

## Conclusion

223. The plaintiff has only faintly raised the possibility that the strips in the Twister could have been undercooked and while there is some evidence that standard procedures were not being followed at KFC Villawood around the time Mr Samaan purchased the Twister, there is nothing that would satisfy the Court the Twister that Monika ate could have been undercooked. The cooking time was automated. The chicken was not 'pink' and, unless the chicken were frozen (of which there is no evidence), it is most improbable that it was undercooked.

224. The defendant has submitted that there is no evidence of where the relevant strain of cross infective Salmonella might have originated and if the chicken strip was free of Salmonella upon its supply to KFC, improper handling of the type described by the store employees before cooking could only infect the chicken with Salmonella if there were some other source of Salmonella in the store that would provide a means for cross infection. The logic in this submission is flawed in that the expert opinions from both sides agree that there is a 35 to 50 percent likelihood that the chicken supplied to KFC contains Salmonella. Further, the evidence is clear that there are readily available sources for cross contamination if food were mishandled or if KFC hygiene practices were not followed.

225. The defendant submits that there is no evidence from which the Court can infer that the strip was exposed to a Salmonella source after deep-frying. If a piece of chicken were to fall onto the breading table or even the floor, it is submitted, it would have just come out of boiling oil in a metal container at 175°C and would remain too hot at its surface for Salmonella bacteria to multiply for some appreciable time. If put in the henny penny (kept at 60°C), it would become free from Salmonella (or certainly, any Salmonella cells would not grow), even if it had somehow picked up cells after cooking. The clams were too hot to handle with bare hands.

226. If the Twister somehow were to come into contact with Salmonella bacteria during the assembly process, the defendant submits that the cell growth would need to reach an infective dose level distributed evenly across the two chicken strips within about 20 minutes of exposure at 37°C, as it is suggested that the plaintiff's evidence was that the Twister was eaten within approximately 15 minutes of purchase. In fact the plaintiff's evidence is again vague as to the approximate time the Twister was eaten (see for example transcripts 04 August 2009 at 75.5 -.11; 20 July 2010 182.5 -.37; 183.2 -.48; 158.45). Monika came home and looked at the new baby before she ate her meal. It is therefore likely the Twister was eaten about 20 to 30 minutes after it was purchased. The defendant suggests it is statistically improbable, within this time frame, for Salmonella to become distributed throughout the Twister with enough toxicity to cause four people (two adults and two children) to be ill from eating approximately 15 to 25 grams each of chicken meat. I accept the statistical improbability of such an occurrence.

227. Further, the defendant appears to base this argument on Professor Fleet's estimations of the standard distribution of bacterial growth on a single piece of chicken. The defendant has not addressed the issue that the Twister (as the C.H.A.M.P.S. manual implies) tends to cool down more quickly than other KFC products, which presumably would be due, in part, to its other ingredients, including mayonnaise sauce, which could also facilitate the spread of bacteria throughout the product. This is a second issue only touched upon in the evidence and submission of both parties.

228. The question of distribution of Salmonella bacteria is a vexed one. In some senses it is a 'red herring' when it is considered in relation to the question of what possible dosage of bacteria each family member could have ingested. The only evidence that was presented in

this regard was that some people may be more susceptible to Salmonella poisoning than others. Therefore there is a possibility that one person may ingest more Salmonella cells than another and either not become sick or be less ill than the person who ingested fewer, and vice versa. It is not possible to assume that Monika ingested more Salmonella bacteria than the rest of her family, from which premise the parties worked. It is possible that Monika did not ingest many, or any, more bacteria than the rest of her family, but that she was unlucky either in that the Salmonella poisoning she experienced was marred by other complications or that she may have been, either due to her size, or due to other physical reasons, more susceptible to the illness than the rest of her family.

