A guide to food poisoning claims

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Introduction

According to the Food Safety Information Council, there are an estimated 5.4 million cases of food borne illness in Australia each year, and that food poisoning results, on average, in 120 deaths, 1.2 million visits to doctors, 300,000 prescriptions for antibiotics, and 2.1 million days of lost work each year. These figures are likely to increase with the rising number of vulnerable Australians who are at the most risk from food poisoning, being the young and the elderly.

This, in turn, is likely to lead to increasing numbers of food poisoning cases.

The purpose of this newsletter is to examine the key issues in food poisoning cases and provide details of some useful resources when dealing with such cases.

The principles

Causes of action

Causes of action in respect of food poisoning may arise in negligence, in contract, or under the Australian Consumer Law (ACL), which is contained in the Competition and Consumer Act 2010 (Cth) (CCA). Typically, claims in negligence can be more difficult for claimants to establish than claims under the ACL because the additional elements of foreseeability and breach of duty need to be satisfied. The ACL, on the other hand, essentially provides for a strict liability regime in the sense that it does not require a claimant to establish a want of reasonable care.

Claims in contract can also have limitations for claimant litigants.

The ACL

There are two avenues for establishing liability under the ACL in respect of food poisoning cases:

1. Defective goods actions;
2. Actions for breach of statutory guarantee.

Defective goods actions

Pursuant to s 138 of the ACL, a manufacturer of goods is liable to compensate 'an individual' if:

1. The manufacturer supplies the goods in trade or commerce; and
2. The goods have a safety defect; and

3. The individual suffers injuries because of the safety defect.

The definition of ‘manufacturer’ is broad and goes beyond actual manufacturers. For example, a party will be deemed to be a manufacturer if it permits its label to be affixed to a product. Similarly, an importer will be deemed to be a manufacturer if the actual manufacturer does not have a place of business in Australia.

In order to establish liability in a defective goods action, a claimant must prove the existence of a ‘safety defect’, the fact that injury has been suffered, and a causal connection between the defect and the injury.

In the context of a food poisoning claim, if it is established that a food product was contaminated, then this will plainly constitute a ‘safety defect’ for the purpose of the ACL. Therefore, the main areas of contention in such claims are typically whether the food product was contaminated and whether this caused the claimant’s injuries.

Defective goods actions are not available against suppliers unless they are deemed to be manufacturers.

**Statutory guarantee**

Pursuant to s 54 of the ACL, if a person supplies, in trade or commerce, goods to a consumer, there is a guarantee that the goods are of ‘acceptable quality’.

For the same reason as discussed in the context of defective goods actions, if a food product is contaminated, it will probably not be in issue that the product was not of acceptable quality, and therefore in breach of the statutory guarantee.

Pursuant to s 271(1) of the ACL, if a manufacturer does not comply with the guarantee, then an ‘affected person’ may recover damages against the manufacturer.

Unlike defective goods actions, there is also a right of action against suppliers of products. However, there are some limitations. For example, if a person purchases a contaminated food product and gives this to a third party, who then becomes ill, the third party may not make a claim against the supplier for breach of the statutory guarantee.

While there are certain statutory defences available to defendants in defective goods actions, no such defences are available in breach of guarantee claims.

**Statutory indemnity**

Suppliers who have failed to comply with the statutory guarantee do have some recourse against manufacturers who have also failed to comply with the guarantee. Section 274 of the ACL provides an indemnity in favour of suppliers against manufacturers in such circumstances.

**Causation**

As mentioned, the main area of contention in food poisoning claims tends to be causation, which largely turns on issues of fact based on circumstantial evidence.

It is therefore necessary to consider the standard of proof in civil proceedings as it applies to circumstantial evidence.

In some jurisdictions, this has been codified. The common law position can probably be best summed up in the often quoted passage from the High Court decision in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5:

‘The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: see per Lord Robson, Richard Evans & Co. Ltd. v. Astley (1911) AC 674, at p 687.’ (emphasis added)

An example of the application of these principles was the recent New South Wales Supreme Court decision in *Samaan bht Samaan v Kentucky Fried Chicken Pty Ltd* [2012] NSWSC 381. This case concerned a seven year old girl who suffered severe brain damage and spastic quadriplegia as a result of salmonella poisoning.

The plaintiff made claims under the *Trade Practices Act 1974* (Cth) (TPA) (the predecessor of the CCA and the ACL), for breach of contract, and in negligence.
The main issue in dispute was the source of the food poisoning.

The plaintiff alleged that she ate a chicken Twister purchased by her father, Mr Samaan, from a KFC store on 24 October 2005 and that the Twister contained the salmonella bacteria that caused her injuries.

For readers who are not KFC regulars, a Twister comprises a chicken breast, cut into two strips, lettuce and sauce, wrapped in a piece of flat bread.

The plaintiff ate approximately one third of the Twister at around 4pm after arriving home from the KFC store. She then offered the Twister to the rest of her family, including her parents, brother and grandmother. Only her grandmother did not eat any of the Twister. Later that night, the plaintiff became sick. The other members of her family who had eaten the Twister became ill shortly after. Every member of the plaintiff’s family who consumed the Twister suffered salmonella poisoning and were hospitalised.

