

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22. *Mexicali Rose*, 1 Cal. 4th at 620, 822 P.2d at 1294, 4 Cal. Rptr. 2d at 147.
23. *Id.*
24. *Id.*
25. *Id.* These three theories of products liability are explained *infra* part II.B.
26. *Mexicali Rose*, 1 Cal. 4th at 620, 822 P.2d at 1294, 4 Cal. Rptr. 2d at 147.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* As discussed above, the *Mix* rule insulates the restaurateur from any liability for injuries caused by natural substances in food—including the chicken bone which injured Clark. *See supra* notes 3-6 and accompanying text.
32. *See* Mexicali Rose v. Superior Court, 213 Cal. App. 3d 1520, 782 P.2d 1139, 264 Cal. Rptr. 683 (1989), *depublished and rev'd*, Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).
33. *Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156.
34. *Id.*

The court began its analysis by reviewing the *Mix v. Ingersoll Candy Co.*[35] decision and subsequent cases which followed *Mix*'s foreign-natural rule.[36] The court acknowledged that, in more recent years, many jurisdictions have abandoned this rule, applying instead the reasonable expectation test.[37] Although it appeared that the court would follow this growing trend and adopt the reasonable expectation test, it took a strange detour: The court noted that "many" courts have not adopted a pure form of the reasonable expectation test, but rather have retained the foreign-natural distinction in applying it, resulting in a hybrid test.[38] Contrary to the court's assertion, however, "many" courts have not adopted this hybrid test; the test is virtually unsupported.[39] Under the hybrid test, a plaintiff injured by a natural object is allowed to recover only if he or she can prove that the restaurant was negligent in its preparation of the food.[40] The plaintiff has no cause of action in strict liability or implied warranty, however, because natural objects are to be expected and therefore do not render the food "defective" or "unmerchantable" as defined by the strict liability and implied warranty theories.[41]

B. The Three Theories of Products Liability

Before analyzing the various tests currently applied in restaurant liability cases, it is essential to examine some of the significant features of each theory of products liability. The doctrine of products liability is designed to protect purchasers, users, and bystanders injured by defective products.[42] There are three general theories of products liability[43] avail-

35. 6 Cal. 2d 674, 59 P.2d 144 (1936), *overruled by* Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

36. *Mexicali Rose*, 1 Cal. 4th at 621-23, 822 P.2d at 1294-96, 4 Cal. Rptr. 2d at 147-49.

37. *Id.* at 625-26, 822 P.2d at 1297-98, 4 Cal. Rptr. 2d at 150-51.

38. *Id.* at 626, 822 P.2d at 1298, 4 Cal. Rptr. 2d at 151. The court, in its insistence that it was adopting the reasonable expectation test, did not refer to its rule as a "hybrid." The rule that it actually adopted, however, turns on whether the injury-causing object was foreign or natural. *Id.* at 633-34, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156. Only if the object is found to be natural is the reasonable expectation test applied. *Id.* The *Mexicali Rose* rule, then, adopts neither the foreign-natural test nor the reasonable expectation test. Rather, it fashions its own test by combining the two standards. The details of this "hybrid" test are discussed *infra* part III.A.2.

39. *See infra* part III.A.2.

40. *See infra* part III.A.2.

41. *See infra* part III.A.2.

42. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 95, at 677 (5th ed. 1984).

43. Some commentators and courts recognize a fourth theory: negligence liability in contract for breach of a warranty that the product was designed and constructed in a workmanlike manner. *Id.* at 678; *see also* E.F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 838 (1967) (noting this common-law theory is not

able to plaintiffs: (1) negligence; (2) breach of the implied warranty of merchantability; and (3) strict liability. The significant differences among these three theories can greatly affect a plaintiff's ability to recover. Moreover, these differences are especially relevant as a result of the foreign-natural distinction in the *Mexicali Rose* hybrid rule.

1. Negligence

All jurisdictions accept the negligence standard as one of the theories of products liability.[44] Generally, the negligence standard consists of four prongs.[45] First, the plaintiff must establish that the defendant had a duty to act.[46] Assuming that the defendant had a duty to act, he or she is usually required to act as a reasonably prudent person under similar circumstances.[47] Second, the plaintiff must show that the defendant breached his or her duty.[48] Third, the plaintiff must show that the defendant's breach actually and proximately caused the plaintiff's injury.[49] Finally, the plaintiff must prove and quantify the resulting damages.[50] In the products liability context, this theory results in a seller being held liable for the negligence of a manufacturer whose product may reasonably be expected to inflict substantial harm if defective.[51]

In some respects, negligence can be the most effective theory of recovery for a plaintiff in a products liability action. The amount of damages recoverable, for example, may be significantly greater in a negligence suit than in an implied warranty suit[52] because negligence not only allows recovery of all reasonably foreseeable damages,[53] but also may permit recovery of punitive damages.[54] The amount of damages available in a breach of warranty action, by contrast, is typically much

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applicable to product suppliers under Uniform Commercial Code; it is limited to housing merchants).

44. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960).

45. KEETON ET AL., *supra* note 42, § 30, at 164-65; *see also* RESTATEMENT (SECOND) OF TORTS § 281 (1984) (listing elements of negligence cause of action).

46. KEETON ET AL., *supra* note 42, § 30, at 164.

47. *Id.*

48. *Id.* § 30, at 165.

49. *Id.*

50. *Id.*

51. *Id.* § 96, at 682-83; *see also* Sheward v. Virtue, 20 Cal. 2d 410, 415, 126 P.2d 345, 347 (1942) (holding defendant liable for negligent construction of chair).

52. *See* Mojica, *supra* note 7, at 378 n.2.

53. *See* Lawrence A. Towers & Peter L. Gardon, *Circumvention of Article 2: Tort Remedies for Breach of Contract*, 19 UCC L.J. 291, 292-93 (1987).

54. *See* Mojica, *supra* note 7, at 378 n.2.

more limited.[55] Moreover, while a seller or manufacturer may disclaim the implied warranty,[56] there is no such option under negligence or strict liability. Nonetheless, significant disadvantages to the plaintiff exist under the negligence standard, especially in comparison to the other two theories of products liability.[57]

2. Strict liability

The principles underlying the theory of strict liability are extremely different than those underlying the theory of negligence. Most significantly, negligence requires the plaintiff to show the defendant's lack of due care,[58] but strict liability requires no showing of fault.[59] Under strict liability, even if the defendant exercised all possible care in producing and marketing a product, he or she is liable for any defect that injures the plaintiff.[60]

Strict products liability originated in the food arena.[61] Fueled by many public policy concerns, the theory gained popularity and spread quickly to other products.[62] This popularity ultimately led to the formulation, in 1964, of section 402A of the Restatement (Second) of Torts.[63]

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55. *See id.*

56. KEETON ET AL., *supra* note 42, § 97, at 691.

57. *See infra* part III.B.

58. *See supra* part II.B.1.

59. KEETON ET AL., *supra* note 42, § 98, at 692-93.

60. *Id.*

61. *Id.* § 97, at 690; *see also* Prosser, *supra* note 44, at 1106-07 (discussing history of strict liability).

62. Prosser, *supra* note 44, at 1111-12. Dean Prosser wrote this article in 1960, when strict liability was just beginning to gain popularity. He commented:

> The wall is still stoutly defended; and most of the courts which accept strict liability without privity as to food still refuse to apply it to [other products] . . . . Of late, however, there has been here and there a breach; the assault goes on apace, and as the nineteen sixties are upon us, it becomes evident that we are to witness a new onslaught . . . the first cracks in the wall were small, and apparently insignificant, when the analogy of food was carried over to something reasonably resembling it . . . .
>
> The last two years have brought no less than seven spectacular decisions, which appear to have thrown the limitation to food onto the ash pile, and to hold that the seller of any product who sells it in a condition dangerous for use is strictly liable . . . .

Id. at 1110-12.

63. KEETON ET AL., *supra* note 42, § 98, at 693. Section 402A revolutionized products liability law and is generally recognized as the framework for strict products liability in jurisdictions throughout the country. *See* FOWLER V. HARPER ET AL., THE LAW OF TORTS § 28.15, at 445 (2d ed. 1986) (recognizing revolutionary effect of section 402A and its adoption by many jurisdictions). Section 402A reads:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

Section 402A contains four requirements. To prevail under section 402A, the plaintiff must show: (1) The defendant is in the business of selling products expected to reach the consumer without substantial change; (2) the product was in defective condition; (3) the product was unreasonably dangerous; and (4) the defect resulted in physical harm.[64] Once these four requirements are met, the defendant is liable regardless of whether he or she took care to prevent the injury.

Surprisingly, although section 402A imposes liability on a defendant without any showing of fault, the California cases which have considered section 402A have found it *too restrictive*.[65] The California courts have disagreed with the limitation placed on the plaintiff's recovery by the second and third prongs of section 402A. Under section 402A's standard, not every defect which causes injury warrants the imposition of strict liability; rather, the plaintiff recovers only when the product is both "defective" *and* "unreasonably dangerous."[66] The California courts decided that requiring a plaintiff to prove both of these prongs was too great a burden,[67] reasoning that the terms "defective" and "unreasonably dangerous" are often synonymous. In effect, the courts held that a defective product necessarily does not meet the expectations of the reasonable consumer; thus, by virtue of its defect, the product is also unreasonably dangerous. Only when the public holds a particular product in low esteem are the terms "defective" and "unreasonably dangerous" not synonymous. In this situation, the reasonable consumer has lower expectations; therefore, although the product is defective, it is not necessarily unreasonably dangerous. The courts, however, wanted to prevent defendants from escaping liability simply because the public

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(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relations with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1984).

64. RESTATEMENT (SECOND) OF TORTS § 402A.

65. See 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 1243, at 679 (9th ed. 1988), which comments that "[t]he terse language of Section 402A is amplified in extensive Comments, and both the section and the Comments are constantly cited by the courts as authoritative statements of the law. . . . On occasion, however, the California Supreme Court has gone beyond the Restatement."

66. *See supra* note 63 and accompanying text.

67. *See* 6 WITKIN, *supra* note 65, § 1248, at 683.

holds their products in low esteem.[68] Thus, to protect the injured plaintiff from this possibility and to alleviate the plaintiff's burden of proving that a product is *both* "defective" and "unreasonably dangerous," the California Supreme Court eliminated the second prong of section 402A.[69] Accordingly, a plaintiff in California must show only that the product which injured him or her was unreasonably dangerous.

