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The Doctrine of Implied Warranty Between Restaurant-keeper and Guest - Child's Dining Hall Co. v. Swingler

THE DOCTRINE OF IMPLIED WARRANTY BETWEEN RESTAURANT-KEEPER AND GUEST

Child's Dining Hall Co. v. Swingler[1]

Plaintiff-appellee ordered a crabcake sandwich in a restaurant operated by defendant-appellant, and was served it at a table in that restaurant. As she was eating the last remaining small piece of the bread she bit down on a piece of tin which was imbedded in the bread. The piece of tin lodged between her teeth, was later removed, but caused an abscess which necessitated removal of a tooth, and caused severe shock and pain. The suit was originally framed in tort but was amended to assumpsit, alleging an express warranty, and at the trial, to meet the proof, a second amended declaration alleging an implied warranty was filed. The lower court granted plaintiff's implied warranty prayer, and refused defendant's demurrer prayer. From a judgment for the plaintiff, defendant appeals. *Held*, two judges dissenting: Reversed and remanded. No im-

[35] *Supra*, note 10, 155 Md. 19, 28.

[36] A collection of excerpts from Maryland cases is found in Best, Restrictions and Restrictive Covenants.

[1] 197 Atl. 105 (Md. 1938).

plied warranty existed, therefore to enable plaintiff to recover in a case such as this there must be an express warranty, or knowledge of the unmerchantable quality of the goods, or negligence.

The issue nominally presented by the facts is whether or not in a restaurant one purchases merely service, or enters into a contract for the sale of food. While the question is by no means a new one generally, it is a case of first impression in the Maryland Court of Appeals. It must be conceded that the holding of the Court is in accord with the weight of authority elsewhere, but it is to be regretted that the decision was upon the basis of judicial precedent rather than upon a consideration of the policy underlying the precedents.

The question of food adulteration had been presented to the Court in two previous cases. The first of these, the *Flaccomio* case,[2] was an action in tort, based upon an off-premises sale of adulterated whiskey. The Court expressly stated that there was no allegation of warranty, and that it was not therefore called upon to determine whether there was any evidence to support such an averment. The second case, the *Sindell* case,[3] was an action in tort against the manufacturer of the beverage there sold, and was not concerned with the doctrine of implied warranty.

One of the leading cases on the majority side of the question is *Nisky v. Child's Co.*[4] There plaintiff was served in defendant's restaurant, unwholesome food, which resulted in the more or less serious illness of the plaintiff. She brought action against the defendant company for breach of warranty generally, and for breach of warranty under the Uniform Sales Act. The Court held that, at common law, in the absence of express warranty or a representation from which a warranty could be inferred, the mere sale of goods without more, did not warrant the quality of the article sold. While the Uniform Sales Act[5] changed this, that act only applied if the transaction could be regarded as a sale. The service of food, however, was never regarded as a sale at common law, and, this being so, there is no obligation on the keeper of a public eating house other than reasonable care. He is liable only for negligence, and cannot be held on an implied warranty that the food served is free from deleterious matter.

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[2] Flaccomio v. Eysink, 129 Md. 367, 100 Atl. 510 (1916).
[3] Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 Atl. 866 (1922).
[4] 103 N. J. L. 464, 135 Atl. 805, 50 A. L. R. 227 (1927).
[5] Uniform Sales Act, Sec. 15; Md. Code, Art. 83, Sec. 36.

On the other side of the question the leading case is *Friend v. Child's Dining Hall.*[6] In that case plaintiff was served, in defendant's restaurant, food containing deleterious matter which caused plaintiff to break a tooth. In holding the defendant liable for a breach of implied warranty, the Court held that under the Uniform Sales Act the transaction arising from a contract to serve a guest food to be eaten upon the premises was a sale, and that, since it can be inferred from the relation of the parties that the guest makes known his particular purpose and relies on the seller's skill and judgment in the selection and preparation of the food, there is an implied warranty that it is reasonably fit for such purposes. Further the Court held that there was also at common law an implied term of the contract that the guest should be furnished wholesome food by the proprietor of a public eating house to which he resorted for refreshment.[7]

The difference in point of view presented by these two cases seemingly is whether the transaction is a sale, and, incidentally, whether at common law there was an implied warranty of wholesomeness. In point of actual fact the basis of the difference comes (as can be seen by a comparison of the opinions in the principal case) in the protection of the restaurant-keeper on the one hand, or the guest on the other.[8] The determination of whether the transaction was a sale is merely a means to the end.

The decisions mainly relied upon to establish that service of food in a restaurant was a sale were criminal cases,[9] which in order to prevent evasion of criminal statutes had held the service of liquors, or quail, or oleomargarine with a meal to be a sale within the meaning of the statute pre-

[6] 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100 (1918).

