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Amended Definition of Sale to Include Food Consumed on Premises

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Amended Definition Of *Sale* To Include Food Consumed On Premises

Effective June 1, 1958, a new definition of the word *sale* was added to the Maryland Uniform Sales Act:

> " '*Sale*' includes a bargain and sale as well as a sale and delivery *and also the serving or providing of food for human consumption by any caterer, or by any restaurant, hotel, boarding house, dining room or any other eating establishment.*"[1]

The effect of this addition will, it would clearly seem, result in bringing food purchased in a restaurant for immediate consumption under the definition of an implied warranty.

Prior to this change in the statute, the only case presenting the question of whether food purchased in a restaurant was a sale or a service was *Dining Hall Co. v. Swingler.*[2] There, the plaintiff entered the defendant's restaurant and ordered a sandwich. When she bit into the bread, a piece of tin lodged in her mouth causing serious injury. The Court, in reversing judgment for the plaintiff, concluded that the purchase and eating of food on the premises was not a sale within the meaning of the Sales Act.[3] The feeling was expressed that if a sale were found, and therefore an im-

[1] 7 MD. CODE (Cum. Supp. 1958), Art. 83, §94(1). It should be noted that this is an amendment to the Uniform Sales Act in Maryland by the Maryland General Assembly, and not one promulgated by the Commissioners on Uniform Laws. The portion added at the end is italicized.

[2] 173 Md. 490, 197 A. 105 (1938), noted, 2 Md. L. Rev. 277 (1938).

[3] *Ibid.*, 503. The Court there said:

> "We hold that an action in tort in such cases as this affords to the injured person a convenient and adequate remedy, and disposes of the contention that the adoption of the negligence theory, rather than that of an implied warranty, would amount to a practical denial to those injured in cases from food adulteration, foreign substances or unmerchantable quality."

plied warranty as to fitness for consumption, the restaurant keeper would be in the position of an insurer. By finding that food served on the premises was only a service, the burden was put on the injured party to show negligence on the part of the restaurant keeper since the action would be in tort and not in contract. Two judges dissented on the grounds that a restaurant keeper who serves food is very well aware of the use to which it will be put and therefore this type of transaction should be treated as a sale and subject to any implied warranties that are applicable.[4]

The Maryland Court has made the distinction between food purchased in a restaurant and food purchased in a retail store for consumption at some other place. In *Vaccarino v. Cozzubo*,[5] the Court, while finding the plaintiff guilty of contributory negligence, still held that sale of food by a retail store for immediate consumption is a sale and not a service, and therefore subject to implied warranties.

Prior to the passage of the amendment to the Sales Act,[6] Maryland was in the minority regarding retail restaurant service.

> "The numerical minority of the jurisdictions in which the question has arisen adhere to the view that one engaged in the business of serving food for immediate consumption on the premises does not impliedly warrant that the food served is wholesome or fit for human consumption but, in the absence of an express statute, is liable only for negligence."[7]

It is interesting to note that the recent Maryland amendment does not specifically mention *drink*.[8] Whether the omission of this word by the legislature was intentional or not we do not know. However, on the face of the language of the amendment it might appear that anyone

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[4] *Ibid.*, 516:

> "To say that a restaurant keeper who delivers a sandwich, or some other similar portion of food, to a patron who pays for it, when the restaurant keeper knows that the purchaser intends to eat it, makes no representation that it is fit to eat, if it is to be eaten in the restaurant, but does make such a representation if it is to be taken out of the restaurant, seems absurd."

[5] 181 Md. 614, 31 A. 2d 316 (1943), noted 8 Md. L. Rev. 61 (1943). And see 18 Md. L. Rev. 156 (1958).

[6] *Supra*, n. 1.

[7] 7 A. L. R. 2d 1027, 1054, 1055, citing the Swingler case, *supra*, n. 2.

[8] The Proposed Uniform Commercial Code (1957 Official Text) provides in §2-314 that the "serving for value of food *or drink* to be consumed either on the premises or elsewhere is a sale." (Italics supplied.)

injured by a deleterious substance in a drink will still have to base his suit on negligence and not on implied warranty. On the other hand, it could be argued that beverages for human consumption are just as much *food* as are solids, and this would seem to be the more reasonable interpretation.

There is some doubt as to what effect the new provision will make in the practical application of the rule. Whether or not the new law will give rise to a series of nuisance claims remains to be seen. In any event, it seems sound to give relief to one injured in a restaurant on the same grounds as if food were taken out. The difficulty, even impossibility, of proving negligence in many cases can result in injustice.

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