3. Breach of the implied warranty of merchantability

Although the implied warranty of merchantability is generally codified under contract law,[70] it originated in tort law; as a result, it has been described as "a freak hybrid born of the illicit intercourse of tort and contract."[71] The warranty is read into every contract for the sale of goods, and requires that the goods sold be merchantable.[72] The underlying assumption is that the parties to the contract would have agreed to such a requirement had they thought of it.[73] It is similar to strict liability

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68. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 425, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233 (1978).

69. These alterations to section 402A were made by the California Supreme Court in two recent cases: Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), and *Barker*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225. Both cases made the same substantive changes to section 402A; the difference between them is merely the type of defect that they addressed.

Products liability doctrines cover three types of product defects: (1) a flaw in the product that was present at the time it was sold, sometimes referred to as a construction defect; (2) a failure of the manufacturer or seller of the product to warn the buyer or user of a hazard related to the product's design; and (3) a defect in the design of the product which results in every unit of that product being defective. KEETON ET AL., *supra* note 42, § 99, at 695. A defect in the duty to warn will only be an issue in cases concerning products in which the manufacturer or seller knew or should have known that the product required some warning, as with a prescription drug. *Id.* § 96, at 688. Hence, this defect is rarely, if ever, an issue in the food arena.

In *Cronin* and *Barker*, the California Supreme Court discussed the other two types of products defects. The plaintiff in *Cronin* was injured when a hasp, a device used to hold bread trays in place in a bread truck, snapped during a collision, causing the trays to strike the plaintiff in the back. *Cronin*, 8 Cal. 3d at 124, 501 P.2d at 1155, 104 Cal. Rptr. at 435. The California Supreme Court held the defendant liable, eliminating the "unreasonably dangerous" requirement of section 402A. *Id.* at 135, 501 P.2d at 1163, 104 Cal. Rptr. at 442. *Barker* followed *Cronin* and extended the rule to design defect cases. *Barker*, 20 Cal. 3d at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233. Consequently, the court broadened the doctrine of strict products liability in California. As discussed *infra* part III.B, however, the *Mexicali Rose* decision ensures that a plaintiff injured by a natural object in food does not benefit from California's more liberal products liability rules as developed in *Cronin* and *Barker*.

70. *See, e.g.*, U.C.C. § 2-314 (1990).

71. Prosser, *supra* note 44, at 1126.

72. *See* U.C.C. § 2-314.

73. Mitchel J. Ezer, *The Impact of the U.C.C. on the California Law of Sales Warranties*, 8 UCLA L. REV. 281, 292 (1961).

because a defendant who breaches the warranty is held liable despite taking the utmost care.[74] The elements required to establish the warranty, however, are based on contract law.[75]

Section 2-314 of the Uniform Commercial Code presents a general framework for the implied warranty of merchantability and has been adopted verbatim by many states, including California.[76] Under this section, three elements must be established for a plaintiff to recover: (1) There must be a sale of goods (as opposed to the performance of a service);[77] (2) the seller must be a "merchant";[78] and (3) the goods sold must be "merchantable."[79] Once the plaintiff establishes these three ele-

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74. HARPER ET AL., *supra* note 63, § 28.15, at 447-53.

75. Prosser, *supra* note 44, at 1126-27.

76. *See* CAL. COM. CODE § 2314 (West 1992). This section reads:

> (1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
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> (2) Goods to be merchantable must be at least such as
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> (a) Pass without objection in the trade under the contract description; and
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> (b) In the case of fungible goods, are of fair average quality with the description; and
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> (c) Are fit for the ordinary purposes for which such goods are used; and
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> (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
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> (e) Are adequately contained, packaged, and labeled as the agreement may require; and
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> (f) Conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (Section 2316) other implied warranties may arise from course of dealing or usage of trade.

Id.

77. *Id.*

78. Both the Uniform Commercial Code and the California Commercial Code define "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

CAL. COM. CODE § 2104(1) (West 1992); U.C.C. § 2-104(1) (1990). The Official Comments which follow this section further define "merchant" as it is used in § 2-314:

> [I]n Section 2-314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant with respect to goods of that kind." Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods.

CAL. COM. CODE § 2104(1); U.C.C. § 2-104(1). The purpose of defining "merchant" in this manner, therefore, seems to be to limit the Code's applicability to those who sell the particular goods as a profession. That is, one who sells cars from a commercial dealership would be a "merchant," while one who simply sells a used car in a private transaction would not.

79. CAL. COM. CODE § 2314.

ments, the defendant is held liable despite taking the utmost care to avoid causing an injury.[80]

III. ANALYSIS

A. The Development of Three Tests to Determine Restaurateurs' Liability

Until 1973, courts had developed two tests to determine whether food was defective or unmerchantable: the foreign-natural test and the

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80. *See* HARPER ET AL., *supra* note 63, § 28.15, at 447-53.

Two other elements of the implied warranty inquiry should be mentioned here to clarify the approach of this Note.

As explained above, when all of the elements of the implied warranty are met, it operates much like the strict liability standard. *See supra* note 74 and accompanying text. Despite this similarity, however, there are two elements of the implied warranty theory which differentiate it from strict liability in tort. Both of these elements, however, have been rendered irrelevant in the context of restaurateur liability. Thus, this Note will examine strict liability and warranty together because they operate almost identically in the vast majority of restaurant cases.

The first element that normally differentiates the implied warranty from strict liability is the requirement that the defendant and plaintiff be in privity with each other. *See* KEETON ET AL., *supra* note 42, § 96, at 681. "Privity" is defined as the "[d]erivative interest founded on, or growing out of, contract, connection or bond of union between parties." BLACK'S LAW DICTIONARY 1199 (6th ed. 1990). Originally privity was construed very strictly and barred the plaintiff's suit unless he or she had directly purchased the product from the defendant. *See* KEETON ET AL., *supra* note 42, § 96, at 681. Recently, however, the privity requirement has been relaxed, allowing more and more plaintiffs to sue manufacturers. *Id.* In food and drug liability cases in California, the privity requirement has been eliminated completely. *See* 3 WITKIN, *supra* note 65, § 106, at 89 (9th ed. 1987) (commenting that privity requirement was eliminated in food and drug arenas mainly because it is common for buyers of these products to buy them for family or guests and that because sellers of food or drug are aware of this fact, it would be unfair to allow them to escape liability simply for lack of technical requirement of privity).

The second factor which differentiates the implied warranty from strict liability is the fact that the defendant seller may, in some instances, disclaim the warranty. *See* REED DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 2.2, at 97-98 n.10 (1951). Such a disclaimer would allow the seller to escape liability, which is impossible under strict liability. *Id.* Again, however, in the food context the issue of disclaimers is virtually irrelevant, for two primary reasons. First, such disclaimers are rarely made. *Id.* Second, both the Uniform Commercial Code and the California Commercial Code set high standards for the viability of such disclaimers, requiring inter alia that they mention "merchantability" and be conspicuous if in writing. *See* CAL. COM. CODE § 2316 (West 1992); U.C.C. § 2-316 (1990). These strict requirements make it unlikely that a disclaimer will be applicable in the restaurant context.

Although these two elements of the implied warranty theory may serve to differentiate it from strict liability in other contexts, they are of little, if any, significance in the area of restaurateur liability: The two theories will almost always operate identically in a plaintiff's suit against a restaurant. *See, e.g.*, Davis v. Wyeth Lab., Inc., 399 F.2d 121, 126 (9th Cir. 1968), which held that, under California law, there was "no error in the District Court's choice to present this case to the jury on warranty rather than on strict liability in tort. The law as emerging is tending toward the latter treatment but under either approach the elements remain the same. The difference is largely one of terminology."

reasonable expectation test.[81] In 1973, however, the Louisiana Court of Appeal in *Loyacano v. Continental Insurance Co.*[82] blended these approaches, creating a third, "hybrid" test.[83] Nonetheless, until the California Supreme Court decided the *Mexicali Rose* case, most states simply applied either the original foreign-natural test[84] or the reasonable expectation test;[85] Louisiana was the only state to apply the hybrid rule which combines the two tests.[86] Now, however, as a result of the California Supreme Court's decision in *Mexicali Rose*, California has become the second state to apply the hybrid test.[87]

This hybrid test was an attempt by the California Supreme Court to remedy the shortcomings of the original *Mix* foreign-natural test.[88] The court realized that the *Mix* rule was too restrictive on injured plaintiffs.[89] Yet while it wanted to broaden a plaintiff's ability to recover, the court also sought to avoid shifting the entire burden of liability to defendant restaurants.[90] The court apparently believed the hybrid test would be an effective way to achieve a balance between these two competing interests. Notwithstanding the court's good intentions, however, the *Mexicali Rose* decision does not achieve its objective: The reasonable expectation test—not the foreign-natural or hybrid tests—is the best way to fairly balance the competing interests at stake in restaurant liability cases.

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81. *See* DICKERSON, *supra* note 80, §§ 4.1-4.3, at 183-90.

82. 283 So. 2d 302 (La. Ct. App. 1973).

83. *Id.* at 305-06. Although the hybrid test was not referred to by the *Loyacano* court as a third test, it does vary from both the foreign-natural or reasonable expectation tests, and thus is treated in this Note as a separate test.

84. *See, e.g.*, Norris v. Pig 'n Whistle Sandwich Shop, Inc., 53 S.E.2d 718 (Ga. Ct. App. 1949); Brown v. Nebiker, 296 N.W. 366 (Iowa 1941); Adams v. Great Atl. & Pac. Tea Co., 112 S.E.2d 92 (N.C. 1960), *overruled by* Goodman v. Wenco Foods, Inc., 423 S.E.2d 444, 450 (N.C. 1992).

85. *See, e.g.*, Johnson v. C.F.M., Inc., 726 F. Supp. 1228 (D. Kan. 1989); Hong v. Marriott Corp., 656 F. Supp. 445 (D. Md. 1987); Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974); Carl v. Dixie Co., 467 So. 2d 960 (Ala. Civ. App. 1985); Hochberg v. O'Donnell's Restaurant, Inc., 272 A.2d 846 (D.C. 1971); Zabner v. Howard Johnson's, Inc., 201 So. 2d 824 (Fla. Dist. Ct. App. 1967); Phillips v. Town of West Springfield, 540 N.E.2d 1331 (Mass. 1989); Stark v. Chock Full O'Nuts, 356 N.Y.S.2d 403 (1974); Thompson v. Lawson Milk Co., 356 N.E.2d 309 (Ohio Ct. App. 1976); Williams v. Braum Ice Cream Stores, Inc., 534 P.2d 700 (Okla. Ct. App. 1974); Jeffries v. Clark's Restaurant Enters., 580 P.2d 1103 (Wash. Ct. App. 1978); Betehia v. Cape Cod Corp., 103 N.W.2d 64 (Wis. 1960).