[7] Such a holding is open to question. See Williston, Sales, 2nd Ed., 478, Sec. 241, where it is stated that the old authorities seem to have rested, in part at least, upon the language of an old statute. And see particularly, Ibid footnote 6. See also dissenting opinion of Crosby, J., in Friend v. Child's Dining Hall, 120 N. E. 413 ff., 5 A. L. R. 1111 ff. The matter need not be here further considered because it has only been incidentally relied on to uphold the result reached.

[8] See Vold, Sales, 478, Sec. 153: "While at present time the authorities are sharply divided, and in many jurisdictions the exact question has not yet been passed upon, the more candid opinions among the cases which have recognized this expansion of the warranty obligation now place it, not on the fiction of calling the service of food a sale, but on the reality that the need and occasion for extending this protection to the customer is equally persuasive in both types of situations."

[9] See cases set out in Friend v. Child's Dining Hall, 120 N. E. 407 ff., 5 A. L. R. 1103 ff., particularly Commonwealth v. Worcester, 126 Mass. 256 (1879), People v. Clair, 221 N. Y. 108, 116 N. E. 868, L. R. A. 1917 F, 766 (1917), Commonwealth v. Miller, 131 Pa. 118, 18 Atl. 938, 6 L. R. A. 633 (1890).

venting sale of such articles. To this extent these cases are distinguishable from the principal case, but it cannot be logically said that a sale is any less a sale because in the one case the result of so holding will be to prevent crime, while in the other the result will be to open the way to obtention of damages. If the transaction be a sale in the one case, it must be also in the other.

Irrespective of the reason for so holding, can the transaction which takes place when food is ordered and served in a restaurant logically be said to be a sale? It has been said[10] that where food is served by an innkeeper title does not pass. So it was said that one who was served in an inn could not, not having consumed all the food served, take the rest of it off with him. Whether or not this be true in the case of the innkeeper, can the same analogy be drawn today? The ordinary transaction in a restaurant in the present day is the acquiring of a portion of food, the service and place for consumption being incidentally rendered. Can it possibly be said that one who orders a portion of food in a restaurant, and pays for it, could be held liable if instead of consuming the food, he took it off the premises? The absurdity of such a position was forcefully presented by Rugg, J., in the *Friend* case. There he pointed out that many restaurant keepers both supply food to guests and put up lunches to be taken out, and that to hold that there was a warranty of wholesomeness in one case but not in the other would be "an incongruity in the law amounting at least to an inconsistency."[11]

The result of holding the transaction to be a sale seems to be supported by Professor Williston.[12] As has been stated, predication of liability upon whether the transaction is a "sale" or "service" is merely a means to an end, and of itself is an unrealistic way of talking about the problem.

Assuming that there is a logical basis for reaching either conclusion (though it is believed that the weight of logic is on the side of holding the transaction to be a sale), was the result reached in the principal case in accordance with public policy? If any justification can be found for imposing liability upon the seller of food in order to insure the buyer's protection, it is equally (if not more so) present in the case where the provider of food is a restaurant-keeper than in

[10] Beale, Innkeepers, 169 and cases cited.

[11] 120 N. E. 409.

[12] Op. cit. supra note 7, Sec. 242b: "Whether this analogy (that title to food served by an innkeeper never passes) holds good in a restaurant where a customer pays not for a meal, but for a definite portion of food, may perhaps be questioned."

the case of the retail food merchant. The question then presented is a broader one than the immediate one in the principal case, and goes to the very basis of the doctrine of implied warranties.

The bases of the decisions holding the seller liable for injuries caused by defective food, even where he has been guilty of no fault, have been severally stated as (1) that the seller is far better able to hold liable the manufacturer who sold him the goods than is the ultimate buyer, (2) that the seller has many more facilities for knowledge than the buyer, (3) that the guest, in ordinary cases, is unable to prove negligence on the part of the restaurant-keeper. On the other side it has been said that to impose such liability leaves the way open for nuisance suits, and imposes "an unjust and unnecessary burden upon a large number of persons engaged in a useful and necessary business."[13]

That the minority holding does open the way to the bringing of nuisance suits is undoubtedly true, for the only evidence necessary to be introduced in such a suit is of the contract of sale, of the deleterious matter, and of the consequent injury. On the other hand, to allow recovery only on the basis of negligence is severely to limit the possibilities of recovery, for in many cases proof of negligence is extremely difficult. While in many cases the doctrine *res ipsa loquitur* will be held applicable,[13a] still the doctrine raises only a rebuttable presumption. Thus in the principal case a showing that the foreign matter was so imbedded in the bread that it could not be found even upon reasonable inspection would preclude recovery. The obvious answer to this is that such a showing precludes negligence, and therefore should preclude recovery. Such an

[13] Crosby, J., dissenting in Friend v. Child's Dining Hall, 120 N. E. 415.

