

## SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

**Case Title:** Gibson (a pseudonym) v Askim Pty Ltd ATF the Askim Trust trading as Central Café Group

**Citation:** [2024] ACTSC 203

**Hearing Date:** 14 March 2023 – 16 March 2023

**Decision Date:** 28 June 2024

**Before:** Baker J

**Decision:**

- (1) Judgment is entered for the plaintiff in the sum of \$65,573.34.
- (2) The defendant is to pay the plaintiff's costs.
- (3) If either party notifies the Court within 7 days of the making of these orders that a different costs order is sought, order 2 is stayed until further order.

**Catchwords:** **CIVIL LAW – NEGLIGENCE** – personal injury – plaintiff contracted salmonella poisoning while working as a kitchen hand at the defendant's café – whether plaintiff demonstrated on the balance of probabilities that she contracted salmonella poisoning from the café – coincidence reasoning - other patrons of the café also contracted same strand of salmonella bacteria - café was found to have committed numerous breaches of the *Food Act 2001* (ACT) – whether the risk of the plaintiff contracting salmonella poisoning was foreseeable and not insignificant – whether defendant breached duty of care - defendant failed to provide soap to its employees and failed to properly refrigerate raw meat and chicken – whether the negligent conduct of the defendant was a necessary condition of the harm caused – liability established – damages awarded

**Legislation Cited:** *Civil Law (Wrongs) Act 2002* (ACT), ss 42, 43, 44, 45, 99  
*Evidence Act 2011* (ACT), s 98  
*Food Act 2001* (ACT), ss 22(2), 27, 89

**Cases Cited:** *5 Boroughs NY Pty Ltd v State of Victoria (No 2)* [2022] VSC 494  
*Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368  
*Bradshaw v McEwans Pty Ltd* [1951] 217 ALR 1  
*CCL Secure Pty Ltd v Berry* [2019] FCAFC 81  
*Cobanov v Josifovski (No 2)* [2021] ACTSC 111  
*Craig v Silverbrook* [2013] NSWSC 1687  
*Cubillo v Commonwealth of Australia (No 2)* [2000] FCA 1084; 174 ALR 97  
*Czatyрко v Edith Cowan University* [2005] HCA 14; 214 ALR 349  
*Dare v Pulham* [1982] HCA 70; 148 CLR 658  
*East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis)* [2020] WASCA 147  
*Fernandez v Tubemakers of Australia Ltd* [1975] 2 NSWLR 190  
*Fox v Percy* [2003] HCA 22; 214 CLR 118

*Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905  
*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540  
*Guojin Huang v Jinghong Wei (No 2)* [2022] NSWSC 473  
*Jones v Dunkel* [1959] HCA 8; 101 CLR 298  
*Karpik v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280  
*Koehler v Cerebos (Australia) Ltd* [2005] HCA 15; 222 CLR 44;  
*Kone Elevators Pty Ltd v Shipton* [2021] ACTCA 33  
*Lewis v Woolworths Limited* [2018] ACTSC 200  
*Matthew Xavier Carton v Rainbow Plumbing and Drainage Pty Limited* [2013] ACTSC 267  
*Michelle Noble v Joshua O'Brien* [2010] ACTSC 29  
*Palmer v Dolman* [2005] NSWCA 361  
*RTA v Dederer* [2007] HCA 42; 234 CLR 330  
*Ryrie v Tanner (No 2)* [2020] ACTSC 104; 92 MVR 27  
*Samaan v Kentucky Fried Chicken Pty Ltd* [2012] NSWSC 381  
*Sangha v Baxter* [2009] NSWCA 78; 52 MVR 492  
*Seltsam Pty Ltd v McGuinness* (2000) NSWCA 29; 49 NSWLR 262;  
*Shaw v Thomas* [2010] NSWCA 169  
*Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182  
*Tabet v Gett* [2010] HCA 12; 240 CLR 537  
*Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2022] HCA 11; 273 CLR 454  
*Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263  
*Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125  
*Whittington v Smeaton* [2016] ACTSC 76

**Parties:**

Sara Gibson (a pseudonym) (Plaintiff)  
 Askim Pty Ltd ATF the Askim Trust trading as Central Café Group (Defendant)

**Representation:**

**Counsel**

D Richards (Plaintiff)  
 D Shillington (Defendant)

**Solicitors**

Maliganis Edwards Johnson (Plaintiff)  
 Hall & Wilcox (Defendant)

**File Number:**

SC 79 of 2020

## BAKER J:

### Introduction

1. In early February 2017, a number of patrons of the Central Café in Gungahlin (“the café”) contracted salmonella poisoning after eating meals at the café. The ACT Department of Health (“ACT Health”) was notified of those illnesses and carried out an inspection of the café. The café was found to have committed numerous breaches of the *Food Act 2001* (ACT) and was immediately closed. A sample of frozen cooked chicken taken during the inspection was later found to contain Salmonella Typhimurium, which was the same type of salmonella bacteria that each of the patrons of the café had contracted.
2. The plaintiff, Sara Gibson (a pseudonym), worked as a casual kitchen hand in the café in early 2017. On 5 February 2017, she was hospitalised with Salmonella Typhimurium. She alleges that she contracted the illness whilst working at the café at this time. She says that she became critically ill as a result of the poisoning and that the illness left her completely debilitated for a number of months.
3. The plaintiff says that she now suffers from long term physical and psychological effects as a result of her illness. She contends that her illness has adversely affected her schooling, resulting in the reduction of her capacity to work. She claims for damages in negligence against the defendant, who was the owner of the café at the time, including general compensation for her physical illness, ongoing ill health and psychological harm (including the development of a food phobia), domestic assistance, out-of-pocket expenses, and loss of past and future income.
4. The defendant disputes both liability and damages.
5. In respect of liability, the defendant contends that the plaintiff has not established on the balance of probabilities that:
  - (a) she contracted salmonella poisoning from the café;
  - (b) the risk of salmonella poisoning was foreseeable and not insignificant;
  - (c) the defendant failed to take precautions that a reasonable person in the defendant’s position would have taken to avoid the risk of harm from salmonella poisoning; and
  - (d) the negligent conduct of the defendant was a necessary condition of the happening of any harm.
6. As can be seen from the above, breach of duty of care and causation are both in issue in respect of the defendant’s alleged liability for negligence.

7. In respect of damages, the defendant contends that the plaintiff was only seriously ill for about two weeks, and not months as claimed by the plaintiff. The defendant notes that during the period that the plaintiff claims to have been critically unwell and bedridden, she was arrested for shoplifting, drug possession and associating with other offenders. The defendant submits that if liability is established, any award for damages should be limited to a modest sum for general damages and pain and suffering.
8. For the reasons outlined below, I have found that liability is established. However, I do not accept that the plaintiff was as ill as is claimed in the Statement of Claim, or that she has suffered ongoing injuries to the full extent alleged. Accordingly, the damages to be awarded are substantially less than those sought on behalf of the plaintiff.

### **The witnesses**

9. The following witnesses gave oral evidence in the proceedings:
  - (a) The plaintiff, who gave evidence concerning her employment at the café, the nature of her duties as a kitchen hand, the instructions that she was given in this role, the circumstances of her hospitalisation with salmonella poisoning, and the extent of her illness and symptoms over the months and years following her hospitalisation;
  - (b) The plaintiff's mother, who gave evidence concerning how her daughter came to be employed as a kitchen hand at the café, the number of shifts that her daughter had worked, the circumstances of her daughter's hospitalisation and the extent of her daughter's illness and symptoms over the months and years following her hospitalisation;
  - (c) Mr Yaman Kasirga, who took over the café as owner in December 2016, who gave evidence about his involvement with, and observations of, the café in early January and early February 2017;
  - (d) Mr Tory Christensen, an ACT Health food inspector, who gave evidence about his observations of the café when he inspected it on 10 February 2017 and about the results of food samples taken from the café at that time;
  - (e) Ms Kelly Daniel and Ms Indiana French, who each contracted salmonella poisoning after they had eaten at the café in late January/early February 2017;
  - (f) Dr Siddarth Sethi, Consultant Gastroenterologist and Hepatologist at MLCOA, and Dr Christopher Vickers, Consultant Physician and Gastroenterologist at St Vincent's Clinic, who gave conclave evidence concerning salmonella poisoning

(including how such poisoning is acquired and the common symptoms of the condition); and

- (g) Dr Reza Sabetghadam, an occupational physician, who was called on behalf of the defendant to give evidence concerning the plaintiff's ongoing disabilities.

- 10. Witness statements from two psychologists were also admitted into evidence, together with a number of volumes of evidence relating to liability, medical evidence and the plaintiff's claim for loss of income.

### **Factual background**

- 11. On the basis of the evidence before me, I find the following facts proved on the balance of probabilities.

#### *The café*

- 12. The defendant purchased the café from the previous owner in December 2016.

#### *The plaintiff commences work at the café*

- 13. The plaintiff started working at the café as a result of a conversation that the plaintiff's mother had with "Vic" (the previous owner of the café) at a local club in late 2016. The plaintiff's mother asked Vic if he had any jobs going at the café. Vic invited the plaintiff's mother to bring the plaintiff to the café for an interview. Vic subsequently had an informal interview with the plaintiff and her mother at one of the outside tables of the café. Vic explained to the plaintiff the general nature of the duties that she would be performing. At the end of the conversation, Vic offered the plaintiff "some hours" working as a casual kitchen hand. At this time, the plaintiff was 15 years old. She had just completed year 10 at [redacted] and was about to commence year 11 at [redacted].
- 14. The plaintiff started work at the café at some point after this conversation. The number and exact dates of the shifts that the plaintiff worked in late January/early February 2017 was the subject of dispute, and will be addressed in detail below.

#### *The plaintiff's work at the café*

- 15. The plaintiff was employed as a kitchen-hand in the café. She could not recall the dates of the shifts that she worked. She said that they would only have been after school shifts, but as classes for students at [redacted] can finish as early as 12:00pm or as late as 7:00pm, the times that she worked may have varied considerably. The café was close to the plaintiff's home, and the plaintiff's mother would usually give her a lift to the café.
- 16. The plaintiff gave evidence that her primary duty as the kitchen hand was to prepare food (primarily meat items) for the chef to cook. She would get an order from a machine in the

form of a ticket. She would then look up the ingredients from a set menu, obtain the ingredients (including steak or chicken) from the cool-room, and put the ingredients in a metal bowl to give to the chef. Some of the food was already battered. She applied batter to other food, including fish (which involved handling raw eggs). Salad would be added by another employee after the meat was cooked by the chef. Another employee was responsible for packing and unpacking the dishwasher.

17. The plaintiff did not wear gloves when handling food. The cleanliness of the café, and the instructions which the plaintiff was given concerning handwashing and similar practices, were the subject of dispute between the parties and are addressed in detail below. Other issues which were the subject of dispute concerned the number of shifts that the plaintiff worked, when those shifts were worked, and how the plaintiff was paid. These issues will also be addressed below.

*The plaintiff becomes sick*

18. The plaintiff presented to the Emergency Department of Calvary Hospital at around 7:15pm on 5 December 2017. The notes taken by the triage nurse on admission recorded the following:

Fevers, vomiting and diarrhoea for 3/7. Central abdominal pain. Difficulty tolerating oral intake. NKDA. Denies PMHX. Unsure of LMP. States is possibility of pregnancy.

19. The handwritten notes of the Emergency Department similarly recorded that the patient had presented with abdominal pain and diarrhoea and vomiting for “3/7”. The Patient Progress chart records her as presenting with “diarrhoea + vomiting for 1 wk”. Another handwritten entry in the Patient Progress chart appears to record symptoms “since last Sun” (presumably Sunday).
20. At 7:45pm, the plaintiff’s heart rate was 102 and she was “febrile” with a temperature of 38 degrees. At 23:50, nursing notes record that the plaintiff’s pain was “much decreased”, with the plaintiff stating that it was “pretty much gone”. At that time, she had no nausea and no vomiting.
21. The Emergency Department Discharge Summary recorded that the plaintiff was discharged early on 6 February 2017. The Discharge Summary stated that the plaintiff had presented “with a few days of diarrhoea illness and vomiting, resulting in dehydration”. The history of present consultation (HOPC) stated:

Describes 7 days of frequent passage of loose stools, often yellow never bloodied and poorly formed.

Associated with bilious vomiting, dry wretching and intolerance of most oral intake.

Generalised abdominal cramping. Dizzy on changes in posture and ambulation. Fevers but no rigors. Decreased urinary frequency and more concentrated. No other focus of symptoms.

No sick contacts, no exotic exposures or travel.

22. The plaintiff's initial diagnosis was "infective gastroenteritis". The Discharge Summary indicated that the plaintiff was tolerating oral fluid and food well in the emergency department and that her "HR" (heart rate) had returned to normal, following "IV therapy and oral anti-pyretics, antiemetics and electrolytes replacement".
23. The Discharge Summary records that the plaintiff was "keen to go home as feeling well". The plaintiff was instructed to hydrate, avoid alcohol and greasy food whilst she was unwell, to continue with ondansetron (an anti-nausea medication) and over-the-counter painkillers for fevers and pain, to see her general practitioner within 3 days to review her blood test results, and to return to the Emergency Department in the event of "fevers, severe pain, inability to eat and drink or [if she was] otherwise deteriorating".
24. In her evidence, the plaintiff denied that she was well at the time that she was discharged. She said that the hospital had said that she could leave but advised her to stay. She explained that she did not follow this advice because:

I just didn't feel comfortable... I just would, yes, rather go and be in my own space and feel sick like I'm dying... you know when you're sick and you just want to be like in your own space? Like, you don't want to be like – yes.
25. The plaintiff's mother also gave evidence that the plaintiff was not well at the time of discharge. The plaintiff's mother said that the hospital had wanted the plaintiff to stay, but that the plaintiff was uncomfortable and just wanted to go home to recover in her own environment.
26. The extent of the plaintiff's illness at the time of discharge is an issue in dispute in the proceedings, which I will address below.

#### *The plaintiff tests positive for salmonella*

27. The plaintiff's faecal samples collected by the hospital at the time of her admission subsequently tested positive for Salmonella Typhimurium.

#### *Other patrons and a waitress of the café contract salmonella poisoning*

28. Ms Daniel attended the café on or about 30 January 2017. She began to feel extremely unwell in the early hours of the next morning. She attended hospital six days later, where she was diagnosed with salmonella poisoning (which pathology results later identified as Salmonella Typhimurium). She remained in hospital for about a week, and has never

fully recovered. She had a large portion of her stomach removed. She gave evidence that the salmonella poisoning has led to “life long scars”, both physical and psychological.