86. *See* Title v. Pontchartrain Hotel, 449 So. 2d 677 (La. Ct. App. 1984); Loyacano v. Continental Ins. Co., 283 So. 2d 302 (La. Ct. App. 1973); Musso v. Picadilly Cafeterias, Inc., 178 So. 2d 421 (La. Ct. App. 1964).

87. *See Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156.

88. *See id.* at 629-31, 822 P.2d at 1300-02, 4 Cal. Rptr. 2d at 153-55.

89. *See id.* at 629, 822 P.2d at 1300, 4 Cal. Rptr. 2d at 153.

90. *See id.* at 630-31, 822 P.2d at 1301-02, 4 Cal. Rptr. 2d at 154-55.

1. The foreign-natural test

The foreign-natural test, developed by the California Supreme Court in *Mix v. Ingersoll Candy Co.*,[91] looks to the origin of the injury-causing object to determine whether the food containing the object is defective or unmerchantable.[92] In *Mix*, the plaintiff was injured when he swallowed a piece of chicken bone while eating a chicken pot pie in defendant's restaurant.[93] The court denied him recovery, holding that, as a matter of law, the chicken pie was not unfit for consumption.[94] The court's rationale was that a consumer cannot expect to be served a perfect meal, but rather, one "reasonably fit" for consumption.[95] This belief, coupled with the court's finding that it is common knowledge that chicken pot pies occasionally contain chicken bones, led the court to conclude that consumers should expect to occasionally find natural objects in their food.[96] Under the *Mix* rule, then, the only way for the plaintiff to recover under *any theory* is to show that a foreign substance caused the injury.[97]

After *Mix*, courts in several states adopted the foreign-natural test.[98] The support initially enjoyed by the foreign-natural test, however, has waned in recent years. Even in *Mix*, the California Supreme Court stated in dicta that its holding was based partly on its consideration of a consumer's expectations when buying food.[99] Thus, although *Mix* established the foreign-natural test, it actually used the language of the

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91. 6 Cal. 2d 674, 59 P.2d 144 (1936), *overruled by* Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

92. *Id.* at 682, 59 P.2d at 148.

93. *Id.* at 676, 59 P.2d at 145.

94. *Id.* at 682, 59 P.2d at 148.

95. *Id.*

96. *See id.* at 682-83, 59 P.2d at 148.

97. *See id.* In *Mix*, the court denied the plaintiff recovery under both negligence and implied warranty. In analyzing the implied warranty claim, the court commented that "we are of the opinion that despite the fact that a chicken bone may occasionally be encountered in a chicken pie, such chicken pie, in the absence of some further defect, is reasonably fit for human consumption." *Id.* at 682, 59 P.2d at 148. The court's comments in rejecting the plaintiff's negligence claim, however, addressed the duty of care of the defendant:

> [We believe it is] a question of whether or not a restaurant keeper in the exercise of due care is required to serve in every instance a perfect chicken pie. . . . If the customer has no right to expect such a perfect product, and we think he is not so entitled, then it cannot be said that it was negligence on the part of the restaurant keeper to fail to furnish an entirely boneless chicken pie.

Id. at 683, 59 P.2d at 148.

98. *See supra* note 84 and accompanying text.

99. *Mix*, 6 Cal. 2d at 682, 59 P.2d at 148 ("Bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to *anticipate* and be on his guard against the presence of such bones." (emphasis added)).

reasonable expectation test. Five years later, the Iowa Supreme Court duplicated this reasoning in *Brown v. Nebiker*.[100]

In *Brown*, the court denied recovery to the estate of an individual who died from injuries caused by a bone in a pork chop.[101] Basing its decision on the foreign-natural distinction,[102] the court nonetheless mentioned that its holding was based in part on the fact that such bones are to be expected.[103] Thus, dicta in both *Mix* and *Brown* indicate that even at the inception of the foreign-natural test, the courts recognized that a consumer's expectations should play a substantial role in determining the defendant's liability.

Perhaps the courts' uneasiness with the foreign-natural distinction stems from the fact that it has many inherent defects. For example, the test—although seemingly simple to apply—actually provides courts with little guidance in deciding cases. Once a court determines that it will apply the foreign-natural test, the next inquiry is whether the object in question is foreign or natural.[104] This only leads to the further question of how to define "foreign" and "natural." Often the answer is obvious, as when a plaintiff eating a chicken enchilada is injured by a chicken bone. There will be many instances, however, when it is not so simple to determine whether the object is natural to the food.[105] Thus, although the foreign-natural distinction initially appears to be a bright-line rule, in reality it only shifts the controversy to an inquiry into what is foreign and what is natural.

The majority opinion in *Mexicali Rose* attempted to remedy this problem by adding a qualifier when it stated that "the term 'natural' refers to bones and other substances natural to the product served, and does not encompass substances such as mold, botulinous bacteria or

100. 296 N.W. 366 (Iowa 1941).

101. *Id.* at 371.

102. *Id.* The decedent was attending a sales representatives' meeting in the Blue Room of the Iowana Hotel in Creston, Iowa. *Id.* at 367-68. He did not order the pork chop personally, as the menu was prearranged by the organizer of the meeting. *Id.* The pork chop was served breaded. *Id.*

103. *Id.* at 371 (stating that "[o]ne who eats pork chops . . . or the type of meat that bones are natural to, ought to *anticipate* and be on his guard against the presence of bones, which he knows will be there").

104. *See Mexicali Rose*, 1 Cal. 4th at 645 n.1, 822 P.2d at 1311 n.1, 4 Cal. Rptr. 2d at 164 n.1 (Arabian, J., dissenting).

105. For example, as Justice Mosk notes in his dissenting opinion in *Mexicali Rose*, salmonella and rat flesh are both natural substances, but surely their presence would render a food product unfit for consumption. *Id.* at 635, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157 (Mosk, J., dissenting). Or consider a seafood stew which contains various types of shellfish, but which does not contain crab, when the plaintiff is injured by a crabshell. Is that shell to be considered natural or foreign to the food?

other substances (like rat flesh or cow eyes) not natural to the *preparation* of the product served."[106] This statement, however, clarified nothing because the court did not define what substances or categories of substances are "natural to the preparation" of food.[107] Thus, the court's definition of what is a natural object only complicates the work of the trial courts. Now, rather than inquiring whether the object in question was foreign or natural to the food, courts must ask whether the object was foreign or "natural to the preparation" of the food. Courts will be at least as confused as they were before *Mexicali Rose*.

This on-going confusion is illustrated by the recent case of *Kilpatrick v. Superior Court*,[108] the only published opinion which has applied the *Mexicali Rose* rule to date. In *Kilpatrick*, the plaintiff became severely ill after eating raw oysters ordered from a hotel's room service.[109] His illness was later determined to have resulted from a bacterium in the oysters, *vibrio cholerae*.[110] According to the court, *vibrio cholerae* is a bacterium inherent in all oysters: Oysters feed by filtering water through themselves, resulting in a buildup of *vibrio cholerae*.[111]

The trial court decided the case prior to the *Mexicali Rose* decision. It held that since the plaintiff ate the oysters raw—in their natural state—he could not sue in either strict liability or implied warranty.[112] The appellate court heard the case after *Mexicali Rose* and reversed the trial court's decision, holding explicitly that "[v]ibrio cholerae is a foreign substance to raw oysters."[113] The court, however, did not explain how it reached that conclusion. Although it mentioned that *Mexicali Rose* changed the standard from "natural" to "natural to the preparation" of the food, it found that this new definition provided no real guidance.[114]

This case, therefore, illustrates the problems created by the foreign-natural rule—problems which the *Mexicali Rose* rule does nothing to

106. *Id.* at 630 n.5, 822 P.2d at 1304 n.5, 4 Cal. Rptr. 2d at 157 n.5.

107. *See id.* at 645 n.1, 822 P.2d at 1311 n.1, 4 Cal. Rptr. 2d at 164 n.1 (Arabian, J., dissenting). Indeed, the only thing that the *Mexicali Rose* explanation really clarifies is that the substances it explicitly lists—mold, botulinous bacteria, rat flesh and cow eyes—are not to be considered natural substances. *Id.* at 630 n.5, 822 P.2d at 1304 n.5, 4 Cal. Rptr. 2d at 157 n.5. This, however, is not much of a revelation.

108. 8 Cal. App. 4th 1717, 11 Cal. Rptr. 2d 323 (1992).

109. *Id.* at 1719, 11 Cal. Rptr. 2d at 324.

110. *Id.* at 1720, 11 Cal. Rptr. 2d at 324.

111. *Id.* The bacteria continue to grow under refrigeration, but their growth is slowed if the oysters are refrigerated at a proper temperature. *Id.*

112. *Id.* at 1725, 11 Cal. Rptr. 2d at 328.

113. *Id.*, 11 Cal. Rptr. 2d at 327.