[13a] The minority opinion states that "the doctrine of res ipsa loquitur" would seem to have no application to such a case as this, as it applies only where "the particular abnormality or defect which caused the aberration is unknown." Assuming this latter standard to be correct, it must relate rather to the question of legal causation than to the physical condition which produced the injury; for as pointed out in Benedick v. Potts, 88 Md. 52, 56, 40 Atl. 1067, 41 L. R. A. 478 (1898), the doctrine cannot be applied until "the physical act has been shown, or is apparent, and is not explained by the defendant." The opinion then continues: " . . . it may reasonably be inferred that had it (defendant) exercised reasonable care in handling and inspecting it, that it would have discovered the tin . . . so that the cause of the harm and the reason for it are known; that is, it is known how it occurred and why it occurred. Therefore there was evidence of negligence. . . ." But the evidence of negligence (the "why it occurred") is the result of an inference, drawn from the fact that if defendant, which selected the bread, had used reasonable care, it would have discovered the tin. Is not this evidence by inference a direct application of res ipso loquitur, before repudiated in the same opinion? See also Goldman & Freiman Bottling Co. v. Sindell, *supra* note 3, 140 Md. 488, 497, 500.

answer would, however, be equally applicable to cases under Workmen's Compensation laws were it not that the policy of such statutes is to impose the cost of injuries to employees on the business. There is no statute covering the problem of the principal case, but the inquiry is suggested whether it would be desirable to impose, in effect, the duty of taking out insurance against liability (or of being ready to respond in damages) through the device of allowing recovery in warranty.

But is the policy of the minority any more affirmative? The ultimate basis of the dissenting opinion in the principal case is that the restaurant-keeper controls the purchase of raw materials, the employing of servants who prepare it, and the manner and means of preparation, while the customer can know nothing of these matters until the food is placed before him, and in many cases not until he has eaten it. But this also misses a fundamental fact, viz. that in the principal case, while the sandwich itself was prepared by the defendant, the bread was not, and that, therefore, to hold the defendant liable in such a case may result in holding one who is guilty of no negligence at all (again assuming that the deleterious matter here was latent, and not discoverable even by proper inspection). It is, of course, true that the guest is equally innocent, but it is a supposed fundamental principle of justice that one be not held liable without fault. To this latter generalization it may be answered that the books are replete with examples of liability without fault, as in Workmen's Compensation and under the statutes of other states which hold the owner of an automobile liable for damage caused by another who is using the car with his consent. The question is whether the restaurant situation may be analogized to these to the end that the restaurant-keeper should be held liable without his fault.

Are the other policy arguments of the minority decisions sound? It is said that the remedy of the restaurateur against the manufacturer is easier of attainment than that of the guest. Some doubt is cast upon this proposition by the holding in the Maryland case of *Goldman & Freiman Bottling Co. v. Sindell*,[14] (though that case dealt with package goods) and by those cases which go so far as to allow a remedy against the manufacturer for breach of warranty, though there is no privity of contract.[15]

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[14] Supra note 3.

[15] Davis v. Van Camp Packing Co., 189 Iowa 775, 796, 176 N. W. 382 (1920).

Further it is said that the seller has more facility for knowledge than the buyer. While this is true, it should not be carried so far as to presume knowledge on the part of the seller when he could have had none. Thus again in the case of latent defects, the seller cannot be reasonably said to have knowledge, and the fact that he has greater facility for the obtention of knowledge should not be made the ground of a liability which he could not reasonably avoid. If the statement be taken to mean that the seller has greater facility for knowledge of the type and quality of goods handled by the manufacturer from whom he buys it has a more reasonable basis. Then the theory of holding him liable is analogous to the theory which holds a principal for the selection of his agents. But even this does not appear to be a sufficient basis for liability, for as a practical matter deleterious matter finds its way into articles of food despite caution. Therefore the logical result can only be to hold the seller who purchases from a manufacturer whom he knows or should know to be a dealer in defective goods, but not to hold him merely because he happens to choose, from among many competent, cautious manufacturers, one whose goods in a particular instance turn out to be defective.

Even though the decision in the principal case may accord with the numerical weight of authority, there are several things about it to give one pause in considering it. The assumption throughout that the denial of liability in warranty and the permitting of it only in tort does not actually prevent the plaintiff from recovering is not entirely accurate. Actually, in many cases, if plaintiff can only recover in tort he cannot recover at all. Then it seems medieval and metaphysical to decide cases of this sort on the concepts of "sale" or "service" in the furnishing of food in a restaurant. The fine line between this case and the sale of food in a grocery or to be consumed off the premises makes it dubious that recovery in warranty should be denied in this instance.

The concurring opinion poses the question of the extent to which the principal question in issue in the whole problem is the danger of "nuisance" suits against restaurateurs if liability in warranty be imposed. If, as that opinion suggests, the ultimate solution must be a statutory one, the legislature could well consider the desirability of compelling, in effect, insurance against liability by a rule (warranty) which would tend to assess the costs of such injuries as part of normal business expenses.