29. Ms French went to the café for brunch with some friends on or about 2 February 2017. She ordered a chicken, cheese and avocado melt. She became very ill the next day, and was hospitalised. She was diagnosed as having Salmonella Typhimurium. She had an irritable bowel for a few months after the incident.
30. ACT Health records also indicate that the following additional people contracted salmonella poisoning after eating at the café in the period from 30 January 2017 to 5 February 2017:
  - (a) On 1 February 2017, a female patron ate nachos at the café. She was later diagnosed as having contracted Salmonella Typhimurium;
  - (b) On 2 – 4 February 2017, a waitress at the café ate food at the café. She attended hospital on 8 February 2017 and 21 February 2017, and was diagnosed as having contracted Salmonella Typhimurium;
  - (c) On or about 3 February 2017, a male patron ate food at the café. He was admitted to hospital on 14 February 2017 and discharged on 15 February 2017. He was later diagnosed as having contracted Salmonella Typhimurium;
  - (d) On 5 February 2017, a female patron ate steak, chips and gravy at the café. She was later diagnosed as having contracted Salmonella Typhimurium.
31. As noted at [9] above, Ms Daniel and Ms French each gave evidence in the plaintiff's case. The patrons and waitress referred to at [30] above did not give evidence in the proceedings.

*The plaintiff is interviewed by ACT Health*

32. On 9 February 2017, an employee of ACT Health interviewed the plaintiff at her home. A handwritten questionnaire completed by the ACT Health employee recorded that the plaintiff disclosed the following:
  - (a) The plaintiff had commenced feeling sick with abdominal pain on 3 February 2017. She first suffered symptoms of diarrhea and vomiting on 4 February 2017. She still had diarrhoea at the date of the interview;
  - (b) The plaintiff was last at the café (“prepar[ing] food”) on 3 February 2017.
  - (c) During the past seven days, she had eaten groceries purchased from Woolworths at [redacted], and had had a beef burger from [redacted]; and



- (d) The plaintiff could not recall most of the meals that she had consumed in the three days before her illness, but she could recall that on Friday 3 February 2017, she had had lasagne at home and hot chips at work. On the day that symptoms commenced (4 February 2017) she had not eaten any meals.

*The café is inspected and closed*

- 33. Subsequent to the plaintiff's presentation at Calvary Hospital, ACT Health became aware that other persons with salmonella poisoning had also presented at the hospital. As a result, ACT Health established an Acute Response Team (ART). The ART directed Mr Tory Christensen, then a public health officer at ACT Health, to attend the café to do an inspection and to take samples of food.
- 34. Mr Christensen conducted that inspection on 10 February 2017 (5 days after the plaintiff presented at hospital) with another inspector under his supervision.
- 35. At the inspection, Mr Christensen obtained a number of food samples and took photographs of various parts of the premises. These photographs were admitted into evidence. Mr Christensen observed the following:
  - (a) There was no soap or paper towels in the dispensers, and no hand sanitiser was available;
  - (b) There was no sanitiser to enable large equipment or surfaces to be sanitised;
  - (c) The cool room and other fridges were not under temperature control;
  - (d) There was fresh chicken in the cool room which was stored at a temperature of 9.5 degrees Celsius, which was not consistent with the requirements of the Food Standards Code. The temperature of other items in the cool room and other refrigerators varied between minus 1.2 degrees Celsius and 14 degrees Celsius, with the temperature of most items well above 5 degrees Celsius.
  - (e) The café's thermometer was unopened, and was still in its plastic packaging.
- 36. Aspects of the above evidence were disputed by the defendant, and will be addressed below.
- 37. ACT Health immediately issued a prohibition order. As a result, the café was shut down for a number of weeks (from 10 February 2017 to 9 March 2017).
- 38. A sample of frozen cooked chicken taken by Mr Christensen from the café later tested positive for *Salmonella Typhimurium*. Mr Christensen said that a positive test for salmonella was not something that frequently occurred in his experience. This was only the second time in his career that a food sample had tested positive for salmonella.

39. Mr Kasirga (the café owner) was subsequently prosecuted for breaching s 22(2) (selling unsafe food), s 27(1) (failing to comply with the Food Standards Code) and s 89 (failing to renew the business registration) of the *Food Safety Act 2001* (ACT) for offences committed between 31 January 2017 and 10 February 2017. Mr Kasirga pleaded guilty to all three offences. On 17 August 2018, he was convicted in the ACT Magistrates Court and ordered to pay fines totalling \$4,500.

*The plaintiff's health following her discharge*

40. The extent of the plaintiff's ill health in the weeks and months following her discharge from the hospital was the subject of dispute in the proceedings. That evidence will be addressed below in considering questions relating both to liability and damages.

**Relevant legislation**

41. The present proceedings are governed by the *Civil Law (Wrongs) Act 2002* (ACT) ("*Wrongs Act*"). Section 42 of the *Wrongs Act* provides as follows concerning the standard of care to be applied in negligence claims:

**42 Standard of care**

For deciding whether a person (the **defendant**) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

42. Section 43 of the *Wrongs Act* concerns the precautions to be taken against risk of harm:

**43 Precautions against risk—general principles**

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
- (a) the probability that the harm would happen if precautions were not taken;
  - (b) the likely seriousness of the harm;
  - (c) the burden of taking precautions to avoid the risk of harm;
  - (d) the social utility of the activity creating the risk of harm.

43. Section 44 of the *Wrongs Act* provides the following additional requirements when assessing the precautions to be taken against a risk of harm:

**44 Precautions against risk—other principles**

In a proceeding in relation to liability for negligence—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which it was done; and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and is not of itself an admission of liability in relation to the risk.

44. The general principles in relation to causation of the harm are set out in s 45 of the *Wrongs Act*, which relevantly provides as follows:

**45 General principles**

- (1) A decision that negligence caused particular harm comprises the following elements:
  - (a) that the negligence was a necessary condition of the happening of the harm ('factual causation');
  - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (the **scope of liability**).

...

**Assessment of the witnesses**

45. It is convenient to make some brief comments about the principles to be applied in assessing the credibility of witnesses before turning to the factual matters that are in dispute.
46. In assessing the witness' evidence, I have borne in mind that a witness' demeanour is not a particularly good indication of either truthfulness or reliability. The "dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses" are well-known: *Fox v Percy* [2003] HCA 22; 214 CLR 118 at 129 [30]–[31]. It is a "crude and inaccurate methodology": *Craig v Silverbrook* [2013] NSWSC 1687 at [140]. A witness who appears to be unsure and evasive may simply be nervous about the prospect of giving evidence in court. On the other hand, a witness who gives firm evidence may be a practised liar. For this reason, the assessment of credibility is "more accurately tested by reference to objective facts, motive and overall probabilities" rather than by reliance on a witness' demeanour: *Cobanov v Josifovski (No 2)* [2021] ACTSC 111 at [8].
47. I have also borne in mind that both the witness' credibility (that is, their truthfulness) and reliability (that is, their accuracy) must be considered. This assessment is not an 'all or none' proposition. The "accumulated wisdom" of the common law, consistent with human experience, is that witnesses may lie, or be unreliable about some matters, and yet tell

the truth about others: *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [94]. For this reason, where possible “an assessment should be made of the reasons for [any] untruthfulness in order to see if other aspects of the evidence are likely to be infected by the same concern”: *Sangha v Baxter* [2009] NSWCA 78 at [155]. Further, “evidence may be rejected because it is apparently unreliable, possibly mistaken or deliberately untruthful or capable of being categorised in a variety of ways which are unlikely to be capable of clear delineation in some cases”: *Sangha* at [155].

48. As will be discussed further below, these observations have particular force in respect of my assessment of the plaintiff’s credibility. There were aspects of the plaintiff’s evidence that I do not accept. In particular, I do not accept the plaintiff’s evidence that she was critically unwell for many months following her hospitalisation, as that evidence was inconsistent with the plaintiff’s mother’s evidence and with police records. However, there were other aspects of the plaintiff’s evidence which indicated that she was attempting to give truthful evidence about events that occurred many years ago. Accordingly, I have not disregarded the plaintiff’s evidence, but rather, in each instance where the plaintiff’s evidence was challenged, I have considered whether the plaintiff’s evidence accorded with contemporaneous records and/or whether her evidence was independently supported by other witnesses.

## **Findings on liability**

### *Outline*

49. The following matters do not appear to be in dispute and were readily established by the evidence:
- (a) The plaintiff was employed by the café as a kitchen hand and worked in this role in January and early February 2017. In this capacity, she was responsible for handling food, including uncooked meat such as chicken;
  - (b) The plaintiff contracted salmonella poisoning, and was hospitalised as a result of this illness from 5 February 2017 until the early hours of 6 February 2017; and
  - (c) Salmonella was found in a sample of cooked chicken obtained by the ACT Department of Health from the café on 10 February 2017.
50. In addition, the defendant did not contest the existence of a duty of care owed by the defendant, as an employer, to the plaintiff, as its employee.
51. All else is in dispute. In particular, the defendant contends that the plaintiff has not established the following matters on the balance of probabilities:

- (a) That the plaintiff contracted salmonella poisoning from the café;
- (b) That the risk of salmonella poisoning was foreseeable and not insignificant (ss 43(1)(a) and 43(1)(b) of the *Wrongs Act*);
- (c) That the defendant failed to take responsible precautions to avoid the risk of the plaintiff contracting salmonella poisoning (s 43(1)(c) of the *Wrongs Act*); and
- (d) That the plaintiff contracted salmonella poisoning as a result of a failure of the defendant to take reasonable precautions to avoid the risk of harm (s 45 of the *Wrongs Act*).

52. In other words, as noted above, breach and causation are live issues between the parties.

53. It is necessary for the plaintiff to establish that she contracted salmonella poisoning from the café before any other issue logically arises. For this reason, it is convenient to first consider the anterior question of whether the plaintiff contracted salmonella poisoning from the café (issue (a)), even though that issue might be properly seen at law as an aspect of causation (alongside issue (d)).

*Did the plaintiff contract salmonella poisoning whilst working at the Central Café (Issue (a))?*

54. The plaintiff's case that she contracted salmonella poisoning from the café is a circumstantial case. In such a case, "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": *Palmer v Dolman* [2005] NSWCA 361 at [35], citing *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

55. The plaintiff submits that the Court should draw the inference that she contracted salmonella poisoning at the café from the following evidence, considered in combination:

- (a) The plaintiff worked at the café within the incubation period for the illness;
- (b) The plaintiff's duties involved handling food, including uncooked meat, fish and chicken;
- (c) The food hygiene standards at the café were lacking when she worked at the café in late January/ early February 2017;
- (d) On 5 February 2017, the plaintiff was admitted to hospital, suffering from diarrhea, vomiting and dehydration. A faeces specimen taken during that admission later tested positive for *Salmonella Typhimurium*;

- (e) A number of patrons who ate at the café between 30 January 2017 and 3 February 2017 became unwell in the days after eating at the café, and also tested positive for Salmonella Typhimurium;
  - (f) A sample of chicken obtained from the café on 10 February 2017 was found to contain Salmonella Typhimurium; and
  - (g) Expert evidence concerning the aetiology of salmonella poisoning and the likelihood of the plaintiff having contracted salmonella poisoning from the café.
56. A number of the above assertions were challenged by the defendant. It is convenient to address each individual matter, before turning to consider their combined weight.
- (a) When did the plaintiff work at the café?
57. The defendant did not challenge the plaintiff's evidence that she worked at the café in late January/early February 2017. However, there was a dispute as to precisely which days the plaintiff worked during that period.
58. The plaintiff could not recall what days she worked in January and February 2017, nor could she recall whether she got sick before or after returning to school in year 11 . The plaintiff's school term commenced on 30 January 2017.
59. A café roster for the week of 30 January 2017 does not record the plaintiff as being rostered to work that week, even though, as outlined below, she received a payslip for work during that week. No explanation was provided in the evidence, either in the plaintiff's case or the defence case, as to what is recorded in that roster. In particular, it is not clear whether the roster records all staff who were rostered to work (including the chef, waitstaff and kitchen staff), or whether it only recorded particular kinds of staff (such as waitstaff). It is also not clear whether the roster included only those employees who were scheduled to work during the week in question, or whether the rosters were updated when any last-minute changes to rostering were made. It may be noted that the plaintiff was not recorded as being rostered to work in any of the rosters in evidence (namely, the weeks of 9 – 15 January and 6 – 12 February 2017), even though she was paid for work during this period.
60. The defendant's records included two payslips relating to the plaintiff's work at the café.
61. The first payslip was for the period 23 December 2016 to 29 January 2017. It records that the plaintiff worked 3.5 hours at a base rate of \$11.25 per hour, 3.5 hours on a Saturday and 3.5 hours on a public holiday (possibly 26 January 2017). The total pay is recorded as \$175.23. Payment of this exact amount was made to the plaintiff's bank account on 8 February 2017. The payment date listed on the pay slip was 2 February

2017. However, Mr Kasirga gave evidence that this date was “what the accountant puts on... not actually when it got paid”.

62. The second payslip was for the period 30 January 2017 to 5 February 2017. It records that the plaintiff was paid \$78.75 for 7 hours work, at a rate of \$11.25 per hour. There is no record of the plaintiff ever receiving payment of this amount into her bank account.
63. The plaintiff gave evidence that she was paid in cash from a drawer near the front of the shop. Mr Kasirga denied that any staff member was ever paid in cash. However, Mr Kasirga had only recently purchased the business. He was working full time as a government employee at the time, and only attended the café in the evenings after finishing work in his full time job. He had no recollection of the plaintiff.
64. However, it is not necessary for me to determine whether the plaintiff was paid in cash, as she recalled, or only by way of electronic transfer, as asserted by Mr Kasirga. On the basis of the payslips, I am satisfied that the plaintiff worked at least 7 hours at the café during the period from 30 January 2017 to 5 February 2017.
65. It is not clear from the payslip whether these hours were worked on a single day, or across more than one day. However, given the previous payslip appears to record shifts of 3.5 hours, and the plaintiff’s mother recalled that the plaintiff’s shifts were about four hours long, it is likely that there were two shifts during that period.
66. The payslip does not indicate which days the plaintiff worked during either payslip period. Nonetheless, as there is no indication that the plaintiff was paid Saturday or Sunday rates in the second payslip, and as the plaintiff was admitted to hospital on Sunday 5 February 2017, it may be safely inferred that the plaintiff did not work on 4 or 5 February 2017.
67. I also note that in the ACT Health interview conducted with the plaintiff and her mother on 9 February 2017, the plaintiff told the interviewer that she had eaten hot chips at “work” on Friday 3 February 2017, and that she was last at the café on that day.
68. In view of the above evidence, I am satisfied on the balance of probabilities that the plaintiff worked at the café on 3 February 2017 and at least one other shift between 30 January 2017 and 2 February 2017. I am also satisfied that the plaintiff worked on three separate shifts between 23 December 2016 to 29 January 2017, one of which was a week day, one of which was a weekend, and one of which was a public holiday.