114. *Id.*

remedy. As they did in *Kilpatrick*, parties in future cases will litigate the issue of whether the injury-producing substance is foreign or "natural to the preparation" of the food. And, as in *Kilpatrick*, the lower courts will be forced to guess blindly because the *Mexicali Rose* court offered no guidance.[115]

The difficulty courts will face in determining whether an object is foreign or natural leads to another, related problem: The foreign-natural test results in inconsistent verdicts.[116] The subjective nature of the foreign or natural inquiry can cause two courts to reach different verdicts under similar sets of facts, simply because one of the courts characterized the object as foreign and the other decided that it was natural. For example, in *Shapiro v. Hotel Statler Corp.*,[117] the plaintiff was eating Hot Barquette of Seafood Mornay[118] when a fish bone lodged in his throat.[119] He sustained serious injuries and subsequently sued the hotel under an implied warranty theory. The court denied him recovery, however, because it determined that the bone was a natural object.[120] In *Lore v. De Simone Bros.*,[121] by contrast, the plaintiff was injured by a bone fragment in a piece of salami.[122] Finding this piece of bone to be a foreign object, the court allowed the plaintiff to recover for her injuries.[123] The *Lore* court distinguished the other "bone in food" cases by pointing out that salami is a processed form of meat, and therefore a piece of bone is less expected.[124] This distinction is not very convincing, however, because most food served in restaurants, including the Hot Barquette of Seafood

115. This definitional void left by the *Mexicali Rose* court will become especially important in the near future, when the flood of litigation resulting from the Jack-in-the-Box/*E. coli* bacteria cases enters the courts. The courts will have to decide whether *E. coli* is foreign or "natural to the preparation" of the food. On the one hand, the bacteria appear to be natural since they regularly live in the digestive tract of warm-blooded animals, particularly cattle. Daniel P. Puzo, *How Much More Tainted Hamburger Meat?*, L.A. TIMES, Apr. 22, 1993, at H29. On the other hand, the courts may choose to analogize to *Kilpatrick*, since both *E. coli* and *vibrio cholerae* are bacteria which live in their carriers. *See id.*; *Kilpatrick*, 8 Cal. App. 4th at 1720, 11 Cal. Rptr. 2d at 324. In any case, the underlying point is that these *E. coli* cases, and all future tainted-food cases in California, will revolve around the issue of whether the substance was foreign or "natural to the preparation" of the food.

116. *See* Mojica, *supra* note 7, at 398-99.

117. 132 F. Supp. 891 (S.D. Cal. 1955).

118. Hot Barquette of Seafood Mornay is a combination of several fishes in a cream sauce. *Id.* at 891.

119. *Id.* at 892.

120. *Id.* at 893.

121. 172 N.Y.S.2d 829 (1958).

122. *Id.* at 831.

123. *Id.*

124. *Id.* Although this may sound like a reasonable expectation test analysis, the court relied on cases which had applied the foreign-natural test in reaching its decision. *Id.*

Mornay in *Shapiro*, is processed to some degree.[125] Since that justification fails, one must conclude that the *Lore* court's underlying reasoning was that the plaintiff did not expect such a large bone fragment in her salami. Therefore, if the court truly had applied the foreign-natural test without considering the plaintiff's expectations, it should have concluded that the plaintiff could not recover. A bone in salami is perhaps one of the clearest possible examples of a natural object in food. The court turned the test on its head, however, finding the bone to be a foreign object.[126] This is similar to what occurred in the California *Kilpatrick* decision. Although the court held *vibrio cholerae* to be a foreign substance, many people would likely disagree. Intuitively it seems that a substance inherent in an animal by virtue of its eating habits is a "natural" substance. The fact that the *Kilpatrick* court concluded that it was foreign demonstrates the malleability of the foreign-natural and *Mexicali Rose* tests and the potential injustices which may result from them.

Besides leading to inconsistent verdicts, the issue of food processing in *Shapiro* and *Lore* leads to another problem inherent in the foreign-natural test. By inquiring whether the injury-causing object was foreign or natural, the test focuses on the origin of the object rather than on the condition of the food as served.[127] This focus might be appropriate if the food were served in the same condition in which the restaurant received it—generally, raw and unprocessed—but more often than not this is not the case.[128] Thus, to look at whether the injury-causing object was foreign or natural is to ignore all of the various processes which the food undergoes before it is served.

Because the likelihood of an injurious object in food is reduced by the amount of processing that food undergoes, focusing on the object's origin is improper.[129] For example, the likelihood of finding bones in a chicken wing is obviously greater than finding them in a chicken fillet. It is unreasonable to ignore this significant difference when deciding whether plaintiffs injured in these situations can recover. The foreign-natural test, however, refuses to take this factor into account, denying recovery to plaintiffs in both situations because the bone is a natural ob-

125. *Shapiro*, 132 F. Supp. at 892.

126. *Lore*, 172 N.Y.S.2d at 831.

127. *See Ex parte* Morrison's Cafeteria of Montgomery, Inc., 431 So. 2d 975, 978 (Ala. 1983); O'Dell v. DeJean's Packing Co., 585 P.2d 399, 402 (Okla. Ct. App. 1978); Betehia v. Cape Cod Corp., 103 N.W.2d 64, 67-69 (Wis. 1960).

128. *See* Hochberg v. O'Donnell's Restaurant, Inc., 272 A.2d 846, 848-49 (D.C. 1971).

129. *See id.*

ject.[130] The only chance for a plaintiff injured by such a natural object under the foreign-natural test, therefore, is to garner the sympathy of the court as the plaintiffs in *Lore* and *Kilpatrick* apparently did.

2. The *Mexicali Rose* hybrid test

At first, it appears that the *Mexicali Rose* court recognized at least some of the flaws of the foreign-natural test[131] because it explicitly rejected the test in its opinion. Upon closer inspection, however, it is obvious that the test which the court adopted is more an affirmation than a rejection of the foreign-natural test. This test is *not*, as the court asserted, the reasonable expectation test, but rather is a strange hybrid test which, in practice, is very similar to the original foreign-natural test created in *Mix*.

This *Mexicali Rose* formulation is not so much a new test as it is a combination of the other two.[132] It consists of a two-step inquiry.[133] First, the court determines whether the injury-producing substance is foreign or natural to the food. If the harmful substance is foreign, the defendant is held strictly liable and no further analysis is required.[134] In this respect this test is no different from the original *Mix* foreign-natural rule.[135] If, however, the substance is found to be natural to the food, the analysis proceeds to the second step. It is at this second step that the hybrid rule varies slightly from the *Mix* analysis. If the substance is natural to the food, this test allows the plaintiff to bring a negligence cause of action rather than barring his or her recovery completely as the *Mix* rule did.[136]

Although this test only slightly modifies the original foreign-natural rule, the *Mexicali Rose* court apparently believed that it was adopting the reasonable expectation test when it stated this two-part rule.[137] The court commented: "[W]e agree with plaintiff that a 'reasonable expectation' test is applicable in this context and, in part at least, is consistent

130. *See id.*; *see also* Zabner v. Howard Johnson's Inc., 201 So. 2d 824, 828 (Fla. Dist. Ct. App. 1967) (commenting that court's inquiry must be into "what the consumer might reasonably expect to find in the food as served and not what might be natural to the ingredients . . . prior to preparation").

131. *See supra* part III.A.1.

132. Indeed, this third variation has never been formally recognized in any opinion as a third test. Because it does vary from both the original foreign-natural test formulated in *Mix* and the reasonable expectation test, however, it is treated here as a separate test.

133. *See Mexicali Rose*, 1 Cal. 4th at 630-31, 822 P.2d at 1301-02, 4 Cal. Rptr. 2d at 154-55.

134. *Id.*

135. *Id.* at 626, 822 P.2d at 1298, 4 Cal. Rptr. 2d at 151.

136. *Id.* at 630-31, 822 P.2d at 1301-02, 4 Cal. Rptr. 2d at 154-55.

137. *Id.* at 633, 822 P.2d at 1303-04, 4 Cal. Rptr. 2d at 156-57.

with the development of tort law in our jurisdiction. Accordingly, we adopt that test as our own."[138]

Contrary to this statement, however, the court perpetuated the foreign-natural distinction by making the first inquiry in the hybrid test whether the object is foreign or natural.[139] As a result, the hybrid rule is destined to suffer from all of the shortcomings that plague the foreign-natural distinction. Moreover, the *Mexicali Rose* hybrid test will be even more problematic than the original foreign-natural test because it also suffers from flaws of its own.

The first of these flaws is a practical one. The hybrid test is an anomaly, virtually unsupported by case law. The court did not provide a sound basis for its decision; there was little support or analysis offered and the court seemed to adopt this test out of thin air.[140] First, the court claimed that "[m]any cases" in "several courts" have adopted this hybrid rule.[141] However, these "many cases" are actually only three, and the "several courts" are all in Louisiana.[142] Nevertheless, the court relied heavily on these three cases, and ultimately adopted the rule that they created.[143] The first of these cases is *Musso v. Picadilly Cafeterias, Inc.*[144] In *Musso*, the court followed the original foreign-natural test and explicitly rejected the reasonable expectation test; nonetheless, it allowed plaintiffs to pursue negligence claims if they had been injured by natural objects.[145] The practical effect of the *Musso* holding, then, is no different than the rule of *Mexicali Rose* because the tests which both courts adopted are based on the distinction between foreign and natural objects and not on a consumer's reasonable expectations.

The second Louisiana case was *Loyacano v. Continental Insurance Co.*[146] In *Loyacano*, the court took *Musso* one step further and created the test which the *Mexicali Rose* court adopted: The court first determined whether the object was foreign or natural, and then applied the

138. *Id.* at 621, 822 P.2d at 1294, 4 Cal. Rptr. 2d at 147.

139. *Id.* at 633, 822 P.2d at 1303-04, 4 Cal. Rptr. 2d at 156-57.

140. *Id.* at 639, 822 P.2d at 1307, 4 Cal. Rptr. 2d at 160 (Mosk, J., dissenting) (commenting that "[w]ithout any particular effort at analysis, the court has put its approval on [the hybrid test] for injuries caused by food").

141. *Id.* at 626, 822 P.2d at 1298, 4 Cal. Rptr. 2d at 151 ("Many cases adopting a 'reasonable expectation' test, however, did not reject completely the foreign-natural test when the injury was caused by a substance natural to the food served. Rather, several courts have retained the foreign-natural distinction in applying the 'reasonable expectation' test.").

142. *See id.* at 639-40, 822 P.2d at 1307-08, 4 Cal. Rptr. 2d at 160-61 (Mosk, J., dissenting).

143. *See id.* at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156.

144. 178 So. 2d 421 (La. Ct. App. 1965).

145. *Id.* at 427.

146. 283 So. 2d 302 (La. Ct. App. 1973).

reasonable expectation test only if the object was natural.[147] Similarly, the third Louisiana case, *Title v. Pontchartrain Hotel*,[148] simply adopted the reasoning of *Musso* and *Loyacano*.[149] Despite its analysis of these cases, the *Mexicali Rose* court did not explain why it was willing to become the first court outside of Louisiana to adopt this rule. In fact, the only comment that it offered for its adoption of the hybrid test was that it was "the trend developing in courts recently."[150] There is, however, no trend outside of California or Louisiana that supports the hybrid test.[151]

The second major flaw of the hybrid test is that it is based on a faulty presumption: All natural objects are to be expected and therefore do not render the food unfit for consumption as a matter of law.[152] Because the food is not unfit, the court reasoned, plaintiffs injured by natural objects can only sue under a negligence theory.[153] This is not a reasonable conclusion.