229. The defendant submits that the question of cross contamination can also be discounted for the reason that the burger station employee making the Twister would have also made the burger purchased by Mr Samaan for Monika's brother, Abanoub. Therefore, it is suggested that if the cook had dirty hands, or the Twister was placed on a contaminated preparation area after cooking, it would be expected that the burger would also have been infected. The defendant suggests that this is known not to be the case as the plaintiff claims the only common food eaten was the Twister. However, the defendant's submission in this regard defies logic. The plaintiff, Monika brings this case, hence the plaintiff's concentration of its case on the Twister. It is impossible to draw the defendant's asserted conclusion on the basis that the plaintiff claims that the only common food eaten was the Twister, thus it was only the Twister that could possibly have been contaminated. Abanoub was also ill, whether or not this illness came from the Twister alone, or also from the burger, is not to be determined by the fact that the Twister was the only common food to the family.

230. The defendant argues that any tendency evidence in relation to the sometimes lacklustre food handling procedures by KFC staff at Villawood must be weighed against the following evidence:

- (a) No other person complained of falling ill or at all about food supplied by the Villawood store on that date;
- (b) No records were produced by area health and food authorities of complaints, notifications, reports or investigations into any other incidences of Salmonella poisoning having any connection with the defendant's Villawood store for the period 1 October 2005 to 31 December 2005;
- (c) There were no penalties, warnings, improvement notices, prohibitions or other notices issued by or on behalf of the NSW Food Authority in respect of the KFC Villawood store during 2004 and 2005;
- (d) The defendant has no record of any other complaints or notifications relating to Salmonella poisoning made by customers of the KFC Villawood store during the years 2003, 2004 and 2005; and
- (e) The KFC employees called by the defendant had more experience in the Villawood store and generally presented more credibly than those called by the plaintiff.

231. Evidence of underreporting of food borne illnesses has been presented to the Court, which I accept. The lack of documentary evidence in relation to any relevant complaints adds some weight to the defence, however, the real issues lie with the evidence of KFCs employees in relation to whether there is some possibility that the Twister Mr Samaan purchased for Monika could have become contaminated through errant food handling procedures between the time Crispy Strips had been cooked and the time the finished product was handed to Mr Samaan.

232. It is accepted that if food preparation and food handling procedures are properly followed, the risk of infection is so low it is close to nil, that is, almost impossible. The evidence from KFC employees, from the expert evidence and from the KFC's food handling guides canvassed the following theoretically possible causes of contamination:

(a)The Crispy Strips were not cooked for long enough.

(b)The henny penny was at the wrong temperature.

(c)The Crispy Strips were left in the henny penny for too long - i.e. they were no longer fresh.

(d)Tongs were used to remove the Crispy Strips that may have been contaminated with flour or blood, which carried the Salmonella bacteria.

(e)The Crispy Strips were dropped on the floor.

(f)The Crispy Strips placed on top of the breading table and came in to contact with flour.

(g)The hands of the person who prepared the Twister, either gloved or ungloved, carried Salmonella bacteria, which was transferred to the Twister.

233. The evidence of mishandling of the chicken provides enough weight, when combined with all of the other evidence, to enable the conclusion to be drawn that it is more likely than not Monika's Twister became contaminated while it was being handled or made up. The evidence, relating to infectious doses leads to the conclusion that it is not theoretically impossible for four people to become infected from one chicken Twister. From a careful process of reviewing, accepting, and at times excluding, the evidence given by both the food authorities and by the Samaan family as to the food eaten during the 72 hour incubation period, I conclude that realistically, the only, and at least the most probable, carrier of the Salmonella bacteria that caused the family's illness was the Twister that Mr Samaan purchased from KFC's Villawood store on 24 October 2005.

234. This matter has caused some difficulty. While the primary facts were settled at a very early stage, including the attitude of the Court to the veracity and reliability of the oral evidence, the effect of that evidence on liability has caused some difficulty in resolution.

235. As is clear from these reasons up to almost 50 percent of all farmed chicken has some Salmonella. KFC has implemented a process that, when followed, renders impossible the survival of Salmonella cells. That process is described in this judgment. Further, KFC has an audit system to ensure that the process is followed. The process includes: ensuring the raw chicken is cooked at temperatures and for a time that will ordinarily destroy Salmonella; cooked chicken is kept warm for no more than a maximum period, also at temperatures that would maintain the food at a temperature that would, itself, destroy Salmonella or at least prevent its growth; hand-washing regimes; and regimes for the use of cooking tools and equipment. The processes, as stated earlier, are summarised herein.