(b) The plaintiff’s duties as a kitchen hand

69. As outlined above, the plaintiff gave evidence that her duties included receiving orders from a ‘ticket’, going to the cool room and collecting the required ingredients, preparing ingredients as required (for example, battering fish using large containers of eggs and

flour or cutting chicken schnitzel to size) and putting them in a bowl for the chef to prepare. This evidence was not disputed by the defendant.

(c) Evidence that the food standards at the café were lacking

70. Photographs of the café amply demonstrated that cleanliness at the café was severely lacking when the café was inspected on 10 February 2017. Importantly, for the reasons outlined below at [169] – [177], I am satisfied on the balance of probabilities that the plaintiff and other staff were not provided with soap for handwashing and that the refrigeration in the café was inadequate.

71. As discussed further below, the expert gastroenterologists both agreed that handwashing with soap and keeping chicken stored at an appropriate temperature (less than 5 degrees Celsius) reduces the spread of salmonella bacteria.

72. This evidence is of particular relevance to questions of breach and causation. However, the deficits in the café's practices are also relevant to a consideration of whether the plaintiff has demonstrated on the balance of probabilities that she contracted salmonella poisoning from the café, rather than from some other source. It is clear from the expert evidence that effective refrigeration and handwashing with soap significantly reduces the growth and spread of salmonella bacteria. Conversely, the absence of these procedures increased the probability of a person acquiring salmonella from the café.

(d) The plaintiff became unwell, was admitted into hospital and tested positive for Salmonella Typhimurium

73. The defendant did not challenge the plaintiff's allegation that the plaintiff became unwell, or that she was admitted into hospital on 5 February 2017 suffering from symptoms consistent with salmonella poisoning (including diarrhoea and vomiting). There was also no challenge to the pathology records which demonstrated that faecal samples taken from the plaintiff during this admission tested positive for Salmonella Typhimurium.

74. However, the evidence was unclear as to precisely when the plaintiff first displayed symptoms of salmonella poisoning. As noted at [18] above, the triage nurse's notes in the Emergency Department Records state that the plaintiff had reported "fevers, vomiting and diarrhoea for 3/7" (that is, the past three days). The handwritten Nursing Progress Notes of the Emergency Department similarly record that the plaintiff had reported abdominal pain, diarrhoea and vomiting for three days. In contrast, the Patient Progress Notes record that the plaintiff presented with "diarrhoea + vomiting for 1 wk" and "since last Sun[day]". The Emergency Discharge Summary stated that the plaintiff had reported symptoms of vomiting and diarrhoea for "a few days", but elsewhere recorded her having symptoms for seven days.



75. In her oral evidence, the plaintiff was not able to recall precisely how many days she had been unwell prior to presenting at hospital. She said that she told the hospital she had had three to seven days of symptoms because she “didn’t know exactly how long she had been feeling like that”. In her evidence, the plaintiff’s mother said that the plaintiff had been sick for a “few days” before she took her to hospital.
76. Generally speaking, the plaintiff’s mother was a more accurate historian than the plaintiff when recounting the events of 2017. As the plaintiff was only 15 years old in 2017, it is unsurprising that the plaintiff’s mother would have a better recollection of the details of the events in question.
77. The plaintiff’s mother’s evidence that the plaintiff was unwell for “a few days” is supported by the hospital notes on admission, which recorded the onset of symptoms as occurring approximately 3 days earlier (that is, on 2 or 3 February 2017) and the Nursing Progress Notes. I consider the Nursing Progress notes, which were likely to have been taken by the nurse contemporaneously with the account given by the patient, to be more reliable than the hospital discharge summary or the Patient Progress notes. The plaintiff’s mother’s evidence that the plaintiff was unwell for “a few days” prior to the hospital admission also accords with the plaintiff’s interview with ACT Health, given just a few days later on 9 February 2017, in which the Plaintiff reported that she had first felt unwell on 3 February 2017 (which was the last day that she worked before she became unwell).
78. In summary, whilst it is not possible to conclude precisely when the plaintiff’s onset of symptoms occurred, it is clear that the plaintiff first suffered symptoms sometime between 30 January 2017 (seven days before her hospitalisation on 5 February 2017) and the evening of 3 February 2017. Accepting the account given in the Nursing Progress Notes, which accords with the evidence of the plaintiff’s mother, I consider it most likely that the plaintiff’s onset of symptoms occurred between 2 and 3 February 2017.
- (e) Expert evidence concerning the mechanism by which salmonella poisoning is acquired
79. The plaintiff told ACT Health that she had eaten some hot chips at the café on 3 February 2017 (that is, either after, or on the same day as, the first onset of the plaintiff’s symptoms). There was no evidence that the plaintiff had eaten any other food at the café in the week or two before she became unwell. It is therefore unlikely that the plaintiff contracted salmonella poisoning as a result of eating food at the café.
80. However, Dr Vickers gave evidence that salmonella poisoning is a “food handler’s disease”. He explained that while “ultimately it all comes through ingestion”, salmonella

may be ingested either by way of consuming contaminated food, or through handling contaminated food:

... it might be on your hands and you may say touch your mouth or touch your tongue or something like that or you may touch a piece of bread and then eat the bread, so in which case you get a much smaller level of bacteria that goes into your intestines and then it takes time for a small amount of bacteria to grow into a large enough bacteria which then serves as the infective stimulus. You've got to have a critical amount of bacteria to form the infection to form the sickness.

But – so you are much more likely to get sicker quickly if you ingest contaminated food than if you are a food handler and that accounts for what we call the incubation period. So the incubation period for salmonella typhimurium can be two to three days to up to two weeks so that people who contract it at two weeks have usually been a food handler who have ingested a small amount of bacteria.

81. Dr Sethi agreed. He said that “ingestion would lead to a higher risk than handling would. It would still be associated with a risk albeit a lower one compared to ingestion”. He said that it was “not a hard and fast rule. It also depends on the host’s response and the host’s immunity as well”.<sup>1</sup>
82. Accepting that the plaintiff’s symptoms first arose on or about 2 or 3 February 2017, it is likely that she contracted salmonella poisoning sometime between mid-January 2017 and 1 February 2017. It is not possible to ascertain the date that the plaintiff ingested the salmonella bacteria.
83. Nor is it possible to ascertain the precise piece of food that caused the plaintiff to contract salmonella poisoning. The plaintiff told a number of the experts that she believed that she might have contracted salmonella after handling “off” fish (the plaintiff described the fish as “furry”) at the direction of the chef. However, it does not appear that any other person became ill with salmonella after eating fish at the café. There is also no evidence as to the date that the plaintiff handled this fish. In these circumstances, I cannot be satisfied that the plaintiff contracted salmonella as a result of handling the “furry fish”, or any other specific food item.
- (f) Evidence that other people became unwell after consuming food from the Central Café
84. As outlined at [28] – [30] above, there is evidence that five other patrons and a waitress contracted Salmonella Typhimurium after eating at the café. Two of the patrons gave oral evidence in the proceedings before me.

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<sup>1</sup> As noted at [215] below, Dr Sabetghadam also gave evidence on this issue. However, as Dr Sabetghadam was not a specialist gastroenterologist and had no specific expertise in salmonella poisoning, I have preferred the evidence of Dr Sethi and Dr Vickers on this issue.

85. The plaintiff contended that this evidence strongly supported her claim. She submitted that, in view of the similarities in these events, it was improbable that she contracted salmonella poisoning from a place other than the café. The plaintiff acknowledged that this submission raised a form of coincidence reasoning. To this end, the plaintiff filed and served a Notice under s 98 of the *Evidence Act 2011* (ACT).

86. Section 98(1) of the *Evidence Act* provides as follows:

**98 The coincidence rule**

- (1) Evidence that 2 or more events happened is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they happened, or any similarities in both the events and the circumstances in which they happened, it is improbable that the events happened coincidentally unless—
- (a) the party seeking to present the evidence gave reasonable notice in writing to each other party of the party's intention to present the evidence; and
  - (b) the court thinks that the evidence will, either by itself or having regard to other evidence presented or to be presented by the party seeking to present the evidence, have significant probative value.

**Note** One of the events referred to in s (1) may be an event the happening of which is a fact in issue in the proceeding.

87. As can be seen from the above, s 98 applies where a party invites the trier of fact to draw an inference that the occurrence of two events must be related because it is “improbable” that the events occurred coincidentally. Where s 98 applies, such reasoning may only be employed if (a) notice is given, and (b) the court thinks that the evidence (either considered alone or with other evidence) has “significant probative value”. However, it is important to recognise that s 98 does not apply to all forms of improbability reasoning.

88. First, s 98 only applies where the probative force of the evidence lies in the “similarities” in the events and the circumstances in which they happened. Reasoning which invokes improbabilities without reference to similarity (such as the improbability that an accused would be in the vicinity of a robbery, armed with a knife, and wearing a balaclava if that accused were not involved in the robbery as alleged) does not fall within s 98. Second, s 98 only restricts coincidence evidence from being used for a particular purpose, namely to “to prove that a person did a particular act or had a particular state of mind”, or to prove that the person failed to do a particular act (s 96).

89. In the present case, whilst the plaintiff sought to invoke coincidence reasoning (that is, by inviting the Court to employ a process of inferential reasoning that focuses on the similarities in the separate events), it was not entirely clear whether this reasoning was invoked to prove that “a person did a particular act or had a particular state of mind”. Rather, the plaintiff sought to employ coincidence reasoning to prove that the plaintiff

contracted salmonella poisoning from the café, rather than from some other location, such as her home. In these circumstances, there is some doubt as to whether s 98 strictly applies.

90. In any event, on the assumption that s 98 of the *Evidence Act* applies to the evidence, I am satisfied that the conditions of the provision are met for the following reasons.

91. There are significant similarities in the events. The events each relate to the same premises – the café. The patrons and the plaintiff each contracted not only the same type of bacterial infection (*Salmonella Typhimurium*) but the same sub-type of that bacteria (MLVA 03-17-09-12-523). The events were also proximate in time. As noted at [28] – [30] above, the patrons contracted this same type of salmonella bacteria after eating or working at the café between 30 January 2017 and 5 February 2017, with the onset of symptoms occurring in each case between 2 February 2017 and 10 February 2017. The plaintiff worked at least one shift in the period between 30 January 2017 and 3 February 2017 and also worked at the café in the period preceding 30 January 2017. The plaintiff became unwell sometime between 30 January and 3 February 2017, and was hospitalised with *Salmonella Typhimurium* on 5 February 2017.

92. Dr Vickers gave the following evidence concerning the significance of the evidence that other persons had become unwell after eating at the café:

... what the epidemiology is telling us this is a very close point contact in a very short space of time. And that points to a very, very close cluster. And it's – you know – it's reasonable to assume then with strong likelihood that Ms [Gibson] was part of that cluster because it's temporary related and geographically related and that's what you look for in epidemiology.

93. In contrast, Dr Sethi maintained that it was unlikely that the plaintiff acquired salmonella poisoning from the café. However, it appeared that Dr Sethi had not been briefed with information concerning the other patrons who had contracted *Salmonella Typhimurium* from the café prior to his giving evidence in these proceedings. When asked why he considered that it was unlikely that the plaintiff contracted salmonella poisoning from the café, Dr Sethi responded “because no other customer or no other staff member seems to have been infected apart from [the plaintiff]”. Dr Sethi conceded that his opinion would change if other persons who had eaten at the café in the same week were found to have contracted the same type of salmonella poisoning:

MR RICHARDS: ... if you presume for a moment that six other persons in a space of about a week at the same time the plaintiff, [Ms Gibson], was affected also contracted the same salmonella typhi, would that change your opinion?

WITNESS SETHI: That would change my opinion, yes.

MR RICHARDS: If the Court were to accept that six other persons were infected with salmonella typhi in that week, then your opinion would be that on the balance of probabilities the plaintiff did, in fact, suffer salmonella typhi at Central Café. Is that your evidence?

WITNESS SETHI: That would be my evidence, yes, but only if they acquired it from that café... they'd have to have dined or worked at the café in question.

94. At the conclusion of his evidence, Dr Sethi again confirmed that his opinion that the plaintiff had not acquired salmonella poisoning from the café would change if there was evidence that six other persons had contracted Salmonella Typhimurium from the café:

It would not – it would make it more likely that that she's got it from there. It wouldn't necessarily prove it. It would make it more likely that she had acquired it from – acquired the infection from the café, rather than elsewhere.

95. I find that the evidence that other persons who had eaten at the café contracted the same subtype of salmonella poisoning as the plaintiff has significant probative value in demonstrating that the plaintiff contracted salmonella poisoning from the café. Reasonable notice of the reliance on coincidence reasoning was provided by the plaintiff. Accordingly, s 98 of the *Evidence Act* is satisfied (assuming that the provision applies) and the coincidence evidence is admissible in the plaintiff's case.
96. When considering the weight to be given to this evidence, the possibility that the other patrons, and the waitress, may have contracted salmonella poisoning from another source must be considered. There was evidence that patrons from another café in the Canberra area (Ricardo's café) had become ill at around the same time with salmonella poisoning involving the same subtype of salmonella bacteria. However, there was no evidence in the ACT Health records that any of the patrons who contracted salmonella poisoning after eating at the café had also eaten at Ricardo's café.
97. Mr Kasirga gave evidence that the other waitress who contracted salmonella had "a conversation I can remember that she was talking with her friends that she was at the Ricardo's at the time". There was no evidence that the waitress had eaten at Ricardo's in her contemporaneous interview with ACT Health (in which she was asked to identify every place that she had eaten during the previous week) or in any other documentation. Although the only evidence that the waitress had attended Ricardo's was in the form of unsupported (potentially second hand) hearsay, for abundant caution, I have disregarded the evidence that the waitress contracted salmonella poisoning after eating food at the café in assessing the combined weight of the coincidence evidence.
98. Nonetheless, it remains the case that five other patrons who ate at the café in the period between 30 January 2017 and 5 February 2017 each contracted the same subtype of salmonella bacteria contracted by the plaintiff at around that time and that there is no

evidence that any of these patrons ate at the only other premises in the ACT known to be associated with salmonella at that time. It is improbable that these events occurred coincidentally – that is, that the plaintiff and each patron separately contracted salmonella poisoning from unrelated premises. The evidence of the experts, as well as ordinary experience, founds a strong inference that the plaintiff, and the other patrons, each contracted salmonella poisoning as a result of consuming or handling food at the café.

