

## CONSUMER LAW: Waiter, there's a fly in my soup ...

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A friend and I recently had a meal at one of the many restaurants along Sukhumvit Road in central Bangkok, and she commented on a recent story she had read where a restaurant in Canada was sued when a patron was served a cheesecake containing nuts, despite having informed the waitress of his allergy to them.



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One bite resulted in a trip to hospital, and the man was eventually awarded both actual and punitive damages. As we dined, we then wondered what would happen if this were to occur in Thailand.

What if you were allergic to prawns, informed the waitress, and yet got some in your tom yum anyway? Could the restaurant be held liable for damages if you unknowingly ate food containing an ingredient to which you are allergic, resulting in a trip to the hospital, after expressly informing the wait-staff of your allergy?

Under the Product Liability Act BE 2551 (2008) and the Consumer Case Procedure Act BE 2551 (2008), the sale of food in a restaurant falls under the definition of the "manufacture" of a "product". If food "manufactured" in a restaurant causes personal injury to a customer as a direct result of the restaurant either knowingly serving unsafe food, or unknowingly serving unsafe food, due to "severe negligence", the restaurant can be held liable under one or both of these Acts.

In our example, although you told the waitress that you were allergic to prawns, and it was the cook who actually prepared the food, all employees when performing the functions of their job, are the responsibility of the restaurant owners. Therefore, regardless of whether it was negligence on behalf of the waitress or the cook, the question of liability pertains to the restaurant itself.

Now, it will of course depend on the specific facts and the decision of the court as to whether something as small as a little forgetfulness on behalf of the service staff qualifies as "severe" negligence.

If a customer advises that they have an allergic reaction to something, especially if they state that their allergy is particularly severe, the standard of care exercised by the establishment should be above and beyond that which would otherwise apply. Logically, the same principles should apply if a customer becomes sick as a result of food storage, handling or preparation procedures known by that restaurant to be unsafe or which are "severely negligent".

One major change that has taken place since the passage of both the Product Liability Act and the Consumer Case Procedure Act is that the burden of proof has been shifted from the customer to the business operator.

Instead of the customer being forced to prove wrongdoing on the part of the restaurant, now the restaurant must prove that they acted in correct capacity. Additionally, both Acts now provide an avenue for the customer to be awarded punitive damages for emotional pain such as "suffering", "anxiety", "shame" or "sorrow".

If severe negligence is proven to have occurred, a customer can be granted up to twice the amount of actual damage in punitive damages under each Act, according to interpretations by legal scholars.

This means that, in theory, a customer who is a victim of severe negligence on the part of a business could receive up to four times the amount of actual damages for their suffering. However, as of yet there is no case precedent where a plaintiff has been awarded full damages under these laws. Most instances of restaurant negligence (probably due to reputational risks) are settled out of court.

Due to the implications of these laws, some international hotels and restaurants in Thailand have begun instituting a policy of having patrons sign a "doggy bag" indemnity waiver before the customer is allowed to take home their leftover food. This is done in order to protect the restaurant from any liability once the food leaves their establishment.

There is a growing prevalence of cases in other parts of the world in which a customer leaves with their remaining food and fails to care for it properly, becomes sick after eating it and then attempts to bring claim against the restaurant because the food made them sick.

While it may be comforting for a person with an allergy to know that a remedy may be available if a restaurant fails to respond to notice of a food allergy, the first line of defence should of course be self-defence; have a look and a sniff and if in doubt, diet. And what a shame it would be to live in Thailand with a peanut, coriander or prawn allergy!

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