When food contains an object, whether foreign or natural, the question of whether that food has been rendered unfit for consumption should not be decided as a matter of law. There are simply too many factual considerations, such as the size of the object, the type of food it was in, and the conditions in the kitchen, that must be resolved. These are properly considerations for a jury, not a judge.[154] Yet, by deciding as a mat-

147. *Id.* at 305-06.

148. 449 So. 2d 677 (La. Ct. App. 1984).

149. *Id.* at 680.

150. *Mexicali Rose*, 1 Cal. 4th at 630, 822 P.2d at 1301, 4 Cal. Rptr. 2d at 154.

151. In fact, only two other cases outside of Louisiana have even cited to *Musso*, *Loyacano*, or *Title*. *See id.* at 640, 822 P.2d at 1308, 4 Cal. Rptr. 2d at 161 (Mosk, J., dissenting). The first of these was Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974), which only cited to *Loyacano* as "an example of the confusion which adherence to the foreign-natural distinction can create." *Id.* at 1065-66. The second case was Evart v. Suli, 211 Cal. App. 3d 605, 259 Cal. Rptr. 535 (1989), a California case. In *Evart*, however, the court made no suggestion that the plaintiff injured by a natural object should be limited to proving negligence. *Id.*

In addition, the court singled out one other case which it heavily relied on, *Ex parte* Morrison's Cafeteria of Montgomery, Inc., 431 So. 2d 975 (Ala. 1983). This case, however, neither cites the line of Louisiana cases, nor applies the two-step hybrid test. *See id.* at 978-79. Rather, *Morrison's Cafeteria* is simply a case which applies the reasonable expectation test. *See id.*

152. Hence the test bars plaintiffs injured by these natural objects from recovering under strict liability or implied warranty. *See supra* notes 96-97 and accompanying text. A discussion of strict liability and implied warranty as viable and, indeed, necessary theories of recovery for those plaintiffs appears *infra* part III.B.

153. *See Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303-04, 4 Cal. Rptr. 2d at 156-57.

154. *See id.*; *see also, e.g.*, Hochberg v. O'Donnell's Restaurant, Inc., 272 A.2d 846, 849 (D.C. 1971) ("We think the question of what appellant was reasonably justified in expecting was properly a jury question here."); Jim Dandy Fast Foods, Inc. v. Carpenter, 535 S.W.2d 786, 791 (Tex. Civ. App. 1976) ("Reasonable persons might also differ as to whether the piece

ter of law that a plaintiff injured by a natural object can only sue in negligence, the *Mexicali Rose* court took these issues from the jury. In effect, the court has decided that because the object was natural, the dish was fit for consumption.[155]

It is far too simplistic, however, to equate natural objects with fit food.[156] A natural object can have just as much, or perhaps more, deleterious effect on food and the person who eats it as a foreign object does. For example, sand is a foreign item in spinach, but because it is commonly found there, it is doubtful that many people would consider the spinach to be defective or unmerchantable. On the other hand, a cow's eye or a chicken's beak are natural to beef and chicken respectively, but most people would probably agree that these items render the food unfit for consumption.[157] Although the reasonable expectation test recognizes these facts, the *Mexicali Rose* hybrid test fails to consider this disparity due to its blind application of the foreign-natural distinction.

3. The reasonable expectation test

The reasonable expectation test is empirically more flexible than the foreign-natural and hybrid tests. It does not rely solely on the nature of the injury-causing object in determining the defendant's liability, but rather asks whether a reasonable person could have anticipated the object encountered in the food.[158] Thus, unlike the other two tests, the reasonable expectation test allows courts to engage in case-by-case evaluations of liability rather than forcing them to apply an inflexible, absolute rule. The reasonable expectation test evolved gradually, as courts struggled to avoid harsh results under the foreign-natural test.

The first case to actually stray from the foreign-natural distinction was *Bonenberger v. Pittsburgh Mercantile Co.*[159] In *Bonenberger*, the

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of chicken in which this particular bone was found was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it . . . [a] jury question was presented.").

155. *Mexicali Rose*, 1 Cal. 4th at 634, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157 (Mosk, J., dissenting).

156. *Id.* at 638, 822 P.2d at 1306-07, 4 Cal. Rptr. 2d at 159-60 (Mosk, J., dissenting). This is especially true in light of the difficulties in determining what is foreign and what is natural to food, discussed *supra* notes 104-15 and accompanying text.

157. *See Mexicali Rose*, 1 Cal. 4th at 635, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157 (Mosk, J., dissenting). The *Mexicali Rose* majority opinion tries to eliminate these sorts of items from the list of natural objects by limiting its holding to objects "natural to the preparation" of the food. As discussed above, however, this qualifier clarifies nothing; defense attorneys will still argue that objects such as these are "natural" to the food served. *See supra* notes 104-15 and accompanying text.

158. *See* DICKERSON, *supra* note 80, § 4.3, at 185.

159. 28 A.2d 913 (Pa. 1942).

Pennsylvania Supreme Court overturned a directed verdict for the defendant and remanded the case to the trial court for a determination of whether a piece of shell in canned oysters made them unmerchantable.[160] The court did not actually base its decision on the reasonable expectation test or even discuss it.[161] Instead, it spent most of its analysis discussing the implied warranty of merchantability.[162] In any event, the court refused to apply the foreign-natural test, as the court would have denied the plaintiff recovery had it followed that test.

The first case to explicitly adopt the reasonable expectation test in lieu of the foreign-natural test was *Wood v. Waldorf System, Inc.*[163] In *Wood*, the plaintiff was eating chicken soup when a bone became lodged in his throat.[164] The court stated that its decision was properly based on whether one could ordinarily expect to find the bone in chicken soup, not on whether the bone was foreign or natural.[165] From these beginnings the reasonable expectation test has gained popularity and is currently the majority rule.[166]

One of the advantages of the reasonable expectation test is that it focuses not on whether the injury-causing object was foreign or natural, but rather on whether the reasonable consumer would have expected to encounter the object in the food.[167] As a result, the reasonable expectation test is much more flexible than the other two tests because the outcome of the case is not necessarily decided once the origin of the injury-causing object is ascertained.

This is not to say, of course, that the distinction between foreign and natural objects is irrelevant. On the contrary, the origin of the injury-causing object plays an important role in determining whether the plaintiff should have expected to find it in his or her food. Yet, as is illustrated by the "sand in the spinach" example above, it should not be the sole determinant.[168] There are many situations in which the origin of the offensive object is no more decisive than any other factor in determining the plaintiff's reasonable expectations. For example, if sand were found in spinach, it would be important to know whether the spinach was served raw, as in a salad, or cooked, perhaps by boiling. It would be of

160. *Id.* at 915.
161. *See id.*
162. *Id.* at 913-14.
163. 83 A.2d 90 (R.I. 1951).
164. *Id.* at 92.
165. *Id.* at 93.
166. *See* Jackson v. Nestle-Beich, Inc., 569 N.E.2d 1119, 1121 (Ill. App. Ct. 1991).
167. *See* DICKERSON, *supra* note 80, § 4.3, at 185.
168. *See supra* notes 156-57 and accompanying text.

equal importance to know the type of restaurant involved, the reputation of the restaurant, and various other facts. Thus, both the nature of the object and how the food was prepared should merely be factors in considering the broader question of whether the plaintiff should have expected to find sand in his or her spinach.[169] As the Wisconsin Supreme Court commented in *Betehia v. Cape Cod Corp.*,[170]

> Categorizing a substance as foreign or natural may have some importance in determining the degree of negligence of the processor of food, but it is not determinative of what is unfit or harmful in fact for human consumption. A bone natural to the meat can cause as much harm as a foreign substance such as a pebble, piece of wire, or glass. All are indigestible and likely to cause injury. Naturalness 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.[171]

Perhaps the reason the California Supreme Court failed to consider the issue from this perspective is that when an object is foreign, the food is almost certainly defective and unmerchantable, and the *Mexicali Rose* court was correct in so holding.[172] It does not follow from this analysis, however, that if the object is *not* foreign, then the food is *not* defective and unmerchantable. This is the problem inherent in the foreign-natural and hybrid tests: They fail to recognize that a natural object can also render food defective or unmerchantable, and therefore they also fail to permit an injured consumer to recover based on strict or implied warranty liability. This problem is remedied, however, when the foreign-natural question becomes one of many factors in the overall analysis—as it does in the reasonable expectation test.

A second advantage the reasonable expectation test offers is that it focuses on the final product served to the customer. As discussed above, a flaw in the foreign-natural and hybrid tests is that in basing the plain-

169. *See* Betehia v. Cape Cod Corp., 103 N.W.2d 64, 67 (Wis. 1960).

170. 103 N.W.2d 64 (Wis. 1960).

171. *Id.* at 67. *See also* Hochberg v. O'Donnell's Restaurant, Inc., 272 A.2d 846, 849 (D.C. 1971) ("Because a substance is natural to a product in one stage of preparation does not mean necessarily that it will be reasonably anticipated by the consumer in the final product served."); O'Dell v. DeJean's Packing Co., 585 P.2d 399, 402 (Okla. Ct. App. 1978) (The foreign-natural test "assumes *all substances* which are natural to the food are anticipated .... Naturalness of substance can only be important in determining whether a consumer would anticipate or expect to find the substance in the food.").

172. *See Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303-04, 4 Cal. Rptr. 2d at 156-57. There are limited exceptions, such as preservative packets in certain foods or cotton swabs in vitamin jars.

tiff's recovery on whether the injury causing object was foreign or natural, those tests focus on the food as it arrived at the restaurant, rather than on its condition when it is served to the plaintiff.[173] Focusing on the final product, however, considers the expectations of the consumer when he or she sits down to eat the meal.[174] As the Oklahoma Court of Appeals noted in *O'Dell v. DeJeans Packing Co.*,[175] it is patently ridiculous to compare a piece of whole fish, which will obviously contain bones, with breaded fish sticks, which have been through several stages of processing.[176] The foreign-natural and hybrid tests, however, will treat them the same, since in both types of fish the bones are natural objects. Conversely, the reasonable expectation test will adjust to each of these situations, recognizing that it is less reasonable to find bones in the processed fish.[177] Thus, the reasonable expectation test leads to the fairer result.