(f) Evidence that a sample of chicken obtained from the café contained Salmonella Typhimurium

99. As noted at [38] above, Mr Christensen gave evidence that he took a sample of frozen chicken from the café when he inspected the café on 10 February 2017. That sample later tested positive for Salmonella Typhimurium.
100. In his evidence, Mr Kasirga denied that the café ever cooked frozen chicken or ever froze cooked chicken. The chicken in the photograph that was identified by Mr Christensen as later testing positive for salmonella was clearly cooked. That chicken was also described in ACT Health records as being “chicken breast that had been steamed and then cut into small pieces and frozen”. The temperature recorded was minus 1.2 degrees Celsius. The photograph records the chicken as being stored in the “under bench fridge”.
101. I am satisfied that a sample of chicken that was taken by Mr Christensen from the café was frozen. Given where the sample was taken from (the under bench fridge), it may be that café staff did not intend to freeze the chicken. Other than further demonstrating the defects in the café’s refrigeration (see further at [155]-[164] below) nothing turns on this. It remains the case that a sample of chicken found in the café tested positive for the same type of salmonella bacteria that was contracted by the plaintiff and other patrons of the café.
102. As noted above, Mr Christensen said that a positive test for salmonella bacteria was not something that frequently occurred in his experience. This was only the second time in his career that a food sample had tested positive for salmonella bacteria.
103. Dr Sethi did not consider that this fact rendered it any more likely that the plaintiff had contracted salmonella poisoning from the café. However, this opinion was predicated on the assumption that no other patrons or workers of the café had contracted salmonella poisoning at this time.
104. In contrast, Dr Vickers explained that salmonella poisoning can be acquired from surfaces or from handling food. In circumstances where the cool room was not properly refrigerated, Dr Vickers considered that:

... salmonella could have contaminated the fridge for weeks before ... it could have been on the surface of the grilles in the fridge, on the door handles. It could have been anywhere.

105. Accordingly, Dr Vickers considered that it was significant that salmonella typhimurium was found in a sample of chicken, even though that sample had been taken more than a week after the plaintiff first became unwell. He continued:

See, it could have been – there could have been a bad chicken say a month before kept in a warm fridge and the bacteria has then contaminated the surface.

... And those chickens may have been cooked or thrown out because they might have been expired, we don't know, but in a warm fridge the salmonella may have been on the surface and then fresh chickens have been put in and then the salmonella has contaminated the new fresh chickens in a warm fridge and that – and then has bred up slowly within the chicken...

106. The evidence that Salmonella Typhimurium was found in a sample of chicken taken from the café also potentially raises coincidence reasoning, as it relies on similarities in two separate events, namely, the improbability that the plaintiff independently contracted the same type of salmonella bacteria to that which was found in a sample of chicken in the café if those events are unrelated. However, it is again unclear whether s 98 strictly applies, first, because the extent to which this reasoning relies on similarity (as opposed to general 'improbability reasoning') is unclear, and second, because as it is not clear whether the fact sought to be proved is that "a person did a particular act", rather than that a particular event or circumstance occurred (that is, that the plaintiff contracted salmonella poisoning from the café). As noted at [88] above, it is only where the fact sought to be proved is that a person "did a particular act" (or failed to do a particular act), *and* the reasoning sought to be deployed relies on similarities in the events, that the coincidence rule applies.
107. On the assumption that s 98 of the *Evidence Act* does apply, the provisions of the section are also met in respect of the evidence concerning the frozen chicken. There is no dispute that adequate notice was given. The similarities between the events (specifically that it was the same sub-strand of salmonella bacteria that was found) are striking. In view of Dr Vickers' explanation as to how salmonella contamination may spread through premises, particularly in circumstances where there is inadequate cleaning and refrigeration, I am satisfied that this evidence has significant probative value. Accordingly, this evidence is admissible in the plaintiff's case.

### Conclusion

108. In support of its submission that the plaintiff had not established that she contracted salmonella poisoning from the café, the defendant placed significant reliance on the decision of Rothman J in *Samaan v Kentucky Fried Chicken Pty Ltd* [2012] NSWSC 381,

in which his Honour awarded significant damages to a plaintiff who had become a quadriplegic as a result of contracting salmonella poisoning after eating a “Chicken Twister” at a KFC restaurant. The defendant contended that this decision is “instructive as to what a plaintiff might be required to prove to establish negligence in a food poisoning case”.

109. The defendant noted that in *Samaan*, the experts had agreed that the most likely source of the bacteria was the chicken twister which the plaintiff (and her family members) had each consumed on a particular day: *Samaan* at [37] and [70] – [92]. The expert evidence in *Samaan* contained a detailed analysis of the mechanism of salmonella infection by ingestion and the bacterial dosing required for infection: *Samaan* at [49] and [53]. The defendant submitted that the absence of similarly detailed expert evidence in the present case was fatal to the plaintiff’s claim.
110. I do not accept this submission. It may be readily accepted that the expert evidence in *Samaan* was considerably more detailed than the expert evidence that was adduced in the present case. It does not follow from that fact alone that the plaintiff has failed to demonstrate that she contracted salmonella poisoning from the café. What is required is an analysis of the particular evidence that was adduced in *this case*.
111. As noted at [80] above, the expert evidence is that the incubation period for salmonella poisoning can be as little as two days and up to two weeks (depending on the method of ingestion, host response and host immunity). I am satisfied the plaintiff worked at the café on 3 February 2017 and an earlier shift between 30 January 2017 and 3 February 2017. I am also satisfied that the plaintiff worked at the café in the period preceding 30 January 2017, although it is not possible to determine the precise days worked. These shifts were within the incubation period for the manifestation of salmonella symptoms requiring hospitalisation on 5 February 2017, and which first arose a few days earlier than that date (likely between 2 and 3 February 2017, and no earlier than 30 January 2017).
112. The plaintiff’s duties as a kitchen hand required her to handle food, largely raw meat and chicken. The expert evidence was clear that salmonella can be contracted through the handling of infected food. The risk of contracting salmonella poisoning is higher when proper procedures for the handling of food, particularly raw meat and chicken, are not followed. For the reasons outlined at [155] – [163] and [169] – [177] below, I am satisfied on the balance of probabilities that soap was not provided to the plaintiff for washing her hands, and that the refrigeration in the café was inadequate.



113. Contrary to the defendant's submissions, it is not fatal to the plaintiff's case that the particular item of food which caused the plaintiff to contract salmonella poisoning cannot be identified. Whilst the particular item of food that caused salmonella poisoning (a KFC chicken twister) could be identified in *Samaan*, in a circumstantial case such as the present, an inference may be drawn that the plaintiff contracted salmonella during the course of her duties without identifying the precise piece of infected food which she handled: see similarly, *Gill v Ethicon Sarl (No 5)* [2019] FCA 1905 at [3178]; *5 Boroughs NY Pty Ltd v Victoria (No 2)* [2022] VSC 494 at [95] – [97], [103]; and *East Metropolitan Health Service v Ellis (By His Next Friend Ellis)* [2020] WASCA 147 at [268] – [271].
114. The coincidence evidence is a particularly powerful component of the present case. (As an aside, it may be noted that this form of evidence was not present in the case against KFC in *Samaan*.) As outlined above, five patrons who had eaten in the café during the period from 30 January 2017 to 5 February 2017 had also contracted the same, comparatively rare, type of salmonella bacteria. Further, a sample of chicken taken from the café on 10 February 2017 also contained the same sub-type of salmonella.
115. As outlined above at [92] – [94], the unanimous expert evidence was that, if it were accepted that six other people contracted Salmonella Typhimurium after dining or working at the café between 30 January 2017 and 5 February 2017, on the balance of probabilities it is likely that the plaintiff contracted salmonella from the café. I have, for abundant caution, disregarded evidence concerning the sixth person. However, I do not consider the difference between five and six persons to be significant in this context.
116. It may be noted that each of the other patrons became unwell after eating different food on different days (including nachos, steak and chicken). An inference may be drawn that, as a result of the lack of proper refrigeration and proper cleanliness, salmonella bacteria had spread to various food items in the kitchen of the café in late January/early February 2017. Contrary to the defendant's submissions, it matters not that the salmonella bacteria was not found in any food other than the frozen chicken when the café was inspected on 10 February 2017. The food items which caused the other patrons to become unwell had been consumed by that date.
117. Each of these matters, considered alone, may not have supported an inference that the plaintiff contracted salmonella poisoning from working at the café. However, "a true picture is to be derived from an accumulation of detail", and the "overall effect of the detail is not necessarily the same as the sum total of the individual details": *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 141, per Tadgell JA. Rather,
- ... in cases of circumstantial evidence each proven fact may gain support from the others, and although each, considered in isolation, might not provide a sound basis for inferring the

ultimate fact to be proved, a combination of all facts might provide a compelling basis from which to draw that inference.

(*Longmuir* at 128, per Winneke P.)

118. Taking into account the combination of each of the above circumstances, I am satisfied on the balance of probabilities that the plaintiff contracted salmonella whilst handling raw meat and chicken in her employment as a kitchen hand at the café.

*The scope of the duty of care*

119. Before turning to consider issues relating to breach of duty and causation (issues (b), (c) and (d)), it is necessary to briefly address the scope of the defendant's duty of care to the plaintiff. As noted above, the defendant did not appear to contest that it owed the plaintiff a duty of care as her employer. The existence of such a duty is well established: *Czatyрко v Edith Cowan University* [2005] HCA 14; 79 ALJR 839 at [12]: (“[a]n employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury”); see also *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15; 222 CLR 44 at [19].
120. It must be emphasised, however, that the obligation to exercise reasonable care is not an obligation to prevent the occurrence of harm: *RTA v Dederer* [2007] HCA 42; 234 CLR 330 at [51]. As was stressed by Gummow J in *Dederer* at [49],

In simple and complicated cases alike, one thing is fundamental: while duties of care may vary in content or scope, they are all to be discharged by the exercise of *reasonable* care.

121. Accordingly, it does not follow from the mere finding that the plaintiff contracted salmonella poisoning whilst working as a kitchen hand in the café that the defendant is liable for any injuries suffered by the plaintiff consequent upon that infection. Rather, the defendant will only be liable to the plaintiff in negligence if the plaintiff demonstrates that that the defendant *breached* its duty of care by acting in a manner inconsistent with what a reasonable person would do by way of response to a foreseeable risk, and that she suffered a compensable injury which was *caused* by the respondents' breach: see *Graham Barclay Oysters v Ryan* [2002] HCA 54; 211 CLR 540 at [230], per Kirby J.
122. In determining questions of breach and causation, it is first necessary to accurately identify the actual risk that was faced by the plaintiff. It is only by correctly identifying the relevant risk of harm that one can assess what a reasonable response to the risk would have been: *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2022] HCA 11; 273 CLR 454 at [106]; *Dederer* at [59], per Gummow J.
123. This enquiry is concerned with “determining what person, thing or set of circumstances gave rise to the potential for the harm for which the plaintiff seeks damages”: *Tapp* at

[106]. Care must be taken to avoid characterising the risk of harm at too high, or too low a level of generality. A defendant cannot avoid liability by “characterising a risk at an artificially low level of generality, that is, with too much specificity”: *Tapp* at [108]. On the other hand, a characterisation at too high a level of generality will not permit a proper assessment of the alleged breach of duty: *Tapp* at [122].

124. So, for example, in *Tapp* (which concerned a plaintiff who had been injured when her horse slipped and fell in a campdrafting competition), the High Court held that the trial judge had erred in characterising the relevant risk as the risk of the plaintiff and/or her horse “falling and being injured”, as that risk did not identify the risk of harm against which the defendant association should reasonably have taken precautions: *Tapp* at [122] – [123]. However, it was also an error to identify the risk “by reference to the precise manner in which [the plaintiff’s] injuries were sustained”: *Tapp* at [124]. Rather, correctly characterised, the risk was “the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena”: *Tapp* at [125], citing McCallum JA (as her Honour then was) in *Tapp v Australian Bushmen’s Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [166].
125. In his written submissions, counsel for the plaintiff characterised the risk as a “risk of [contracting] salmonella” or a “risk of poisoning in a food premises”. In view of s 44(b) of the *Wrongs Act* (which provides that the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible), either characterisation is open. I will proceed on the narrower basis particularised by the plaintiff. In any event, salmonella poisoning is a well-known form of food poisoning. In my view, nothing turns on the distinction between food poisoning generally and salmonella poisoning.

*Was the risk of salmonella poisoning foreseeable and not insignificant (issue (b))?*

126. The requirement in s 43(1)(b) of the *Wrongs Act*, that the risk be “foreseeable” and “not insignificant”, imposes “something not very much more than [that the risk] be not far-fetched or fanciful”: *Whittington v Smeaton* [2016] ACTSC 76; *Shaw v Thomas* [2010] NSWCA 169 at [44]. As noted above, the precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable; it is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected: *Tapp* at [107] – [109].
127. The risks of food poisoning, and particularly salmonella poisoning, are well known. Where the duties of an employee include the handling of raw meat, particularly chicken,

the risk of an employee contracting salmonella poisoning cannot be said to be “far-fetched or fanciful”.

128. Although Dr Sethi and Dr Vickers did not agree as to the extent of the illness which would be suffered in a ‘typical’ salmonella case, it is plain that the consequences of salmonella poisoning are not insignificant. As the experiences of other patrons of the café demonstrated, salmonella poisoning can have serious effects on a person’s health, both in the short and in the long term. The immediate effects of contracting the bacteria include vomiting, diarrhea and lethargy. Hospitalisation may be required, particularly to avoid dehydration. If untreated, salmonella poisoning (particularly with salmonella typhimurium, also known as typhoid fever) may be fatal.
129. Accordingly, I find that the risk of the plaintiff, as an employee who handled food including raw chicken, contracting salmonella poisoning in the course of her employment was foreseeable and not insignificant.