236. In the ordinary course, again assuming compliance with KFC procedures, it is effectively impossible to contract Salmonellosis (Salmonella poisoning) from KFC. Moreover, as earlier stated, compliance with those procedures is strictly enforced by KFC and regular unannounced audits are conducted.

237. The foregoing renders the likelihood of KFC being the cause of this injury remote and the occurrence generally highly improbable. The degree of improbability is also affected by

the number of cells likely to cause illness to each of the affected members of the family and the sales records, which disclose no order that, as a whole, was the same as Mr Samaan's order (on his evidence).

238. Against that improbability is the fact that each affected family member did contract Salmonellosis and, most probably, contracted it from chicken. The only chicken meal, according to the oral evidence, which I accept, common to each affected family member, was the Twister from KFC. The acceptance of the oral testimony of Mr Samaan, Mrs Shanoda and Mrs Dous necessarily leads to that conclusion. However, the systems in place at KFC warranted a reconsideration of the testimony of the witnesses. Truthful witnesses can be mistaken and their truthfulness must be re-assessed.

239. The effect of the KFC system, rendering, as it does, the contracting of Salmonella poisoning impossible, must be qualified by the evidence of the aberrant behaviour at this store. First, there is the "breakdown" score on audits before and after the alleged purchase. Second, some of those breaches to the high standard set by KFC related to issues affecting (or that may affect) these issues, for example, the temperature of the warming tray and the longer than prescribed time before use. Third, there is the skylarking by employees at this store of which KFC central management (except vicariously) were unaware. Lastly, there is the lack of total accuracy in the cash register results and the capacity, in that area in particular, for human error.

240. A Twister was purchased at 3.10pm. That was at or about the time Mr Samaan says he purchased a Twister. A difference of half an hour in the estimate of the time of purchase by the witnesses is unremarkable. The Twister was purchased after school and the "inconsistency" in the time makes no difference to the likelihood that the oral evidence is otherwise accurate and truthful. These were unusual days because of the birth of the baby and the unusual timings may not be probative. Further, the fact that KFC cash registers record a sale of a Twister without any other product does not detract from the evidence of Mr Samaan that he ordered another product. It is far more likely that Mr Samaan's order was split into the Twister and one or other orders.

241. It is unnecessary for the Court to find the precise breach in the KFC procedures that has led to the Salmonella cells remaining or being transferred to the Twister. However, there is no suggestion that the Twister was not cooked properly. The timing and temperature of the cooking is automated. For the detailed reasons in the judgment it is unlikely that, if there were Salmonella cells on the pieces of raw chicken, they would have survived the cooking. The chicken, while being cooked, would reach well over 60°C, which would have destroyed the cells.

242. On the other hand, given the evidence that I accept of the behaviour of the employees, it is likely, if Salmonellosis were contracted, there was cross contamination of the Twister pieces after cooking, most likely by contact with flour or other dipping material used previously on the raw chicken, or possibly by handling (manually or with cooking utensils). Moreover, it is more likely than not that the tray operated at a temperature that did not ensure the chicken (or, more relevantly, the Salmonella cells) remained at or above 50°C, which means that any Salmonella on a piece of chicken (probably on a clump of foreign material) in the warmer tray for any but a short moment, would have experienced an optimum reproduction environment, augmented by the effect of applying sauce and the delay between sale and consumption during which the temperature of the food would have fallen even further. The effect of that augmentation would have spread and multiplied the Salmonella. This is one of the reasons that KFC has placed such importance on processes that destroy Salmonella and prevent its reintroduction after cooking.

243. I do not have to be convinced beyond reasonable doubt of the occurrence. However, I have to be satisfied on the balance of probability. Submissions (and evidence) showing a reasonably available hypothesis inconsistent with KFC having supplied the offending chicken are not strictly on point.