The final and perhaps most important reason to favor the reasonable expectation test is that, of the three tests, it is best suited to balancing the competing public policy concerns presented by restaurant liability cases. Because it evaluates each case on its individual facts, the test only holds liable those defendants who have failed to meet consumers' reasonable expectations, and thus compensates only those plaintiffs whose reasonable expectations have not been met.

The foreign-natural and hybrid tests, however, ignore these policy concerns. Neither of those tests, for example, encourages defendant restaurateurs to exercise greater care in making their food. By holding the restaurateurs liable only when the plaintiff was injured by a foreign object, the courts send a mixed message: A restaurant must, at all costs, avoid serving food which contains foreign objects, but on the other hand its food may contain all forms of natural objects, and still meet the legal

173. *See supra* parts III.A.1 and III.A.2.

174. *See* Matthews v. Campbell Soup Co., 380 F. Supp. 1061, 1065 (S.D. Tex. 1974) ("[T]he only way of avoiding misapplication . . . is to focus on what the consumer might reasonably expect to find in the final product."); *Ex parte* Morrison's Cafeteria of Montgomery, Inc., 431 So. 2d 975, 978 (Ala. 1983) ("The undesirability of the foreign substance test lies in the artificial application at the initial stage of processing the food without consideration of the expectations of the consumer in the final product served."); *Hochberg*, 272 A.2d at 848-49 (commenting that under modern restaurant procedures, "a substance . . . natural to a product in one stage of preparation does not mean necessarily that it will be reasonably anticipated by the consumer in the final product served"); Zabner v. Howard Johnson's, Inc., 201 So. 2d 824, 828 (Fla. Dist. Ct. App. 1967) (noting that the focus "must be [ ] on what the consumer might reasonably expect to find in the food as served and not on what might be natural to the ingredients . . . prior to preparation").

175. 585 P.2d 399 (Okla. Ct. App. 1978).

176. *Id.* at 402.

177. *Id.*

standard for fitness for consumption.[178] Such an ambiguous message does nothing to encourage restaurants to eliminate risks. It would be much easier and more effective to tell the restaurants that they must always meet the expectations of the consumer: that the restaurant is serving reasonably risk-free food products.

The tort system is also concerned with compensating plaintiffs for their injuries.[179] The foreign-natural and hybrid tests, however, quash this goal by denying compensation to persons unless they are injured by foreign objects. As a result, these tests ignore the simple fact that a plaintiff can easily suffer a similar or even worse injury from a natural object than from a foreign one.[180] This is not to say that all injured plaintiffs should always recover, but rather that the line between those who recover and those who do not should not be drawn at the foreign-natural distinction. The reasonable expectation test easily remedies this situation, as its entire point is to award recoveries only to those plaintiffs injured by unexpected objects.[181]

B. Plaintiffs Injured by Unexpected Natural Objects Should Be Able to Recover Under Strict Liability and Implied Warranty Theories

The problems with the *Mexicali Rose* approach do not end when a court determines whether the object is foreign or natural. Once that issue is decided, the court must determine under which theory(ies) of recovery—strict liability, implied warranty, or negligence—the plaintiff can recover. The *Mexicali Rose* court allowed the nature of the injury-causing object to determine the plaintiff's theory of recovery. If, instead, all distinctions between foreign and natural injury-causing objects were eliminated, all plaintiffs whose reasonable expectations have been vio-

178. *See* Charles R. Janes, *Products Liability—The Test of Consumer Expectation for "Natural" Defects in Food Products*, 37 OHIO ST. L.J. 634, 649 (1976).

179. KEETON ET AL., *supra* note 42, § 1, at 6.

180. *See, e.g.*, *Ex parte* Morrison's Cafeteria of Montgomery, Inc., 431 So. 2d 975, 978 (Ala. 1983) ("It is entirely possible that a natural substance found in processed food may be more indigestible and cause more injury than many 'foreign' substances."); Zabner v. Howard Johnson's, Inc., 201 So. 2d 824, 826 (Fla. Dist. Ct. App. 1967) ("A nutshell natural to nut meat can cause as much harm as a foreign substance, such as a pebble, piece of wire or glass."); *O'Dell*, 585 P.2d at 402 ("Oftentimes, extensive damage and even death is caused by a substance in the prepared food that is 'natural' to the food item in its *original state*. Thus, there seems little logic in the 'foreign-natural' test.").

181. *See Mexicali Rose*, 1 Cal. 4th at 643, 822 P.2d at 1310, 4 Cal. Rptr. 2d at 163 (Mosk, J., dissenting) ("It is theoretically possible to determine that a flaw in food does not render the food unfit as a matter of law, but this is so not because the offending object is natural to the dish, but because any reasonable consumer would anticipate the problem.").

lated could simply recover under any of the three theories of products liability: strict liability, implied warranty, or negligence.[182]

In effect, the *Mexicali Rose* rule will allow a plaintiff only mildly injured by a piece of glass to recover, while denying recovery to a plaintiff severely injured by a bone.[183] Basing a plaintiff's theory of recovery on the type of object which injured him or her, as this rule does, defies many public policy concerns.[184] Moreover, the case law in this area reveals that food servers have historically been held to very high standards.[185] Finally, an analysis of the elements of the implied warranty and strict liability theories in California shows that an injury incurred from objects in food creates a cause of action under both theories, regardless of the nature of the injury-causing object.[186]

1. Public policy reasons supporting use of strict liability and implied warranty theories for natural-object injuries

At common law, sellers of food were always held to higher standards than sellers of other products, primarily because food is ingested and can very directly affect one's health.[187] In light of this fact, the *Mexicali Rose* decision seems an especially odd one. California has historically been a leader in the products liability area, especially in the area of strict products liability.[188] It has traditionally sought to compensate the injured plaintiff by holding the defendant who sells or manufactures a

182. Although this Note treats them separately, the "theory of recovery" debate and the "foreign-natural/hybrid/reasonable expectation" debate are not completely separate issues; indeed, they are interwoven. Which theories of recovery are available to a plaintiff is a direct result of whether the foreign-natural, hybrid, or reasonable expectation test is applied. The focus of this Note, of course, is to eliminate this interplay between the two issues by allowing all plaintiffs whose reasonable expectations have been violated to recover under any of the three theories.

183. See *Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156, where the court states its holding:

> If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature. . . . A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory.
>
> If the injury causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability . . . .

Id.

184. *See infra* part III.B.1.

185. Prosser, *supra* note 44, at 1103.

186. *See infra* part III.B.2.

187. Prosser, *supra* note 44, at 1103.

188. *See supra* part II.B.2.

product to a very stringent standard.[189] Indeed, California was the first state to impose a tort theory of strict liability on a defendant.[190] This tendency of the California courts, coupled with the traditional belief that sellers of food should be held to higher standards, would lead one to believe that a seller of food in California would undoubtedly be held to the highest possible standard. Oddly, however, the California Supreme Court did not follow this logic in *Mexicali Rose*, concluding instead that in certain instances—those involving natural objects—the defendant need only exercise due care.

Even more surprising is the fact that the court's decision makes very little reference to convincing authority. On the contrary, the majority opinion is dotted with only paltry citation to supportive case law and often incorrect readings of the relevant statutes and rules.[191] Moreover, the opinion does not consider any of the policies underlying tort or contract law. Justice Mosk, commenting on the majority's analysis in his dissenting opinion, stated that the "analysis must be more refined . . . because [the] task is to determine not so much the outcome of this lawsuit as the standard to be applied."[192] An analysis of the policies behind warranty and strict liability, however, explains why the majority may have been reluctant to discuss them: These policies support a conclusion

189. See generally Prosser, *supra* note 44, which, in tracing the emergence of strict liability, refers often to opinions of California courts, and quotes extensively from Justice Traynor's concurrence in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). For further discussion of Justice Traynor's concurrence, see *infra* notes 200-03 and accompanying text.

190. *See* KEETON ET AL., *supra* note 42, § 98, at 694 (referring to California case of Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963)). The high standards imposed on defendant manufacturers and sellers in California is also evidenced by the fact that the California courts found Restatement § 402A to be too restrictive and thus eliminated its requirement that the product be "unreasonably dangerous." *See supra* note 69 and accompanying text.

191. See, for example, *Mexicali Rose*, 1 Cal. 4th at 632, 822 P.2d at 1302, 4 Cal. Rptr. 2d at 155, where the court comments that "the Restatement Second of Torts, Section 402A, comment h, emphasizes that the doctrine of strict liability applies in the limited situation arising when foreign objects or ingredients not characteristic of food cause harm." *Id.* This is incorrect. Comment h actually reads: "The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, *from decay or deterioration before sale, or from the way in which the product is prepared or packed.*" RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1984) (emphasis added). The plain language of comment h thus indicates that while strict liability is certainly applicable to foreign objects in products, it is by no means *limited* to them. Natural injury-causing objects in food certainly could fall within the domain of decay, deterioration, or product preparation. The applicability of section 402A to natural-object injuries is discussed further *infra* part III.B.2.

192. *Mexicali Rose*, 1 Cal. 4th at 640, 822 P.2d at 1308, 4 Cal. Rptr. 2d at 161 (Mosk, J., dissenting).

contrary to that of the *Mexicali Rose* court, that strict liability and implied warranty should be imposed on sellers of food without any differentiation between foreign or natural objects.

First, virtually all product defects are judged under a strict standard. California has been a leader in enforcing high standards on manufacturers and sellers.[193] The *Mexicali Rose* rule, however, creates a subcategory of products liability law for restaurateurs; cases involving food are treated differently from those involving other injury-causing products. There is no reason for this discrepancy. Food sold by a restaurant is no different from any other product sold by a retailer, and can even pose greater risks to the consumer because it is ingested.[194] The *Mexicali Rose* court obviously agreed with this reasoning, as it held that restaurateurs are strictly liable in tort and warranty when they serve food which contains an injury-causing *foreign* object.[195] Why, however, did the court not extend this strict standard to situations involving *natural* objects as well?