*Did the defendant fail to take “reasonable precautions” to avoid the risk of salmonella poisoning (issue (c))?*

130. In light of the above, I find that the defendant owed the plaintiff a duty to take reasonable care to avoid the risk of her contracting salmonella poisoning during the handling of food, particularly raw meat and chicken.
131. In closing submissions, counsel for the plaintiff contended that the defendant breached this duty by failing to take the following reasonable precautions to avoid the risk of salmonella poisoning:
- (a) Providing soap for employees to wash their hands when handling food;
  - (b) Providing disposable hand towels for employees after washing their hands when handling food;
  - (c) Using a thermometer to check the temperature of stored food in the premises;
  - (d) Providing its employees with sanitiser to clean surfaces;
  - (e) Storing food within the cool room at a safe temperature;
  - (f) Having a food safety supervisor at the premises; and
  - (g) Having its fittings and fixtures in good order and repair.
132. As outlined below, the only breaches which were ultimately the subject of expert evidence concerned the defect in the café’s refrigeration and the failure of the café to provide soap to its employees. In these circumstances, I will limit my consideration of the questions of breach and causation to these particular allegations.

133. Before turning to these particular allegations, it is necessary to address a pleadings issue that was raised by the defendant at the conclusion of the evidence.

#### The pleadings issue

134. In his written and oral submissions at the conclusion of the evidence, the defendant's counsel contended that the plaintiff should not be permitted to rely on the absence of soap or proper refrigeration as constituting a breach of the defendant's duty of care. He submitted:

... whilst the plaintiff has repeatedly referred to the [un]availability of soap in the kitchen and the effectiveness of the refrigeration, it is no part of the plaintiff's case on the pleadings that those matters form part of the allegations in negligence.

135. In her Further Amended Statement of Claim filed on 23 September 2021, the plaintiff pleaded her case in the following general terms:

#### **3. Precise particulars of the negligence and breach of statutory duty**

- 3.1 Failing to maintain the premises in a condition that was safe for the plaintiff while she carried out her work duties;
- 3.2 Exposing the plaintiff to salmonella in the workplace;
- 3.3 Allowing or directing the plaintiff to carry out her work duties in the premises when there was salmonella present in the workplace;
- 3.4 Failing to implement a system within the premises to ensure the premises would remain free of salmonella;
- 3.5 Failing to adhere to the health and safety requirements of the *Food Act 2001* (ACT).

136. As can be seen from the above, the plaintiff did not specifically plead the reasonable precautions which she said the defendant should have taken to avoid the risk of her contracting salmonella poisoning during the handling of food.

137. On 20 July 2020 (prior to the filing of the Further Amended Statement of Claim), the defendant's solicitor had sought further and better particulars in response to an earlier iteration of the Statement of Claim which had pleaded the alleged breach of duty in identical terms. In that letter, the defendant, *inter alia*, asked whether the plaintiff alleged that the defendant "did not implement any system to ensure the premises would remain free of salmonella". The defendant also sought further particulars as to the "system" that the plaintiff alleged the defendant "should have implemented to ensure the premises would be free from salmonella" (referring to paragraph 3.4 of the Statement of Claim) and "which requirements of the *Food Act*" the plaintiff alleged the defendant failed to adhere to (referring to paragraph 3.5 of the Statement of Claim).

138. The plaintiff's solicitor replied by letter dated 11 August 2020. That letter confirmed that the plaintiff did allege that the defendant had failed to implement any system to ensure the premises remained free of salmonella, but that the balance of the request concerning the system that should have been implemented "is not a matter for particulars". With respect to the allegations concerning the *Food Act*, the plaintiff's solicitor replied, "we refer you to division 3.2 and 3.3 of the Act". Divisions 3.2 and 3.3 of the *Food Act* provide generalised offences relating to unsafe food handling. Section 27 of the *Food Act*, which is contained within Div 3.3, provides that it is an offence to contravene a requirement of the Food Standards Code in relation to the conduct of a food business, food intended for sale, or food for sale.
139. The defendant did not make any further request for further and better particulars, nor did the defendant seek an order from the Court for further and better particulars to be provided. On 23 November 2021, the defendant filed a defence which denied paragraph 3 of the Further Amended Claim and the particulars of negligence and breach of statutory duty contained therein.
140. In his opening, counsel for the defendant informed the Court that liability was in issue, and that a key issue in dispute was whether the plaintiff had demonstrated that she contacted salmonella poisoning from the café. He then submitted:

Your Honour will need to consider the foreseeability of the risk, whether or not it was significant and the precautions that could have been taken by the defendant which again, would, you might have thought, requires some expert evidence as to firstly how the disease was contracted, what precautions the defendant might have taken to avoid the contraction of the disease and whether or not the harm would have continued if those precautions were taken. Again it's a matter for submission at the end of the case, your Honour, but I just wish to make it clear that they're significant issues that the plaintiff sees, particularly most in liability and the complete absence of any expert evidence in relation to these matters. (emphasis added)

141. In reply, counsel for the plaintiff submitted:

With regard to the expert evidence, your Honour, there is no liability evidence on what should or shouldn't happen, but Mr Tory Christensen is the ACT Health Inspector who attended and shut down Central Café for health reasons, including an outbreak of salmonella typhi and we [have] a pretty strong view that we need not much more than that, other than that, other than you'll hear evidence about the refrigerator not working at the café on the hottest days in Canberra in that particular year. You'll hear evidence about the temperature in the coolroom. You'll hear evidence as to what she did with that coolroom. So that's something that will come out.

142. In other words, it was apparent from the opening that the plaintiff relied on the evidence on the inspection that had been conducted by ACT Health to demonstrate that the defendant had breached its duty of care.

143. The plaintiff tendered a liability bundle immediately after the opening addresses. That bundle included a Prohibition Order that had been issued by ACT Health. The Prohibition Order recorded that various breaches of the Food Standards Code had been identified on 10 February 2017. The Prohibition Order made express reference to the relevant clauses of the Food Standards Code that applied. These breaches included a failure to provide soap (standard 3.2.3, cl 14), a failure to provide food grade chemical sanitiser to ensure all eating and drinking utensil and food contact surfaces were in clean and sanitary condition (standard 3.2.2, cl 20), failing to ensure that potentially hazardous food were stored under temperature control (standard 3.2.2, cl 6), and requiring the replacement of the seal on the under bench freezer to maintain temperature control (standard 3.2.2 cl 21). The defendant did not object to the admission of this document.

144. The oral evidence called in the plaintiff's case included the following:

- (a) Evidence from the plaintiff that she was not provided soap or hand sanitiser, and that she was instructed not to wash her hands;
- (b) Evidence from Mr Christensen, the ACT Health Inspector, that when he inspected the café, it was unclean, and there was no soap or sanitiser available;
- (c) Evidence from Mr Christensen that when he inspected the café, the café cool room and refrigerators were not holding the food at or below 5 degrees Celsius (in particular, raw chicken was stored in the fridge at 9.5 degrees Celsius), which was "not consistent [with the food code for storing fresh chicken]", and that the only thermometer was unopened in its original packaging;
- (d) Evidence from the two expert gastroenterologists (an expert of the plaintiff and an expert of the defendant) that the use of soap prior to and following handling of food and proper refrigeration of food will minimise the risk of contracting salmonella poisoning.

145. The defendant responded to the evidence adduced by the plaintiff, in particular by:

- (a) Adducing evidence from Mr Kasirga that soap and hand sanitiser were "always" available for the employees' use;
- (b) Cross-examining Mr Christensen about the possibility that soap and sanitiser may have been kept in an area of the premises that he did not see.

146. In respect of the issue of refrigeration, the defendant submitted that the plaintiff had not established that any inference could be drawn from the refrigeration temperatures observed on 10 February 2017 concerning the refrigeration temperatures in late January 2017 through to 3 February 2017.

147. The defendant did not object to the plaintiff's evidence concerning the lack of soap, sanitiser and proper refrigeration, which was clearly directed to establishing that the defendant had breached its duty of care. Nor was there any mention of any concern about deficiencies in the pleading at any time prior to the close of evidence. The first time the defendant mentioned any deficiency in the pleadings was in the defendant's closing written submissions, which contained the unelaborated complaint extracted at [134] above.
148. When asked about this paragraph of his written submissions in his oral closing address, the defendant's counsel submitted that the unavailability of soap and lack of refrigeration should have been specifically pleaded in the Statement of Claim. He contended that the pleading "doesn't go anywhere near the requirement for a particular – for a pleading to identify what the defendant should have done and what the negligence was".
149. There is some force in the defendant's contention that further particulars should have been provided which clearly particularised the alleged breach of duty, including the particular provisions of the *Food Act* (and/or the Food Standards Code) which were said to have been contravened: see, eg, *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (In Liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [959] – [962]; *5 Boroughs NY Pty Ltd* at [131].
150. Nonetheless, the issues in the trial were not complex. Although the alleged breach could have been better particularised, it was clear from the Statement of Claim (both in its original form, and as amended) that the plaintiff relied on asserted contraventions of the *Food Act* (which expressly incorporates the Food Standards Code) to demonstrate that the defendant had breached its duty of care, and a more general assertion concerning the failure of the defendant to implement proper systems for the effective prevention of salmonella infection. The pleadings were sufficient to notify the defendant of the case advanced and to avoid taking the defendant by surprise: *Dare v Pulham* (1982) 148 CLR 658 at 666.
151. In circumstances where no objection was taken to the pleadings until closing addresses, the defendant should not be permitted to now insist that the pleadings be strictly applied: see similarly *Carton v Rainbow Plumbing and Drainage Pty Ltd* [2013] ACTSC 267; 8 ACTLR 260 at [64] and the cases cited therein. I do not accept the defendant's contention that any prejudice arose from any lack of complete clarity in the pleadings. The plaintiff's evidence was addressed in the defence case. The absence of objection following the plaintiff's opening address or at any time during the evidence prior to the closing address provides a cogent indication that no such prejudice was perceived.



152. Accordingly, I find that the plaintiff is permitted to rely on evidence of the absence of soap and improper refrigeration in support of her contention that the defendant breached its duty of care.

153. The questions that now arise are:

- (a) Whether the plaintiff has established that there were defects in the café's refrigeration whilst the plaintiff was working at the café in late January/early February 2017;
- (b) Whether the plaintiff has established that the defendant did not provide employees with soap whilst the plaintiff was working at the café in late January/early February 2017; and
- (c) Whether any failure of the defendant to provide the plaintiff with soap and/or to ensure that raw meat was kept properly refrigerated constituted a breach of its duty of care to the plaintiff.

154. Each of these issues is addressed below.

#### Failure to properly refrigerate raw meat and chicken

155. When Mr Christensen conducted his inspection, refrigeration in the café was found to be inadequate.

156. The temperature of items stored in the refrigerated salad bar, under-bench fridge, cool room and cold display fridge was highly variable. There was little temperature consistency even within the cool room itself. For example, chicken stored at the top of the cool room was found to be 4.2 degrees Celsius, while the temperature of cooked sausages in the cool room was 10.4 degrees Celsius. Nacho mix in the cool room was found to be 13 degrees Celsius.

157. One of the photographs in evidence showed that raw chicken was stored in the cool room at a temperature of 9.5 degrees Celsius. Mr Christensen gave evidence this was not consistent with the food code for storing fresh chicken. He explained that "potentially hazardous food" is "required" to be kept at or below 5 degrees Celsius.

158. In respect of this evidence, the defendant made the following submission:

On an isolated occasion on 10 February 2017 ACT Health identified an issue with the refrigeration in the defendant's kitchen. There is no evidence to suggest that there was a problem with the refrigeration at any other time. It is noted that on 10 February 2017 the Bureau of Meteorology recorded a maximum temperature of 41 degrees Celsius. This may account for the refrigeration temperature readings on 10 February 2017 but otherwise should be a matter for expert evidence in the event it was relied on by the plaintiff.

159. I do not accept this submission.
160. It is a natural inference that, if a cool room is not properly refrigerating food on a given day, unless action is taken to reduce its temperature, the cool room will continue to not properly refrigerate food on successive days. The same reasoning applies in reverse. In the absence of evidence of an event which caused the refrigeration failure, it may be inferred that a cool room that is not properly refrigerating food on one day will also have been not properly refrigerating food in the preceding days.
161. Other than the warm weather on 10 February 2017, the defendant did not identify any matter which could explain why the cool room might have been operating ineffectively on that day in comparison to any earlier day. As the temperatures during the weeks preceding 10 February 2017 (and indeed most of the previous month) regularly exceeded 30 degrees, and often exceeded 35 degrees, it is unlikely that the variable temperatures in refrigeration on 10 February 2017 can be attributed to unusual weather conditions.
162. Further, at his inspection, Mr Christensen observed that the only thermometer held by the café was still in its packaging, unopened. I am satisfied that the thermometer had never been used. Accordingly, the café had no way of knowing that the cool room was not properly refrigerating the food that it contained.
163. In these circumstances, I am satisfied on the balance of probabilities that the café's cool room was not maintaining a consistent temperature of 5 degrees or lower in the period between late January 2017 and 3 February 2017.

Did the lack of proper refrigeration constitute a breach of the defendant's duty of care to the plaintiff?

164. As noted above, Mr Christensen gave evidence that the Food Standards Code requires that potentially hazardous food such as chicken be stored at 5 degrees Celsius or less. This evidence, which was consistent with the prohibition order (which identified Standard 3.2.3 cl 6 as the relevant clause of the Food Standards Code), was not ultimately challenged by the defendant.<sup>2</sup>
165. The experts also confirmed the importance of refrigeration in preventing the spread of salmonella bacteria. They unanimously agreed with Mr Christensen's recommendation

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<sup>2</sup> The defendant's counsel initially objected when the plaintiff's counsel asked Mr Christensen to give evidence as to the safe temperature for storing chicken, on the basis that Mr Christensen lacked expertise to give this evidence. However, this objection was not maintained when Mr Christensen explained that the requirement was contained in the Food Standards Code.

that chicken be stored below 5 degrees Celsius. Dr Vickers explained that “in general, all food has to be kept at between two and five degrees in a refrigerator so to stop replication”. He stated that where chicken was stored at a higher temperature, any bacteria is “more likely to undergo slow replication”.