244. Nevertheless, by the lower standard of balance of probabilities, I must be satisfied that the Salmonellosis was contracted from KFC. If there were another reasonable possibility, given the KFC procedures, I could not be convinced, even on the balance of probability, of the liability and responsibility of KFC.

245. Ultimately, the existence of another reasonable possibility depends on the evidence that is otherwise accepted. I accept, without qualification, the evidence of Mrs Shanoda that she ate the hospital food and not the additional relevant food brought to the hospital by her family.

246. I do not consider the evidence of the food inspectors as inconsistent with the evidence of Mrs Shanoda. I accept that their notes derive from statements at the hospital made by Mr Samaan, not Mrs Shanoda. Mr Samaan knew only what was brought to the hospital, not what was eaten.

247. Further, the testing of the remaining raw chicken at the Samaan home gives added confidence to the foregoing view. However, that testing would not, by itself and without more, be sufficient to displace the possibility of other causes.

248. Finally, for all of the foregoing reasons, I am satisfied, on the balance of probabilities, that:

(i) Monika Samaan contracted Salmonellosis from ingesting Salmonella cells on chicken;

(ii) The source of that chicken was a KFC Twister brought by Mr Samaan on the afternoon of 24 October 2005 and consumed predominately by Monika within an hour and in lesser quantities by her family (except Mrs Dous and the newborn), and

(iii) Monika Samaan's Salmonellosis developed into Salmonella encephalopathy.

249. As a consequence of the foregoing, KFC is liable to Monika Samaan for damages arising from her injuries and I so determine.

250. Given the nature of the KFC audits and procedures, real questions arise as to the extent to which vicarious liability ought to attach to the action of those departing from such procedures, in some cases deliberately. If this store were a franchise store, KFC would most likely not be liable, having taken all practical steps to ensure compliance with the procedures. However, this was not a franchise store. Further, given the improbability of an infective dose from KFC generally, if there were another possible source of infection on the evidence that I accept, liability could not be imposed on KFC.

251. Ultimately, the law enforces a policy that employers are liable for the acts of their employees. This policy has been implemented at least since 1701: see *Hern v Nichols* (1701) 1 Salk 289 per Holt CJ and the modern approach is described recently in *Hollis v Vabu* (2001) 207 CLR 21. But the policy basis for such liability, particularly in circumstances where steps of the kind here have been taken, makes more obvious the call for no-fault liability insurance to cover disabilities. The determination of liability on a business for the aberrant and disapproved conduct of its employees is unfair. Ultimately, it is less unfair than

the liability falling on the victim, who has, on the balance of probabilities, contracted a disease from goods purchased and on which she should be able to accept were edible.

### **Breach of duty of care**

252. As earlier stated, the plaintiff pleads its causes of action in negligence, contract and statutory causes of action under the *Trade Practices Act*, *Fair Trading Act* and *Sale of Goods Act*.

253. An extensive exposition of the legal principles is unnecessary. As KFC have been found, as a matter of fact, to have produced product contaminated with Salmonella cells, the product is not of merchantable quality, not fit for its known intended use and otherwise not in conformity with the description. The provision of such product, intended as it was for human consumption is a breach of contract and a contravention of a number of warranties implied either by the common law or statute both.

254. Further, as the Court has stated elsewhere, the Court is of the view that the contamination occurred after cooking, by cross-contamination with product (directly or indirectly) that was contaminated with the bacteria and, more probably than not, a clump of flour or other such material that was contaminated. That contact was a breach of the procedures mandated by KFC and was negligent, or the use of it after such contact (also a breach of KFC procedures) was negligent.

255. These proceedings have been contested on a factual basis, not on the basis of an absence of liability if the facts were concluded against the defendants. This is an appropriate course to have been taken.

256. Nevertheless, some adumbration of the principle is appropriate. First, I deal with the alleged contravention of the *Trade Practices Act*. Clearly, KFC, in processing and selling chicken product is engaged in trade or commerce. I do not, for present purposes, distinguish between the duties under the *Trade Practices Act* and the *Fair Trading Act*, which are relevantly identical. Further, to the extent relevant, the terms of Schedule 2 to the *Competition and Consumer Act 2010* are relevantly identical to ss 66, 70, 71, 74, 74B, 74D of the *Trade Practices Act*.