The court did not offer an answer to this question. The only reason the court mentioned for the differentiation between foreign and natural objects was that a "plaintiff cannot state a cause of action based on the breach of the implied warranty of merchantability or strict products liability, because it is a matter of common knowledge that the natural substance is occasionally found in the food served."[196] This is quite an assumption. Even assuming the plaintiff in *Mexicali Rose* could be charged with the "common knowledge" that his enchilada could have contained chicken bones, it is quite a leap in reasoning to assume that all people, when ordering food, also possess the "common knowledge" that it may contain other supposedly natural objects such as feathers, salmonella, or mold. While there are certainly many situations in which one could be charged with common knowledge, such as expecting that a cherry will contain a pit, it does not automatically follow that a particular object should *always* be expected simply because it is natural.

The fact that the court offered no justification for differentiating foreign and natural objects may be an indication that there is no justification. One possible argument, and probably the argument on which the court implicitly relied, is that of common sense. That is, when a natural object such as a bone is present in the food, in all likelihood the preparer

193. *See supra* part II.B.2.

194. *See generally* Prosser, *supra* note 44, at 1103-06 (discussing special treatment of food cases by courts, even as early as 15th century).

195. *Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303-04, 4 Cal. Rptr. 2d at 156-57.

196. *Id.* at 626, 822 P.2d at 1298, 4 Cal. Rptr. 2d at 151.

never noticed it or simply neglected to remove it; if a foreign object such as glass is in the food, however, this indicates some higher culpability. At least one extra step must have been taken by the defendant for the foreign object to have gotten into the food. Although this argument may sound convincing, for purposes of products liability it has no merit. It focuses entirely on the manufacturer's or seller's conduct, rather than on the condition of the product itself, the more appropriate focus in a products liability action.[197]

The second policy reason to adopt strict liability in the food context is that the restaurateur is in a much better position to achieve the objectives underlying tort law. Two of the principal aims of tort law are (1) to reduce the hazards which are present in society, and (2) to do so as efficiently as possible.[198] Between the injured plaintiff and the defendant seller, the latter is obviously in a much better position to achieve these goals. Holding the defendant liable places liability on the party that could more readily have avoided the injury, and that is in the better position to spread the costs of the injury through pricing.[199]

These arguments are especially applicable in the context of food products served in restaurants. When consumers go into such establishments, there is limited opportunity for them to inspect the food they are served.[200] Although they might be able to pick through the food once it arrives at their table, this is neither a realistic expectation nor should it be the consumer's duty.[201] The restaurateur, however, generally receives the food in an unprocessed condition and can therefore inspect it and eliminate harmful objects through proper management and preparation. It is, therefore, the restaurateur—not the consumer—who is in the best position to maintain the quality of the food and prevent injuries from occurring.[202] When restaurateurs fail to do this, whether negligent or

197. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 418, 573 P.2d 443, 447, 143 Cal. Rptr. 225, 229 (1978) ("[T]his test reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the *product*, not on the *manufacturer's conduct*, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail . . . .").

198. *See* KEETON ET AL., *supra* note 42, § 3, at 16.

199. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

200. *Id.* (Traynor, J., concurring).

201. *Id.* (Traynor, J., concurring).

202. *Id.* (Traynor, J., concurring). Justice Traynor commented:

> It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. . . .

not, well-established tort goals dictate that they be held liable.[203] As the Supreme Court of Texas has pointed out,

> [i]t is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption. Since it has been placed on the market as a food for human consumption, and marked as such, the purchaser usually eats it or causes it to be served to his family without the precaution of having it analyzed by a technician to ascertain whether or not it is suitable for human consumption. In fact, in most instances the only satisfactory examination that could be made would be only at the time and place of the processing of the food. It seems to be the rule that where food products sold for human consumption are unfit for that purpose . . . the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.[204]

Critics of this theory have argued that it will subject restaurateurs to crushing liability and that society cannot force restaurateurs to become absolute insurers of the products they serve.[205] Restaurateurs, however, would not be subject to strict liability for *every* object in the food they serve. The application of the reasonable expectation test would eliminate any risk of crushing liability to restaurateurs because it would impose strict liability on them only when the injury resulted from an object which the consumer could not have reasonably expected. Indeed, many courts which apply the reasonable expectation test have denied plaintiffs recovery under strict liability and implied warranty theories.[206]

Furthermore, restaurateurs would not be subject to crushing liability because they may sue their suppliers for indemnity or increase their

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> . . . .
> . . . The consumer no longer has means or skill enough to investigate for himself the soundness of a product. . . . Consumers no longer approach products warily but accept them on faith . . . .

Id. at 462, 467, 150 P.2d at 440-41, 443 (Traynor, J., concurring).

203. *Id.*

204. Jacob E. Decker & Sons v. Capps, 164 S.W.2d 828, 829 (Tex. 1942), *overruled on other grounds by* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).

205. *See, e.g.*, Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936), *overruled by* Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 154 (1992).

206. *See, e.g.*, Carl v. Dixie Co., 467 So. 2d 960, 960 (Ala. 1985) (disallowing plaintiff's recovery under implied warranty theory because jury found plaintiff should have reasonably expected bone in piece of chicken); Webster v. Blue Ship Tea Room, Inc., 198 N.E.2d 309, 312 (Mass. 1964) (disallowing plaintiff's recovery under implied warranty theory because jury found plaintiff should have reasonably expected shells in fish chowder); Allen v. Grafton, 164 N.E.2d 167, 174 (Ohio 1960) (disallowing plaintiff's recovery under implied warranty theory because jury found plaintiff should have reasonably expected to find oyster shell in oysters).

prices, thereby distributing the cost among the public as a cost of doing business.[207] The plaintiff is not in a position to pass along the costs of his or her injury, nor should he or she be required to when the defendant's action has occasioned the injury.[208] This does not mean that strict liability or implied warranty liability would not burden the restaurateur. On the contrary, they might often be substantial burdens. They are burdens, however, which must be borne by one side or the other, and in that context the defendant is the only fair and reasonable choice.[209] Having the restaurant assume liability and spread the loss, therefore, satisfies both goals of the tort system: It encourages the restaurateur to meet consumers' reasonable expectations, and also makes the system function more efficiently.

Finally, the adoption of strict liability in warranty and tort for plaintiffs injured by natural objects is important to further the policy of compensating an injured plaintiff. Under a negligence standard, the plaintiffs in these cases are unlikely to receive compensation.[210] Thus, the *Mexicali Rose* rule hinders this policy goal.

The primary reason that plaintiffs injured by natural objects will not recover damages is that negligence is generally too difficult to prove in restaurant cases. The difficulty stems from the first two prongs of the test: proving the defendant had a duty and that he or she breached that duty.[211] In general tort law, the first prong poses an especially difficult problem to plaintiffs who are suing retailers rather than manufacturers of

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207. *See Escola*, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J., concurring).

208. *Id.* (Traynor, J., concurring).

209. *See Mexicali Rose*, 1 Cal. 4th at 636, 822 P.2d at 1305, 4 Cal. Rptr. 2d at 158 (Mosk, J., dissenting). Some might argue that this rationale treats defendants as scapegoats in situations where they may not be morally blameworthy. Simply because neither side is blameworthy, however, does not eliminate the fact that one party has been injured by the other party's actions, whether they were innocent, negligent, reckless or intentional. As Justice Mosk commented in his dissenting opinion in *Mexicali Rose*, quoting a previous decision of the California Supreme Court:

> "The application of the rule of implied warranty to cases such as that before us may impose a heavy burden upon the keepers of restaurants and lunch counters, but considerations of public policy and public health and safety are of such importance as to demand that such an obligation be imposed. 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."

Id. (Mosk, J., dissenting) (quoting Goetten v. Owl Drug Co., 6 Cal. 2d 683, 687, 59 P.2d 142, 143-44 (1936)).

210. *See Mexicali Rose*, 1 Cal. 4th at 645 n.1, 822 P.2d at 1311 n.1, 4 Cal. Rptr. 2d at 164 n.1 (Arabian, J., dissenting).

211. As discussed *supra* part II.B.1, these two prongs constitute the main difference between negligence and the other two theories of products liability. The last two prongs of the

products, as most courts hold that retailers have no duty to inspect the products they sell.[212] Manufacturers, on the other hand, are required to manufacture safe products.[213] Thus, the plaintiff who sues a retailer will virtually never survive the first prong.[214] In the restaurant context, the issue becomes whether restaurants are to be considered "retailers" or "manufacturers" of food. On the one hand, restaurants frequently sell food products purchased from other "manufacturers," so they could be viewed as retailers. Conversely, and perhaps more accurately, they do not sell these products without first handling them, and thus they are more analogous to manufacturers. The *Mexicali Rose* court adopted the latter view, ruling that restaurants do owe consumers a duty of care because the food served is directly under their custody and control.[215]

Although a plaintiff injured by a natural object thus may be able to satisfy the first prong of the negligence test, he or she will almost never satisfy the second prong. The plaintiff in a products liability action has very few tools available to prove that the defendant failed to meet the duty of reasonable care. For example, in light of the *Mix* line of cases, it is doubtful that a restaurateur who serves food containing natural injury-causing substances has violated any sort of custom.[216] Moreover, it is doubtful that a plaintiff in California could rely on any statutory violation to establish that the restaurateur was negligent.[217] Although the

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negligence test, causation and damages, must also be proven in both strict liability and implied warranty.

212. *See* Prosser, *supra* note 44, at 1116-17.

213. *See id.*

214. *See id.* at 1117 ("It is here that negligence liability breaks down. The wholesaler, the jobber, and the retailer normally are simply not negligent. They are under no duty to test or inspect the chattel, and they do not do so . . . .").

215. *Mexicali Rose*, 1 Cal. 4th at 632, 822 P.2d at 1303, 4 Cal. Rptr. at 156.

216. Courts occasionally consult custom, or the manner in which activities are normally carried out in a trade or community, in determining the defendant's duty of care and whether this duty was met. *See* HARPER ET AL., *supra* note 63, § 17.3, at 578-92. *Mix* and its progeny, however, indicate that the courts probably would not find any sort of customary duty for restaurateurs to inspect the food they serve for natural objects. Moreover, even if the courts did find such a duty, and then that the particular defendant had breached that duty, custom is not considered conclusive on the issue of the defendant's reasonable care; rather, it is merely one factor in the calculus. *Id.*

217. In addition to custom, courts in negligence suits also consult statutes in evaluating whether the defendant has met his or her duty. *See id.* § 17.6, at 613-48. Ordinarily, a statutory violation is advantageous to the plaintiff, as courts in most states, including California, hold that such a violation establishes that the defendant was negligent per se. *Id.* at 619.