166. Accordingly, I accept that the defendant had a duty to take reasonable precautions to ensure that raw chicken and meat was refrigerated at or below 5 degrees. The taking of such reasonable precautions would, at a minimum, include regularly monitoring the temperature of the cool room. As noted above, the café’s only thermometer was still in its packaging, unopened, at the time that Mr Christensen inspected the café a week after the plaintiff became ill.
167. Of course, the taking of reasonable precautions requires consideration of the matters prescribed by s 43 of the *Wrongs Act*. Whilst there was no evidence concerning the precise probability of illness if raw food is not properly refrigerated, there was expert evidence that the probability of contracting salmonella bacteria from ingesting food that has been improperly refrigerated is increased: s 43(2)(a) of the *Wrongs Act*. As outlined above, the harm to be avoided (illness arising from salmonella poisoning) is serious. Salmonella poisoning may seriously compromise a person’s short and long-term health and possibly result in death: s 43(2)(b) of the *Wrongs Act*. Whilst the provision of food to members of the public is socially useful, the cost of ensuring proper refrigeration, in particular, by monitoring the temperature of the cool room, was minimal: s 43(2)(c) and 43(2)(d) of the *Wrongs Act*.
168. I find that the defendant breached its duty of care to the plaintiff by failing to take reasonable precautions to ensure that food, including raw chicken, in the café was properly refrigerated.

#### Absence of soap

169. The plaintiff gave evidence that there were no soap products or hand sanitiser provided by her employer to wash her hands. She said that she would just wash her hands under the tap water, which could run at any temperature.
170. Mr Kasirga’s evidence contradicted the plaintiff’s evidence. He was adamant that soap and hand sanitiser was provided by the defendant, and that both were kept on the left-hand side of the sink. Mr Kasirga stated that the soap and sanitiser was “always there” .
171. As outlined above, Mr Christensen conducted an inspection of the café on 10 February 2017. Mr Christensen gave evidence that, at that inspection, he “identified no hand sanitiser or a hand wash” on the premises, that there was “no soap or single [use] towel on site”, and there was no sanitiser for cleaning large equipment on the premises. Mr

Christensen acknowledged in cross-examination that he did not recall whether he had seen the café's storeroom, and that soap, paper towel and/or sanitiser may have been kept in any such storeroom. However, Mr Christensen also explained that his general practice when there is no soap or paper towel in the dispenser to ask staff "to fill it while we're there and make a note of the fact that it has been refilled". Mr Christensen said that his note that there was no soap or paper towel on the premises is "me noting that we've asked them to do that and it wasn't – it hadn't been done, there was none onsite that they could fill it up in".

172. When Mr Kasirga was asked about Mr Christensen's records of the absence of soap, hand sanitiser and surface sanitiser, he replied "[i]f its been recorded I'm not going to argue with that" and "I'm not sure. I don't recall, to be honest".
173. As noted above, Mr Kasirga had only acquired the café in late December 2016 (around the time the plaintiff was hired). In early February 2017, he was working in another full-time job. He gave evidence that he was still being trained by the previous owner. He stated that he was "not a chef to see how things are done" and trusted his chefs in relation to food preparation. I am satisfied that Mr Kasirga was not fully aware of the day-to-day functioning of the café, including the stock or availability of cleaning items. I accept Mr Christensen's evidence that there was no soap, hand sanitiser or sanitiser for cleaning large equipment in the café when he inspected it on 10 February 2017.
174. I have borne in mind Mr Christensen's inspection on 10 February 2017 occurred a week after the plaintiff had last worked in the café (on 3 February 2017). However, it remains the case that Mr Christensen's evidence concerning the availability of soap and sanitiser directly contradicted Mr Kasirga's evidence that soap and sanitiser were "always there".
175. More generally, Mr Kasirga insisted that hygiene was "very important" to him. The photographs of the café that were taken during Mr Christensen's inspection tell a different story. Those photographs show accumulated grease, waste and dust build up underneath the cooking equipment and in the cooking equipment fixtures and accumulated grease and waste in the grill features and the rangehood. Accumulated dirt and food waste is also pictured below the under-bench refrigerator, in the refrigeration motor housing, on the floor beneath the salad bar and under the preparation bench. These photographs demonstrate a lack of attention to hygiene at the café over the previous weeks and months, if not years. Those photographs demonstrate that this was not a case where a café has had the misfortune to be inspected on an "off day".
176. As explained further below, there are aspects of the plaintiff's evidence concerning the extent of her illness which I do not accept. However, this does not mean that the whole

of her evidence must be rejected: *Cubillo v Commonwealth* [2000] FCA 1084; 103 FCR 1 at [121]. Evidence that “is of logical probative value” – and, in particular in this case, evidence that has some independent corroboration – may be relied upon, while evidence found to contain discrepancies, inadequacies or untruthfulness may be rejected: *Huang v Wei (No 2)* [2022] NSWSC 473 at [17]; see similarly *Sangha* at [155]. The plaintiff’s evidence that she was not provided with soap or hand sanitiser was generally supported by Mr Christensen’s evidence that there was no soap or hand sanitiser on the premises when he inspected the café a week later.

177. In these circumstances, I am satisfied on the balance of probabilities that the plaintiff and other employees were not provided with soap to wash their hands in late January/early February 2017.

Did the failure of the defendant to provide soap constitute a breach of the defendant’s duty of care?

178. As noted above, the prohibition order recorded that Food Safety Standard 3.2.3 cl 14 required the café to provide its employees with soap.
179. Further, both of the expert gastroenterologists gave evidence, consistently with common experience, that handwashing with soap reduces the chance of contracting bacteria such as salmonella. Dr Vickers explained:

When it comes to, in particular, salmonella, that’s a ... human only bacteria. Its not found in any other animals and the only way it can be transmitted is from humans to humans... by either handling contaminated protein which has been handled by another carrier or eating contaminated food that hasn’t been cooked properly...

Now when we use soap in a particular context of gut bacteria, the gut bacteria have a coating on them which is made of lipopolysaccharide ... And we know that soap washes lipids and fats. And so handwashing with soap is the best way of getting rid of enteric or bacteria which has a lipopolysaccharide coat.

180. As with the evidence concerning refrigeration, whilst there was no evidence concerning the precise probability of illness if soap is not used before and after handling raw food, there was expert evidence that the probability of contracting salmonella bacteria is increased if soap is not used: s 43(2)(a) of the *Wrongs Act*. As noted above, it is clear that the harm to be avoided (illnesses arising from salmonella poisoning) is serious. Soap is inexpensive. The burden of providing soap to employees whose duties require them to handle food is minimal: s 43(2)(c) and 43(2)(d) of the *Wrongs Act*.
181. In light of the evidence regarding the effects of soap on the spread of salmonella and the minimal cost of doing so, the duty to take reasonable precautions to avoid exposing employees to the risk of contracting salmonella in the workplace must include a duty to

provide soap to employees who are involved in the preparation of food and raw meat. The defendant's failure to do so constituted a breach of its duty of care.

### Conclusion

182. For the reasons outlined above, I find that the defendant's failure to provide soap to employees preparing food, particularly employees handling raw meat, fish and chicken, and the defendant's failure to take reasonable precautions to ensure the proper refrigeration of such food each constitute a clear breach of the defendant's duty of care to the plaintiff.

*Did the defendant's negligence cause the plaintiff to contract salmonella poisoning (issue (d))?*

183. The final question that remains in respect of liability is whether the defendant's breaches of duty of care to the plaintiff, as set out above, were a "necessary condition" of the plaintiff's injury (namely, salmonella poisoning). This requires determination of two interrelated questions: first, whether the plaintiff contracted salmonella poisoning from the café, and if so, whether the defendant's negligence caused the plaintiff to contract salmonella. I have found above at [118] that the plaintiff contracted salmonella from the café. The question that remains is whether the defendant's breaches were "a necessary condition" of this happening: s 45(1)(a) of the *Wrongs Act*.

184. It is well settled that establishing that a defendant's negligence was a necessary condition of harm "does not require certainty – [a]ll that is necessary is that ... the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm": *Karpik v Carnival Plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280 at [814] quoting *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [111]. To put it another way, "it is no answer to the question whether something has been demonstrated as being more probable than not to say that there is another possibility open; the determination of the question turns on consideration of the probabilities": *Kone Elevators Pty Ltd v Shipton* [2021] ACTCA 33 at [81] citing *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [34].

185. In cases involving infectious diseases, it has been noted that:

... expert evidence of possibility expressed in opinion form and evidence of possibility from epidemiological research ... is admissible and must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn.

*Seltsam Pty Ltd v McGuinness* [2000] NSWCA 29; 49 NSWLR 262 at [79], cited in *Karpik* at [817].

186. I do not accept the defendant's contention that the plaintiff must identify the precise source of the infection in order to establish liability. For the reasons outlined at [113] – [117] above and the cases cited therein, in determining whether it should be inferred that the plaintiff contracted salmonella poisoning from her work at the café, it is not necessary to identify the causal mechanism of the injury with precision. Nor is this necessary when determining whether the salmonella poisoning was caused by the defendant's breaches of its duty of care. What is required under s 45(1)(a) of the *Wrongs Act* is satisfaction on the balance of probabilities that the defendant's negligence was a necessary condition of the happening of the harm.
187. I am satisfied, on the balance of probabilities, that the defendant's breaches of its duty of care to the plaintiff (see at [163] and [182] above) were a necessary condition of the happening of the harm (that is, the plaintiff's contraction of salmonella poisoning, and her ensuing illness). The expert evidence established that handwashing with soap is "the best way of getting rid of enteric or bacteria [such as salmonella]". The experts also agreed that bacteria on food may undergo slow replication when stored at temperatures above 5 degrees Celsius.
188. The expert evidence demonstrates that if these precautions had been in place, the risk of a food handler contracting salmonella would, necessarily, have been significantly reduced. Specifically, had the plaintiff and other employees been appropriately washing their hands in between touching food items, the likelihood of spreading or ingesting salmonella bacteria would be lessened. Similarly, had the cool room been kept at a temperature between 2 – 5 degrees, the chance of salmonella remaining and replicating on food items, spreading between food items, and spreading to surfaces would have been significantly reduced.
189. While the expert evidence was expressed in terms of risk rather than certainty (as is necessitated by the nature of such epidemiological evidence), this does not mean that a finding of causal connection is precluded: *Seltsam* at [83] quoting *Fernandez v Tubemakers of Australia Ltd* [1975] 2 NSWLR 190 at 197. What is required is that "the materials offered justify an inference of probable connection": *Seltsam* at [83] quoting *Fernandez* at 197.
190. On the basis of all the evidence before me, including the expert evidence, I find on the balance of probabilities that the failure of the defendant to provide soap, and the defendant's failure to store food at an appropriate temperature, including its failure to regularly check the temperature of the cool room, were each necessary conditions (although not necessarily the sole cause) of the plaintiff contracting salmonella. As in *Karpik*, the implementation of those measures would have "so substantially reduced the

risk” of contracting salmonella that, on a balance of probabilities, the most probable result is that the plaintiff would not have contracted salmonella: *Karpik* at [824].

191. I am satisfied on the balance of probabilities that the failure to take each individual precaution caused the plaintiff to contract salmonella poisoning. It follows that taken together, I am satisfied that the defendant’s breaches caused the plaintiff to contract salmonella poisoning.
192. Accordingly, I find that the defendant is liable in negligence for the plaintiff contracting salmonella in February 2017. The extent of the harm caused by that illness, and the damages which should follow, will be addressed below.

*Additional note regarding the date of contraction of salmonella*

193. I was informed that the defendant was uninsured for the period from December 2016 to 30 January 2017. The plaintiff’s counsel invited me to make a finding as to precisely when the plaintiff contracted salmonella poisoning, so as to assist in the determination of any issues of insurer liability.
194. In response, the defendant’s counsel contended that it was not necessary, or appropriate, for this Court to make findings that are not necessary for the resolution of the plaintiff’s claim. I agree. For the reasons outlined at [78] above, it is not possible for me to draw a firm conclusion as to precisely when the plaintiff contracted salmonella poisoning. As it is not necessary for me to do so to resolve the issues in the present proceedings, I express no view on this issue.

**Findings on Damages**

195. As outlined above, the Plaintiff claims damages for the following harm:
- (a) General Damages of \$160,000, plus interest of \$9,600, in respect of her food phobia condition, her significant weight loss, her gagging and retching, her vomiting, her IBS, her headaches and migraines, her memory and cognitive issues, and her lack of energy and lethargy.
  - (b) Damages of \$137,128 (including superannuation), for past economic loss in respect of her inability to continue part-time work throughout high school and to commence full-time work after high school.
  - (c) Damages of \$141,115 (including superannuation) for future economic loss in respect of her limited employment prospects for the next 5 years.
  - (d) Damages of \$70,223.40, plus interest of \$4,214, for past domestic assistance.



- (e) Damages of \$27,887 for future domestic assistance with gardening and food preparation for the next five years.
- (f) Damages of \$1,000 for past out of pocket expenses, including nappies, pull ups, medication and travel to medical appointments.
- (g) Damages of \$10,325 for future out of pocket expenses, including consultations with a psychologist, a psychiatrist, a dietician, and a GP.

196. The defendant did not contend that any of the above heads of damages were outside of the scope of its liability: s 45(1)(b) of the *Wrongs Act*. Rather, the defendant contended that the plaintiff had not established that she had suffered the harm alleged, either at all, or to the extent alleged.

#### *Medical evidence*

197. Before turning to consider the individual heads of damage claimed, it is convenient to briefly set out the medical evidence tendered in relation to these issues.

#### Dr Vickers and Dr Sethi, gastroenterologists

198. Dr Vickers provided a report, dated 9 March 2018, which was based on an examination of the plaintiff conducted in February 2018. Dr Sethi provided a report dated 30 October 2020, which was based on an interview conducted on 26 October 2020, and a supplementary report dated 23 May 2022. As noted above, both experts also provided a joint expert conclave report and gave oral evidence in a conclave.
199. Noting the plaintiff's high temperature, pulse rate, and high CRP reading, Dr Vickers was of the opinion that the plaintiff had developed a serious infection. He considered that the salmonella infection may have caused her ongoing gastric reflux disorder (causing gag reflux vomiting), gastroduodenal dysmotility syndrome (bowel issues) and Irritable Bowel Syndrome (IBS) causing issues such as loose stools, reduced meal portions and anal seepage, food phobias and mild OCD related to food checking, and being mildly underweight.
200. In contrast, Dr Sethi stated that the plaintiff experienced "an acute episode of salmonella gastroenteritis ... which fully resolved after a few days" and that the "overwhelming majority of her ongoing symptoms [are] entirely unrelated". He considered that the evidence the plaintiff left hospital after a few hours demonstrated that her infection was not serious.
201. Both experts agreed that salmonella infection can cause IBS, through Dr Sethi caveated that it "usually doesn't last for six years [and is] usually much milder". While Dr Sethi stated in his initial report that salmonella would not usually cause gastric reflux or

gastroduodenal dysmotility syndrome as it affects the colon and has “little ongoing effect on the stomach and duodenum [small intestine]”, after “research[ing] the topic a little bit more” he conceded that it “can affect the small [intestine] as well”.