It was not in issue that the most likely source of the bacteria was chicken. The evidence was that almost 50 percent of all fresh, raw chicken contained some salmonella cells.

KFC led expert evidence which established that it was virtually impossible for the Twister to become infected with salmonella bacteria if its standard procedures were followed. The expert evidence also suggested that it was highly unlikely that four people could simultaneously ingest an infective dose from two small pieces of chicken. The court therefore considered that it was highly improbable that KFC caused the plaintiff’s injuries.

The simultaneous onset of illness was plainly consistent with a common source, which suggested that there was a single exposure to the salmonella bacteria that came from a shared meal. However, before it could be concluded that the Twister was the source of the salmonella bacteria (against the persuasive evidence of KFC), it was necessary for the court to consider, and then discount, any other potential sources.

The incubation period for salmonella poisoning was found to be between six hours and 72 hours. After constructing a history of the food consumed by the plaintiff and her family during the maximum incubation period, it was found that the KFC Twister was the only meal that was common to the plaintiff and the members of her family who had become ill.

Moreover, the plaintiff adduced evidence from KFC employees about staff behaviour and hygiene practices which suggested that there were incidents of aberrant behaviour and the mishandling of chicken at the store in question.

After considering the case law on causation, the court concluded that, on the balance of probabilities, the plaintiff contracted the salmonella poisoning from KFC. The court went on to find that KFC had contravened the defective goods and implied warranty sections of the TPA. The court also found KFC liable in negligence on the basis that its employees had failed to comply with its food standards, for which KFC was vicariously liable.

Conclusion

Food poisoning cases typically turn on issues of fact and, in particular, being able to establish the source of the poisoning, rather than issues of law. Resolving such factual issues usually involves a process of elimination. The process adopted in the KFC decision was assisted by the fact that salmonella poisoning had a relatively short incubation period.

Other forms of food poisoning can have longer incubation periods. Listeria poisoning, for example, has an incubation period of up to 70 days. Plainly, the process of elimination over such a long period would be significantly more difficult for a plaintiff to prove. For this reason, food poisoning claims can be difficult to prove, depending on the type of contamination involved.

As a guide, the following factors should be taken into consideration when investigating food poisoning claims:

1. The incubation period for the contaminant;
2. The potential sources of contamination;
3. Simultaneous onset of illness in other people;
4. The history of the food consumed by the complainant and other affected people during the incubation period;

In order to establish liability in a defective goods action, a claimant must prove the existence of a ‘safety defect’, the fact that injury has been suffered, and a causal connection between the defect and the injury.
5. Potentially competing sources of contamination;
6. Any other incidents of contamination during the same period involving the same contaminant;
7. Statistics involving similar forms of poisoning;
8. The applicable food standards;
9. The adequacy of the defendant’s processes;
10. The degree to which the defendant’s processes are adhered.

There are a number of resources available that can assist with some of these enquiries.

‘Food Standards Australia and New Zealand’ – This body develops and administers the Australia New Zealand Food Standards Code (Code), which lists requirements for foods, including food safety and labelling. A copy of the Code can be found on its website. Standard 4.2.2, for example, deals with the primary production and processing standard for poultry meat.

‘Ozfoodnet’ – This body was established in 2000 as a collaborative initiative with Australia’s State and Territory health authorities to provide a better understanding of the causes and incidence of foodborne disease in the community. Its website contains useful information on outbreaks of food poisoning in the various States resulting from various identified and unidentified sources, which is current up to June 2013. As the web site does not seem to have been updated since then, its usefulness for more recent outbreaks may be limited.

New South Wales Food Authority – The authority’s website provides reports on recalls and alerts relating to food products sold in New South Wales and the other States and Territories.

National Guidelines - Pathogen Management – This is an initiative of various Australian and New Zealand Food and Dairy regulators and are guidelines for the dairy industry response to pathogen detections in dairy products and the processing environment. The Guidelines contain, among other things, a useful checklist for assisting in the determination of possible causes or links to contamination.

Dairy Food Safety Victoria – Code of Practice 2002 – Dairy Food Safety Victoria (DFSV) is the independent regulator of Victoria’s dairy industry. It has developed a code of practice setting minimum mandatory standards for the production, manufacture, storage and transport of milk and dairy foods to be used by all dairy premises in conjunction the Australia New Zealand Food Standards Code.

Australian Manual for Control of Listeria in the Dairy Industry – This manual was prepared by the Australian Dairy Authorities’ standard Committee. The manual contains listeria prevention procedures which can be a useful guide for determining potential causes of listeria contamination.

2 See s 7(1) of the ACL.
3 Pursuant to s 259 of the ACL.
4 See s 142 of the ACL.
5 For example, in New South Wales, s 140 of the Evidence Act 1995 (Cth) provides:
   (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
   (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
       (a) the nature of the cause of action or defence, and
       (b) the nature of the subject-matter of the proceeding, and
       (c) the gravity of the matters alleged.


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