257. The statutes impose on the provider of goods (or services) to a consumer a duty to guarantee that the goods are of acceptable quality, fit for purpose to be used (if known), and that the goods meet the description of the goods. As earlier stated, if the goods sold were contaminated with Salmonella, the goods were not of acceptable quality; not fit for the purpose for which they were sold (namely, to be eaten); nor does the item meet the description of the goods: see, *inter alia*, *Ryan v Great Lakes Council* [1999] FCA 177; (1999) 102 LEGRA 123.

258. A later discovered defect, which the supplier (in this case KFC) does not prove did not exist at the time of supply, is a latent defect for which the supplier is responsible: *Effem Foods Ltd v Nicholls* [2004] NSWCA 332. If there were contamination in the chicken supplied, it could only be from a failure by KFC through its employees, to implement the procedures required by KFC and, therefore, impossibility of discovery does not arise: *Graham Barclay Oysters v Ryan* [2000] FCA 1099; 102 FCR 307.

259. Further, the duties imposed by the common law of contract and/or the *Sale of Goods Act* are such that this later discovered defect, which existed at the time of sale, renders the goods unmerchantable and/or not reasonably fit for the purpose required. The contract (including statutory warranties) has been breached and damages must flow. To the extent

that authority for the foregoing is required, there is abundant authority and I refer to *Henry Kendell & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 particularly at 74, 75, 77 and 79 per Lord Reid and to Dixon J in *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 at 413. Reference should also be made to *McWilliams Wines Pty Ltd v Liaweena (NSW) Pty Ltd* (1988) ASC 55-695.

260. Lastly, there is a cause of action in negligence, governed by the *Civil Liability Act 2002*, and of particular current relevance, ss 5B, 5C and 5D thereof.

261. As these reasons and the evidence from KFC itself, and the experts, make clear, the risk of harm from Salmonella is foreseeable. Steps have been taken by KFC to ameliorate the risks. The risk is not insignificant and no reasonable person in the position of KFC would decline to take the ameliorating steps, particularly having regard to the possibility of harm and the burden in taking the steps, even bearing in mind the utility to the community of the supply of these products.

262. In this case, the general requirements of KFC, if followed, eliminate the risk of contamination. The contamination has occurred because of the failure of one or more employees of KFC to adhere to that procedure. The failure to adhere to the procedure was negligent and, more probably than not, given the infective doses most likely to have been on the food, and the steps otherwise taken by KFC to avoid contamination, involved food coming in contact with flour (or some other substance) that was old (in the sense of hours) and significantly affected by Salmonella. I infer the employee 'dusted off' the chicken leaving small clumps of infected 'flour' on the chicken. The Salmonella cells continued to multiply before and after sale and were spread by the use of sauce and other such additives.

263. Frankly, there is little any employer can do about behaviour of an employee inconsistent with the procedures mandated by the employer, other than better supervision or better training. There is some evidence, which I accept, that some employees were unaware of the full consequences of a breakdown in the system that was to be implemented. Such knowledge would no doubt impact on the conduct of employees. Nevertheless, the conduct of the employee was negligent and KFC, as the employer, is vicariously liable for the negligence: *Hollis v Vabu*, supra.

264. The relationship between KFC, Mr Samaan and Monika created by the purchase and sale of the product and the consumption of the product as a result of the sale creates a duty of care in KFC to persons in the class of those intended to consume the product: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Adeel Palace v Moubarak* (2009) 239 CLR 420; *Donohue v Stevenson* [1932] AC 562; [1932] All ER Rep 1.

265. But for the negligence of the staff, the harm to Monika would not have occurred: *Adeels Palace*, supra. Liability for the damage to Monika arises in negligence as well.

266. It is unnecessary, at this time, to deal with any difference in the calculation of damage in contract or in tort (or under statute). Those issues are matters for assessment of damage.