Report of Dr William Knox, consultant psychiatrist

202. Dr Knox provided a report dated 9 November 2018, and a Supplementary Report dated 4 December 2019. In these reports, Dr Knox diagnosed the plaintiff as suffering from a with chronic food phobia causing nausea and vomiting as a result of the infection.
203. Dr Knox considered that the plaintiff was not (in 2018) fit for full-time work but could gradually extend her work hours, and was not restricted from carrying out domestic duties. He also recommended ongoing treatment with a psychologist and a GP.
204. In his Supplementary Report, Dr Knox recorded that the plaintiff continues to eat irregularly and lose weight, and diagnosed with plaintiff with a mild adjustment disorder with mixed anxiety and depressed mood.

Report of Dr Tom Sutton, clinical psychologist

205. Dr Sutton provided a report dated 29 December 2019 and a Supplementary Report dated 31 October 2022. In these reports, Dr Sutton considered that the plaintiff’s infection and the ongoing symptoms of nausea, vomiting and diarrhoea had disrupted her schooling, social life, sporting pursuits and emotional state and led to a generalised aversion to food and avoidance of eating.
206. Dr Sutton stated that the infection and associated nausea, diarrhoea and gag reflex were “a strong reinforcer of subsequent eating avoidance behaviour” in someone “prone to somatising emotional problems”, although he considered that a “complex interaction of factors” was present. He stated that the “direct cause of her present eating avoidance and rituals is the experience of adverse gastrointestinal symptoms following her [illness]” but that the additional causes are “enmeshed in her developmental background and personality dynamics”.
207. Dr Sutton’s supplementary report also noted that the plaintiff’s food aversion, nausea and vomiting had diminished and remained in a “milder form” with residual bodily depression and anxiety symptoms. He considered that the plaintiff had plateaued and would experience residual infrequent bodily nausea/vomiting, fatigue and bodily anxiety of which her illness is a “partial but not the whole ongoing cause”.

Report of Mr Vincent De Giovanni, vocational psychologist

208. Mr De Giovanni provided a report dated 18 May 2020. In this report, he noted that the plaintiff confirmed her previously reported symptoms (including diarrhoea, reflux,

nausea, food phobia and lethargy) and additionally reported loss of strength and weakened stomach muscles, body image issues, and a lack of enjoyment of all food.

209. Mr De Giovanni considered that the plaintiff likely had a pre-existing learning difficulty (dyslexia and probably dyscalculia) and would have “struggled to achieve other than a modest to fair result in year 12”. For the plaintiff to have maximised her educational potential, she required consistent education, which was interrupted by her illness. He considered that a lack of medical treatment and vocation support had made recovery more difficult. He stated that her learning difficulty will make any professional career very difficult to achieve and that clerical/administrative work may be not appropriate.

Report of Mr Stephen Woolley, occupational therapist,

210. Mr Woolley provided a report dated 15 July 2020, based on an in-home assessment on 7 July 2020 and a Supplementary Report dated 28 June 2022, on the basis of an in-home assessment conducted on 21 June 2022.
211. Mr Woolley considered that the plaintiff presented as a reliable historian and that her performance of activities was consistent with the information she provided. Mr Woolley recorded that the Plaintiff reported suffering from abdominal pain, constant lethargy, intermittent nausea, retching and vomiting, intermittent light-headedness, faecal urgency, intermittent diarrhoea, nightly fevers, and chills. She reported that her symptoms were exacerbated by standing or walking for long periods, bending, and being around food. He stated that during the assessment, she demonstrated that lethargy and fatigue impact her ability to complete various domestic tasks. On the basis of the assessment, Mr Woolley determined that the plaintiff had difficulty performing personal care, cleaning, meal preparation, laundry, shopping, and driving tasks as a result of her symptoms.
212. In his Supplementary Report, Mr Woolley observed that the frequency of the plaintiff's symptoms had reduced but that she continued to experience ongoing symptoms including fatigue. He concluded that the plaintiff had required a total of 1431.545 hours of past gratuitous assistance with domestic tasks and personal care. Mr Woolley's initial report estimated that the plaintiff would require 5.25 hours weekly of domestic and garden care, weekly shopping delivery, and a commercial car cleaning service every four weeks on an ongoing basis. In his supplementary report, Mr Woolley reduced this by three hours to 2.25 hours per week on the basis of the plaintiff's improvement.

Dr Reza Sabetghadam, occupational physician

213. Dr Reza Sabetghadam provided a report dated 12 November 2020, on the basis on a telehealth assessment conducted on 30 October 2020. Dr Sabetghadam also gave oral evidence at the hearing.
214. Dr Sabetghadam gave evidence that a person was unlikely to acquire salmonella from handling, rather than consuming food, and that salmonella resolves “maximal[ly] within a few days”. Dr Sabetghadam acknowledged that he is not an expert in salmonella poisoning per se, but maintained that his general medical qualifications were sufficient for him to express an opinion on this issue.
215. Dr Sabetghadam considered that it was likely that the plaintiff had a chronic gastrointestinal condition, which could have psychological contributing factors. In his report and oral evidence, Dr Sabetghadam confirmed his opinion that this condition is probably not related to the initial infection.
216. Dr Sabetghadam disagreed with Dr De Giovanni’s conclusion regarding the existence of a causal relationship between the plaintiff’s employment at the café and the salmonella infection; and between the salmonella infection and her subsequent physical symptoms, education/employment disruption, and diet issues. However, in cross-examination he conceded that that his opinion would change if it were accepted that the plaintiff was unwell with salmonella for two weeks rather than a few days.
217. Dr Sabetghadam also disputed Mr Woolley’s conclusions regarding the domestic assistance needed. On the basis of his assessment, he considered the plaintiff had capacity to return to full-time employment and that she did not require any ongoing assistance.

Report of Ms Anne Embry, dietician

218. Ms Embry provided a report dated 24 July 2020, based on an assessment on 3 July 2020; and a Supplementary Report dated 23 July 2022 based on an assessment on 11 July 2022.
219. In her original report, Ms Embry expressed the opinion that the plaintiff suffered from a disordered eating behaviour (probably Avoidant Restrictive Food Intake Disorder), inadequate oral intake of energy and vitamins, and altered gastrointestinal function (delayed gastric emptying). In her supplementary report, Ms Embry confirmed this diagnosis, noting that the plaintiff had shown some improvement in food tolerance but that she continued to have dietary and physical symptoms.

220. Ms Embry's initial report stated that the plaintiff's "disordered eating behaviours and other dietary impacts have developed as a direct consequence of the ... salmonella poisoning and the significant impacts on [the plaintiff], her gut function and fears of reoccurring symptoms from that poisoning". Her supplementary report noted that the history given to her by the plaintiff indicated that the salmonella poisoning had created an ongoing anxiety around food. She said that significant anxiety can contribute to functional gut disorders such as reflux and IBS. She recommended the plaintiff be referred to a mental health professional.
221. The plaintiff submitted that I should draw an adverse inference, in accordance with *Noble v O'Brien* [2010] ACTSC 29, from the fact that the defendant commissioned but did not tender a report of Ms Kylie Matthews-Rensch, dietician, based on a consultation on 7 October 2020. The plaintiff submitted that I should consequently accept the evidence of Ms Embry in its entirety.

Dr Allnutt and Dr Roberts, forensic psychiatrists

222. Two forensic psychiatrists, Dr Stephen Allnutt and Dr John Roberts, prepared individual reports and a joint report. Despite differences in their opinions, neither expert was required for cross-examination.
223. In his report dated 5 November 2020, Dr Roberts provided the opinion that none of the plaintiff's symptoms could be attributed to the salmonella infection, stating that the impact of the infection on the plaintiff's current symptoms is of "such a trivial degree as to be unable to be assessed in the context of the [plaintiff's] other major problems". He assessed the plaintiff as having a degree of intellectual handicap, substance misuse, and an oppositional defiant disorder which has developed into an antisocial personality disorder. In forming this opinion, Dr Roberts particularly relied on the fact that a medical record from 2019 indicated the plaintiff was at a near-normal weight, and on her police and school records which evince behavioural issues pre-dating the illness. He also considered that there was minimal chance of a person developing a food phobia as a result of gastroenteritis.
224. In his report dated 8 October 2022, Dr Allnutt agreed with Ms Embry's diagnosis of Avoidant Restrictive Food Intake Disorder (ARFID). He stated that the plaintiff showed some evidence of a possible learning disorder and behavioural problems preceding the salmonella infection (including a potential oppositional defiant disorder, but considered that there was insufficient evidence to diagnose an antisocial/conduct disorder). However, there was no evidence of an eating disorder, pervasive anxiety or depressive symptoms before the infection. Dr Roberts was of the opinion that the plaintiff had

developed a “constellation of symptoms related to [the salmonella] infection that continue to date” and that the infection made a “substantial contribution to her mental state”. He considered she would be able to engage in employment, and would benefit from consultation with a psychologist and psychiatrist. He also observed that he “did not find evidence of significant exaggeration”, particularly in light of her report of improvement in symptoms.

225. In their joint report dated 2 March 2023, Dr Allnutt and Dr Roberts agreed that the plaintiff had pre-existing underlying personality traits including oppositional defiant disorder, a learning disorder and substance use disorder. They agreed that the salmonella infection contributed to the plaintiff’s eating disorder, but not to any other conditions.
226. However, Dr Roberts maintained that the salmonella’s contribution was only somatic and an “assessment of her incapacity would relate to ... non-Salmonella related impairment”. In contrast, Dr Allnutt considered that while a diagnosis of somatic symptom disorder was raised, in light of her medical history (including evidence of salmonella infection and the onset of any ARFID in close proximity to the infection), any such disorder would be attributable to her infection which has “triggered a psychological response with food aversion and disordered eating behaviour, substantially contributed to by the [infection]”.
227. Both experts agreed that the plaintiff had capacity to work, but required psychological and psychiatric treatment.

#### *Failure to mitigate harm*

228. Before turning to the particular damages sought by the plaintiff, it is necessary to first consider a submission somewhat faintly advanced by the defendant that the plaintiff’s failure to seek further treatment during her initial illness or during the 6 years following her illness should reduce the amount of damages to be awarded.
229. Dr Vickers considered that the lack of initial treatment with antibiotics may have caused chronic re-infection within the gut, which can lengthen the duration of illness. While Dr Sethi agreed in a general sense, he considered that there was no evidence that this occurred to the plaintiff.
230. The plaintiff’s counsel submitted that the plaintiff could not be held responsible for a failure to mitigate the injury, given she was only 15 years old at the time of the infection. He further submitted that while “another person in another family who received antibiotics may have been completely better at six months or 12 months”, the plaintiff “should not be held responsible for her upbringing ... the defendant has to accept [a] plaintiff as they find them”. In response, the defendant submitted that while the plaintiff was 15 at the

time of the injury, she has “been an adult for four years [and] has sought no treatment at all”.

231. There is insufficient evidence to conclude that the plaintiff’s condition would have progressed differently if other treatment had been sought at an earlier stage. In those circumstances, it is not necessary for me to determine whether a plaintiff who is a child should be held responsible for failing to mitigate their injury.

*Finding as to damages*

232. The general damages sought by the plaintiff include damages for:

- (a) Severe consequences of salmonella poisoning, including hospitalisation and “severe diarrhoea for four months”;
- (b) A food phobia, including intolerance to meat odours and an inability to eat certain foods;
- (c) Ongoing illness and disabilities caused by salmonella poisoning and/ or the food phobia, including ongoing nausea, gagging, dizziness, diarrhoea, memory difficulties, lethargy, IBS, reactive gastritis, and difficulty undertaking exercise and taking part in social and leisure activities.

233. The defendant did not accept that these injuries were established on the evidence. It contended that the plaintiff was an unimpressive witness and that she had exaggerated the extent of her incapacities.

234. There are aspects of the plaintiff’s account that I do not accept.

235. The plaintiff gave evidence that she was critically unwell for three months following the salmonella poisoning, and that during this time, she was unable to bathe, toilet or feed herself, that she could not keep any food down, and that she could not leave the house. She testified that she had to wear adult nappies because she could not control her bowels for this period.

236. The plaintiff’s evidence concerning the extent of her illness in the first three months was inconsistent with police records which recorded that:

- (a) On 20 February 2017 (that is, a little over two weeks after her discharge from hospital), police attended the plaintiff’s home after receiving reports of a disturbance. The plaintiff’s mother advised police that the plaintiff was having a tantrum, screaming and slamming doors because her mother would not permit her boyfriend to stay over.

- (b) On 23 April 2017, the plaintiff went to [redacted] with her boyfriend. Police were called by a bystander when the plaintiff's boyfriend allegedly attempted to assault her. When police arrived, the plaintiff ran away.
- (c) On 25 April 2017, the plaintiff was located in [redacted] with her boyfriend in possession of two hatchets and a pair of scissors. Police were called after the pair argued and her boyfriend threatened a bystander who intervened.
- (d) On 26 July 2017, the plaintiff had a fight with her mother and went to stay at a friend's house.
- (e) On 6 October 2017, the plaintiff was caught shoplifting at David Jones and a Kathmandu store.
- (f) On 22 November 2017, police observed the plaintiff and two other males swearing loudly at the bottom of a staircase in Woolworths at [redacted].
- (g) On 27 November 2017, the plaintiff was found in the possession of marijuana in the car park at McDonalds.
- (h) On 29 December 2017, the plaintiff was caught stealing fragrances from David Jones.
- (i) On 6 January 2018, the plaintiff was stopped by police and found to be in possession of a substance they suspected to be cannabis.
- (j) On 6 January 2018, the complainant and her boyfriend at the time trespassed in someone's backyard.

237. When cross-examined about this evidence, the plaintiff acknowledged that yelling and slamming of doors on her birthday (item (a) above) was inconsistent with her being "very sick" at that time. She said that she had no recollection of that event. She did recall the [redacted] incident and maintained that she was still somewhat unwell at that time. She noted that there was a toilet at [redacted], and explained that she was "just hanging out" with her boyfriend. The plaintiff did not recall the fight with her mother on 26 July 2016, and volunteered that she did not know which friend she would have stayed with. The plaintiff admitted that she was caught shoplifting in Kathmandu and David Jones, but could not recall exactly when this occurred. She said that she was starting to get better after three months, and said that these events might have occurred after she her health started to improve.

