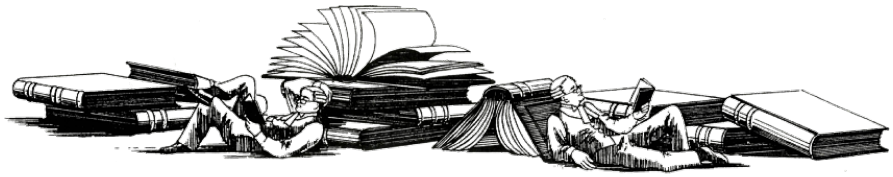

NOTES ON THE STYLE OF THE LAW

No bones about it

by

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tort law ≈ legal village ≈ reasonable man ≈ single-word cases ≈ word wrangling ≈ American law ≈ plain meaning ≈ Ohio law ≈ poultry ≈ food law ≈ consumer law ≈

When a consumer sits down for a meal of chicken wings described to him as 'boneless', should he reasonably expect that they be free of bones? In *Berkheimer v Rekm LLC*,[1] the Supreme Court of Ohio decided, over a vigorous dissent, that the answer was 'no'. The analysis of the majority and the dissenters are illustrative of the puzzle of determining the meaning of seemingly plain terms.

The facts are straightforward. Man goes to a restaurant, orders a 'boneless [chicken] wing', ends up in the hospital with a bone in his œsophagus. Man then sues restaurant in tort on the grounds that the restaurant (and others upstream in the supply chain) breached their duty of care, because a reasonably prudent restaurant patron would not reasonably anticipate and take precautionary against a substance (bones) which he had been told specifically were not present in the food.[2]

The test in Ohio law to be applied is worth quoting in full, because its deceptive simplicity caused a noticeable rift amongst the Court's justices:

> To determine whether a supplier of food breached its duty of care by failing to eliminate an injurious substance from the food, we look to whether the presence of the substance was something that the consumer could have reasonably expected and thus could have guarded against. And whether the substance was foreign to or natural to the food is relevant to determining what the consumer could have reasonably expected.[3]

1 Slip Opinion № 2024-Ohio-2787 (25 July 2024)
2 *ibid*, paras 1–8, *per* Deters J
3 *ibid*, para 18, *per* Deters J

The majority, led by Deters J (with whom Kennedy CJ, Fischer & DeWine JJ agreed) placed particular emphasis on the fact that the chicken bone was not a foreign substance to the boneless chicken, and that it is common knowledge that boneless foods do occasionally have bones in them.[4] Most of all, the reasonable restaurant patron would not consider the advertisement of a wing as 'boneless' to be anything more than a descriptive term, and place no reliance upon it:

> [R]egarding the food item's being called a 'boneless wing,' it is common sense that that label was merely a description of the cooking style. A diner reading 'boneless wings' on a menu would no more believe that the restaurant was warranting the absence of bones in the items than believe that the items were made from chicken wings, just as a person eating 'chicken fingers' would know that he had not been served fingers. The food item's label on the menu described a cooking style; it was not a guarantee.[5]

The dissent from Donnelly J (with whom Stewart & Brunner JJ agreed) applied the same test as the majority. Donnelly J, comparing the majority view to something out of Lewis Carroll's nonsense poems, insisted that, to an ordinary person, 'boneless' meant 'exactly' what the literal meaning communicates.[6] To the dissenter, the majority's conclusion went into the realm of patent absurdity:

> The question must be asked: Does anyone really believe that the parents in this country who feed their young children boneless wings or chicken tenders or chicken nuggets or chicken fingers expect bones to be in the chicken? Of course they don't. When they read the word 'boneless,' they think that it means 'without bones,' as do all sensible people. That is among the reasons why they feed such items to young children. The reasonable expectation that a person has when someone sells or serves him or her boneless chicken wings is that the chicken does not have bones in it. Instead of applying the reasonable expectation test to a simple word—'boneless'—that needs no explanation, the majority has chosen to squint at that word until the majority's sense of the colloquial use of language is sufficiently dulled, concluding instead that 'boneless' means 'you should expect bones.'[7]

The simplicity of this case provides a good opportunity to consider the layers of meaning that face a court trying to interpret words. There was no disagreement here that the plain meaning of 'boneless' is 'free of bones'. Rather, the split in the Court turned on the question of the *impression* that descriptor, situated in the context of a menu, would leave

4 *ibid*, paras 19–22, *per* Deters J
5 *ibid*, para 23,*per* Deters J
6 *ibid*, paras 36–37, *per* Donnelly J (dissenting)
7 *ibid*, para 38, *per* Donnelly J (dissenting)

upon the reasonable restaurant patron. Does a reasonable restaurant patron rely on that as a guarantee? Furthermore, even if the reasonable restaurant patron does not rely on it *completely*, what size bone does a reasonable restaurant patron expect he will find in his chicken? How reliable does a reasonable restaurant patron think the 'boneless' descriptor is? Meaning in law (and perhaps in life, though your correspondent leaves that question to the philosophers) depends entirely on context. In tort cases, the context is of a nonexistent person encountering a real scenario and behaving in a way that might well be inconsistent with how almost all real people would behave.

Thus, what seems like a dispute on what 'boneless' means really boils down to how far our chap in the legal village—the reasonable restaurant patron—ought to diverge from the actual restaurant patron. It seems clear that most actual restaurant patrons would not expect bones in their boneless wings, and thus would not take precautions against their presence. Yet, should the reasonable restaurant patron be so prudent and circumspect as to be sceptical of the descriptions on menus? Where does this lead allergen tort cases, for example? Deters J valiantly tried to argue that descriptors like 'gluten-free' and 'lactose-free' were distinct to 'boneless',[8] probably because His Honour realised that applying the logic in the case at bar to allergen cases would upend a large field of tort cases.

The question comes down to one of judicial discretion and common sense. Your correspondent's view is that as a matter of setting the boundaries of tort, the denizens of the legal village should be fairly cautious, but not pathologically paranoid. Where a restaurant advertises something as 'boneless', and fails to put a disclaimer at the foot of a menu that this descriptor is not a guarantee, the reasonable patron does not begin quaking with fear that every bite risks a nasty surprise and chew with supreme delicacy as a result. Where injury results from accepting a restaurant's description of food, the policy balance ought to clearly be in favour of holding the restaurant liable for the breach of its duty of care. For that reason, I have something of a bone to pick with the majority's judgment.

8 *ibid*, para 24, *per* Deters J

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