In California, there are several federal and state statutes and regulations which address the issue of substances in food. For example, 9 C.F.R. § 319.5 (1990) prohibits bones larger than .85 millimeters in any processed foods. In addition, section 26520 of the California Health and Safety Code states that food containing any poisonous or deleterious material "is not considered adulterated if the substance is a naturally occurring substance and if the quan-

court in *Mexicali Rose* noted that most plaintiffs asserting negligence in food cases do so under the doctrine of res ipsa loquitur,[218] even that more liberal doctrine will be of little help to plaintiffs.[219] In short, in most jurisdictions plaintiffs will have difficulty asserting a negligence cause of action.

Under the *Mexicali Rose* rule, the situation is even worse for plaintiffs in California who are injured by natural objects, for they will have to clear one additional hurdle. They will be required to prove their negligence claim against a presumption that the natural object did *not* render the food unfit or defective.[220] The court stated this "negligence plus" standard as follows:

> If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory.[221]

This presumption further restricts the plaintiff's ability to recover. In effect, trial courts will be required to instruct juries that the plaintiff must

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tity of such substance in the food does not render it injurious to health." CAL. HEALTH & SAFETY CODE § 26520 (West 1992). Thus, a plaintiff injured by a natural substance, already limited to a negligence cause of action, would be further limited because the very language of this statute precludes the plaintiff from using it to establish that the defendant was negligent per se.

218. *See Mexicali Rose*, 1 Cal. 4th at 633 n.9, 822 P.2d at 1303 n.9, 4 Cal. Rptr. 2d at 156 n.9 (Mosk, J., dissenting). For a general discussion of res ipsa loquitur, see Prosser, *supra* note 44, at 1117. Generally, res ipsa loquitur allows the plaintiff to infer the defendant's negligence from circumstantial evidence, when the instrumentality producing the injury was in the exclusive control of the defendant. *Id.*

219. Prosser, *supra* note 44, at 1117. In this article, Dean Prosser states that despite this more liberal standard, "no inference of negligence can arise against [the wholesaler and retailer] and res ipsa loquitur is of no use at all." *Id.*

California Supreme Court Justice Traynor, in his famous concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), pointed out another problem which confronts plaintiffs trying to assert res ipsa loquitur in a products liability action. He noted that although res ipsa loquitur may appear to work to the plaintiff's advantage because it allows the court or jury to infer the defendant's negligence:

> [T]he inference of negligence may be dispelled by an affirmative showing of proper care. . . . An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is.

Id. at 462-63, 150 P.2d at 441 (Traynor, J., concurring).

220. *See Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156.

221. *Id.*

prove the defendant was negligent in preparing food that is nondefective. It is doubtful that jurors will be able to reconcile the contradiction in this statement and thus, the plaintiff's already difficult recovery becomes herculean. Consequently, plaintiffs will find it nearly impossible to win cases under the *Mexicali Rose* "negligence plus" standard.

Thus, the *Mexicali Rose* court has apparently forgotten what it recognized fourteen years ago in *Barker v. Lull Engineering Co.*:[222] "One of the principal purposes behind the strict products liability doctrine is to relieve an injured plaintiff of many of the onerous burdens inherent in a negligence cause of action."[223] This statement is so irreconcilable with the holding of *Mexicali Rose* that one cannot help but wonder how the same court decided both cases. In denying patrons injured by a natural object in food the ability to assert strict liability and implied warranty actions, the California Supreme Court has plainly subjected them to "the onerous burden[ ]" of proving negligence, a burden nearly impossible to shoulder.

2. Injuries from natural objects in food fall well within the California rules for strict liability and implied warranty

Aside from public policy reasons, the most compelling argument for allowing plaintiffs injured by natural objects to recover under strict liability and implied warranty is that California law in these areas plainly covers such natural-object injuries. Neither theory is limited only to plaintiffs injured by foreign objects in food, yet the *Mexicali Rose* majority somehow read this limitation into both of them.[224] When the *Mexicali Rose* court denied plaintiffs injured by natural objects the opportunity to recover under these theories, it blatantly contradicted California's statutory and common law.

To the extent that the *Mexicali Rose* court allowed plaintiffs injured by foreign objects in restaurant food to pursue claims under strict liability and implied warranty, it impliedly conceded that the elements of each of these theories are satisfied when a plaintiff is injured by a foreign object.[225] Under strict liability, for example, the *Mexicali Rose* holding implies that a restaurateur is considered a seller engaged "in the business of selling products"[226] designed to "reach the user or consumer without

222. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

223. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

224. *Mexicali Rose*, 1 Cal. 4th at 632, 822 P.2d at 1302, 4 Cal. Rptr. 2d at 155.

225. *Id.* at 633, 822 P.2d at 1302, 4 Cal. Rptr. 2d at 155.

226. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1984).

substantial change."[227] It also implies that the plaintiffs injured in restaurants meet the Restatement's "physical harm"[228] requirement. Similarly, under an implied warranty theory, the *Mexicali Rose* holding implies that food sold in a restaurant is considered a "sale of goods,"[229] rather than a service, thus invoking the warranty. It also implies that the restaurateur is considered a "merchant"[230] as defined in the California Commercial Code. Thus, it is apparent from the language of Restatement section 402A and the California Commercial Code as well as from the holding of *Mexicali Rose* itself, that at least some food cases—those involving foreign objects—satisfy the elements of both strict liability and implied warranty.

The *Mexicali Rose* court, however, was far more restrictive regarding injury-causing objects that are *not* foreign to the food. Cases involving natural objects are no different than foreign object cases, however, and thus should not be treated differently. The above-mentioned elements of both the strict liability and implied warranty theories are still met in natural object cases; in fact, it is ludicrous to assert that they are not.[231] There is, however, one element of both theories which remains a point of controversy in the natural object cases: What constitutes a "defective" product under section 402A, or an "unmerchantable" product under the implied warranty? In the food context, this one element of both the strict liability and implied warranty tests becomes the central issue to be resolved.[232] The issue is the same in both tests, despite the different language each uses.[233] In determining both a product's defec-

227. *Id.*

228. *Id.*

229. *See* CAL. COM. CODE § 2314 (West 1992).

230. *See id.* See also *supra* note 78 for the definition of "merchant."

231. Under strict liability, for example, the restaurateur is still a seller "in the business of selling products" designed to "reach the user or consumer without substantial change." RESTATEMENT (SECOND) OF TORTS § 402A. Moreover, plaintiffs injured by natural objects still meet the physical harm requirement. Similarly, under implied warranty, food sold by the restaurateur in natural object cases is still considered a "sale of goods," rather than a service. CAL. COM. CODE § 2314. Moreover, the restaurateur still falls within the code's definition of "merchant." *See supra* note 78.

232. *See* Grinnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 432-33, 79 Cal. Rptr. 369, 373 (1969).

233. *See id.* (commenting that "[t]he fact that no instruction was given by the trial court on the law of strict liability in tort does not preclude reliance on that theory since the basic elements to be proved are the same"). *See also* Davis v. Wyeth Lab., Inc., 399 F.2d 121, 126 (9th Cir. 1968) (commenting that "[w]e find no error in . . . present[ing] this case to the jury on warranty rather than on strict liability in tort. The law as emerging is tending toward the latter treatment but under either approach the elements remain the same. The difference is largely one of terminology."); Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) (commenting that strict liability under section 402A is "hardly more than what exists

tiveness and its lack of merchantability, the underlying question is the same: Was the food of such inferior quality as to trigger the imposition of a strict standard of care? It is this question which the foreign-natural, hybrid, and reasonable expectation tests are designed to answer, and the reasonable expectation test provides the best answers.

IV. CONCLUSION

The California Supreme Court's decision in *Mexicali Rose v. Superior Court*[234] was probably intended to strike a compromise.[235] The court did not want to perpetuate the strict rule of *Mix v. Ingersoll Candy Co.*,[236] which made a plaintiff's recovery so difficult, but it also did not want to subject the restaurateur to potentially "crushing liability."[237] Indeed, in fashioning any rule for the apportionment of tort liability, achieving this balance is always the principal goal; society wants to compensate those plaintiffs who have been wronged, but at the expense of only those defendants who caused the wrong.[238] Unfortunately, in fashioning its rule, the *Mexicali Rose* court failed to strike this balance. In its rejection of the reasonable expectation test, it tipped the scales in favor of defendant restaurateurs and offered plaintiffs injured by natural objects little more than they had under the original foreign-natural test.

The court could have better achieved the balance it sought by adopting the reasonable expectation test as the standard to assess defendant restaurateurs' liability.[239] This standard allows for a case-by-case assessment of liability, holding defendants liable only if they serve food that contains an object that a reasonable person would not have anticipated.[240] This rule secures the defendants' side of the balance, ensuring that they will not be held liable unless they violate the customer's reasonable expectations.[241] And it also protects plaintiffs—once they prove that the food did not comport with their reasonable expectations, they may recover under any of the three theories of products liability and not

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under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation.").

234. 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

235. *See id.* at 631-32, 822 P.2d at 1302-03, 4 Cal. Rptr. 2d at 155-56.

236. 6 Cal. 2d 674, 59 P.2d 144 (1936), *overruled by* Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

237. *See Mexicali Rose*, 1 Cal. 4th at 630-33, 822 P.2d at 1301-03, 4 Cal. Rptr. 2d at 154-56.

238. KEETON ET AL., *supra* note 42, § 1, at 6 (commenting that "[t]he purpose of the law of torts is to adjust . . . losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.").

239. *See supra* part III.A.1.

240. *See supra* part III.A.3.

241. *See supra* part III.A.3.

merely under negligence.[242] Under the *Mexicali Rose* rule, a plaintiff injured by a natural object can only recover under a "negligence plus" theory—a nearly impossible task.[243] Further, public policy, statutes and case law all indicate that plaintiffs injured by natural objects (in addition to those injured by foreign objects) should be allowed to recover under strict liability and implied warranty theories.[244] This would secure the plaintiffs' side of the balance, ensuring that if they prove their expectations were not met, they will recover.[245] Thus, the court's attempt to balance the competing interests of plaintiffs and defendants in restaurant liability cases was legitimate. The rule it adopted to achieve that balance, however, was faulty.

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242. *See supra* part III.A.3.

243. *See supra* notes 211-23 and accompanying text.

244. *See supra* part III.B.2.

245. *See supra* part III.B.2.

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