238. The plaintiff's account that she was bedridden for three months following the contraction of salmonella poisoning was also not fully supported by the plaintiff's mother, who painted a less dire picture of the plaintiff's health in the months following the plaintiff's



hospitalisation. She said that that the plaintiff was seriously ill for “about two weeks”, and that after this time, the plaintiff began to regain her strength, although the plaintiff remained less than fully well.

239. In view of the evidence of the plaintiff’s mother, and the police records, I do not accept the plaintiff’s evidence that she was bedbound for three months after contracting salmonella, or that she remained seriously unwell after that time.
240. I do not find that the plaintiff was deliberately untruthful in her evidence. As Mr Sutton described in his report, the plaintiff has a mindset which is “comfortable with conspiracy theories and fantastical imaginings of events where something unknown and scary is causal of many happenings in the world”. The illness that the plaintiff suffered as a result of the defendant’s negligence was extremely unpleasant. It is not surprising that the plaintiff might recall the acute phase of the illness as lasting longer than it did. This aspect of the plaintiff’s evidence reflects adversely on her reliability rather than her credibility. I note that the plaintiff accepted in cross-examination that her memory as to the periods that she was bedridden was “very vague”.
241. The flaws in the plaintiff’s evidence do not extend to her mother. The plaintiff’s mother made many frank concessions in her evidence, and her evidence generally accorded with objective contemporaneous evidence. As noted above, she estimated that the plaintiff began to improve about two weeks after her hospitalisation. She openly acknowledged that her daughter had struggled at school even prior to contracting salmonella poisoning. When asked about her daughter’s memory issues, she did not claim that her daughter’s memory was adversely affected by her illness, but volunteered that the plaintiff has “always been a bit off with the fair[ies]”.
242. The plaintiff’s mother’s credibility was not undermined in cross-examination. When asked whether she recalled the police attending on the plaintiff’s 16<sup>th</sup> birthday, she responded “I don’t remember, but it’s possible... I can’t remember it, to be honest”.
243. The plaintiff is a single mother, whose children, including the plaintiff, have been in contact with the police both before and after the events in question. I do not consider that her lack of recall of calling police almost seven years ago is such as to place a cloud over her credibility, nor her reliability as to the overall course of the plaintiff’s illness. The defendant’s counsel did not submit otherwise in either his written or oral submissions. Indeed, in his written submissions, the defendant’s counsel pointed to the plaintiff’s mother’s evidence as undermining the plaintiff’s evidence.
244. In respect of the plaintiff’s illness, the plaintiff’s mother gave evidence that:

- (a) The plaintiff was seriously ill for about two weeks. After this time, she began to regain her strength, whilst remaining less than fully well;
- (b) The plaintiff still has some ongoing gagging and “vomits every now and then”;
- (c) She was not aware of the plaintiff having any ongoing issues with diarrhoea;
- (d) The plaintiff still gets fatigued;
- (e) The plaintiff has complained of dizziness “a few times” in the past twelve months; and
- (f) The plaintiff joined a gym, but did not keep going, because she “couldn’t keep up with it”.

245. The plaintiff’s mother’s evidence was generally consistent with the plaintiff’s medical records, which indicate that the plaintiff has not regularly attended her general practitioner since her illness, and that when she has attended, she has occasionally made reference to some ongoing symptoms, but has not complained of significant continuing symptoms since she contracted salmonella poisoning in February 2017. For example:

- (a) The plaintiff’s GP’s consultation record dated 11 September 2017 recorded that the plaintiff was experiencing “difficulty swallowing, constipated, feels tired, sometimes heartburn”.
- (b) The plaintiff’s GP’s consultation records dated 6 February 2019, in relation to obtaining a Mental Health Care Plan and fitness assessment, included the following statement “she suffered from salmonella... now feeling ok and wants fitness certificate, Not working with food preparation anymore, Works with photoshop” and “definite delusional paranoia about her salmonella infestation her intestine which is causing this diarrhoea”.
- (c) In a Mental Health Care Plan dated 6 February 2019, the following is recorded “Food phobia and vomiting at least twice a week ... for 2 years. Den[ies] any eating disorder ... started 2 years ago when she was infected with salmonella and suffered from diarrhoea since then. She believes that salmonella is still infecting her. This could be IBS after infection or eating disorder or infective pathology. A stool test will be ordred [sic] today”.
- (d) Finally, a referral from [the plaintiff’s GP] to a dietician dated 6 February 2019 regarding “recurrent vomiting and diarrhoea episode ever since, she had salmonella infection 2 years ago ... [Ms Gibson] denying losing her weight, however, her BMI is 18-20 ... possibility of infection, or IBS or eating disorder”.

246. I also note that Canberra Hospital Emergency Department records dated 12 December 2020 indicate that when the plaintiff presented with acute tonsillitis, she described “one week history of vomiting 5-6 times daily ... with mild right lower abdominal pain [and] right throat pain” and reported having “normal bowel habit”. There is no indication in those notes that the plaintiff was suffering from a serious ongoing illness that was unrelated to her tonsillitis at that time.
247. In view of the above, I find that the plaintiff has not established that she suffered from ongoing physiological effects from the salmonella poisoning after she recovered from the acute phase of the illness, which lasted about two weeks.
248. In so finding, I have not accepted Dr Vickers’ opinion that the plaintiff contracted gastric reflux disorder, or irritable bowel syndrome. In this respect, I have taken into account that part of the basis for Dr Vickers’ opinion in this respect was an assumption that the plaintiff was seriously unwell for a lengthy period after contracting salmonella poisoning. For the reasons outlined above, I have not accepted this evidence. I have borne in mind that there is evidence that there is evidence of the plaintiff having some ongoing physical effects, particularly loss of weight, a significantly reduced appetite, fatigue (which affects her ability to play sport), some dizziness and occasional vomiting. These symptoms may be explained by the plaintiff’s psychological condition, to which I now turn.
249. As outlined above, Dr Allnutt diagnosed the plaintiff as suffering from an “avoidant, restrictive food intake disorder”, or a food phobia. Dr Knox similarly diagnosed the plaintiff as suffering from a “chronic phobia for food”. Dr Roberts did not agree. He considered that the appropriate diagnosis was of a Somatoform Disorder, which, he later observed in the joint report with Dr Allnutt, would “imply that an assessment of [the plaintiff’s] incapacity would relate to pre-existing non-salmonella related impairment”. This finding echoed the opinion expressed by Dr Roberts in his first report, namely, that the infection’s impact on the plaintiff’s symptoms was of “such a trivial degree as to be unable to be assessed in the context of the [plaintiff’s] other major problems”. Nonetheless, in the joint expert report, Dr Roberts also agreed that the salmonella infection “made contribution” to the plaintiff’s eating disorder.
250. Further, the defendant contended that the plaintiff’s claim for psychiatric injury was contradicted by evidence that the plaintiff had worked as a kitchen hand in 2018, by evidence that she joined an AFL sporting team in 2018 and 2020 (“the AFL evidence”), and by the plaintiff’s bank account records from 2018 and 2019, which record regular purchases from fast food outlets including McDonalds, KFC, Hungry Jacks, Domino’s Pizza and a Touch of India.

251. As none of the psychiatric experts were required for cross-examination, no expert was asked whether any of these matters would have affected the opinion that they provided. Fortunately, cross-examination was not ultimately necessary for me to determine the weight to be placed on the respective opinions of the experts.
252. In respect of the AFL evidence, the plaintiff explained that she wanted to “go to try and do something rather than sit at home all day”. She said that she “tried to go back and play”, but that she wasn’t able to make it through the training and would frequently “sit out for half of it”. Whilst she did not recall playing any AFL games, she did not dispute what was recorded, namely that she had played 3 games in 2020 and 4 games in 2018. There was no evidence in this record as to how much time on the field “playing” in those games involved.
253. Moreover, it is significant that the AFL records show a notable reduction in the number of games played by the plaintiff after her illness as compared to before her illness. In 2016 (when the plaintiff was 15 years old), the plaintiff played in both the under 16 and the under 19 girls’ teams. In that year, the plaintiff played 10 games for the under 16 girls’ team, and 11 games for the under 19 girls’ team, totalling 21 games. However, in 2017 (the year of her illness), the plaintiff is not recorded as playing AFL at all. In 2018, she is recorded as having played in four games. She did not play in 2019. In 2020, she is recorded as having played in three games. In short, rather than demonstrating that the plaintiff fully recovered from her illness (as alleged by the defendant), these records are consistent with the plaintiff’s evidence that she was unwell in 2017, and that she was not well enough to participate in sport at the levels that she had prior to her illness.
254. The plaintiff’s bank records record regular purchases from fast food outlets such as McDonalds and KFC in 2018 and 2019. In her evidence, the plaintiff suggested that some of these purchases may have been made by her brother, to whom she occasionally lent her debit card. However, she also acknowledged that she does now eat fast food, including McDonalds, KFC and pizza. It was unclear from the plaintiff’s evidence as to precisely when she recalled that she could first consume fast food after her illness. In any event, as outlined at [75]-[76] above, I have not found the plaintiff to be a reliable historian concerning the progression of her illness. In these circumstances, it is not necessary for me to consider the defendant’s contention that I should draw an adverse inference against the plaintiff for not calling her brother to give evidence: see *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 at 320. I accept that the defendant’s contention that the plaintiff has regularly consumed fast food since 2018.
255. Importantly, however, the expert reports of Dr Knox, Dr Allnutt and Ms Embry were not predicated on the plaintiff not consuming any fast food following her illness. In November

2018, Dr Knox stated that the plaintiff “wishes” to eat, but as a result of nausea, can only consume “small quantities” of food. In December 2019, Dr Knox said reported that the plaintiff had told him that she “could eat chicken, but avoided meat and fish”. In July 2020, Ms Embry described the plaintiff’s diet as “erratic”. Similarly, when Dr Allnutt wrote his report in October 2022, he noted that the plaintiff had told him that:

... sometimes, she did go to places with food. She said that she estimated she avoided places with food 10 times a month and would go to places with food three times a month.

256. The bank account records (which do not record what the plaintiff purchased from outlets such as KFC or McDonalds) were not inconsistent with the plaintiff’s accounts to these experts. Nor is the evidence that the plaintiff was able to work as a kitchen hand at [redacted] café for a short period in 2018. The plaintiff gave evidence that in this role, she was working as a barista and waitress and was not working with raw food.
257. The opinions of Dr Knox, Dr Allnutt and Ms Embry concerning the plaintiff’s aversion to food are consistent with the February 2019 GP records, the Mental Health Claim and the evidence of the plaintiff’s mother referred to at [244] above. Importantly, the opinions are also consistent with the evidence of the various medical experts throughout 2018, 2019 and 2020, who each recorded the plaintiff as appearing underweight through this period. The plaintiff was not underweight prior to contracting salmonella poisoning. The plaintiff’s mother’s evidence, which I accept, was that the plaintiff had a healthy appetite prior to her illness.
258. Dr Roberts’ opinion that the plaintiff did not meet the criteria for a food related disorder arising from the contraction of salmonella poisoning, did not accord with this evidence. Although Dr Roberts noted that the plaintiff was significantly underweight at the time that he examined her in November 2020, Dr Roberts appeared to place significant reliance on a GP appointment record from 2019 (referred to at paragraph [245] above) which recorded the Plaintiff’s BMI as “18-20” (with 20 being a “normal” weight). Dr Roberts considered that this entry demonstrated that any food phobia and subsequent weight loss had developed well after the salmonella poisoning. This medical record was inconsistent with the evidence of various medical experts who observed otherwise in 2017 and 2018, including Dr Vickers, Dr Knox and Dr Sutton.
259. Further, as noted above, in the joint report, Dr Roberts ultimately agreed that the salmonella poisoning had contributed to the plaintiff’s eating disorder. In so concluding, Dr Roberts appears to have accepted that the plaintiff was properly diagnosed with an eating disorder.

260. For these reasons, I do not accept the initial opinion of Dr Roberts that the plaintiff did not meet the criteria for a food related disorder arising from the contraction of salmonella poisoning. I accept the opinions of Dr Allnutt and Dr Knox, that the plaintiff suffered a food aversion (either a chronic food phobia or an avoidant restrictive food intake disorder) as a result of contracting salmonella poisoning due to the defendant's negligence. As Ms Embry described, as a result of this condition, the plaintiff has "irregular poor energy and food intake".
261. As to prognosis, Dr Knox stated that he expected the plaintiff to "make gains once she is able to access a psychologist and have support from a dietician". In his original report, Dr Allnutt considered that the plaintiff's prognosis is positive in the longer term, particularly with treatment. For reasons that were unexplained, in the joint report, Dr Allnutt and Dr Roberts stated that the plaintiff's prognosis was "relatively poor". Contrary to this unexplained assertion, it is clear that there has already been significant improvement in this illness. With proper treatment, I find that the plaintiff has good prospects of recovery. The plaintiff's counsel did not submit otherwise.
262. On the basis of the above evidence, I am satisfied on the balance of probabilities that:
- (a) The plaintiff required hospitalisation for salmonella poisoning, and was seriously ill for a period of two weeks after her hospitalisation;
  - (b) The plaintiff's strength increased after this time;
  - (c) The plaintiff developed a food phobia as a result of her salmonella poisoning. That food phobia has improved significantly;
  - (d) As a result of her food phobia, the plaintiff is underweight, and has some continuing issues with fatigue and dizziness. She also continues to gag and vomit occasionally. I do not accept that these issues are significantly debilitating;
  - (e) Although she is not presently able to participate in sport at the same level that she did pre-illness, she remains able to socialise and to work;
  - (f) With treatment, the prognosis for the plaintiff's recovery is good.
263. Under s 99 of the *Wrongs Act*, I may consider earlier decisions of this Court, or other courts, for the purpose of establishing the appropriate award for general damages. The plaintiff provided me with two decisions said to be relevant to the determination of damages: *Ryrie v Tanner (No 2)* [2020] ACTSC 104 (in which the plaintiff was awarded \$160,000 in general damages) and *Lewis v Woolworths Limited* [2018] ACTSC 200 (in which the plaintiff was awarded \$170,000 in general damages). Each of those decisions relate to back injuries which had long term consequences for the plaintiffs in question.

They do not provide any guidance in determination the appropriate damages to be awarded.

264. I will award the plaintiff \$35,000 for general damages, of which 85 percent relates to past injury and 15 percent relates to damages for ongoing injuries (a food phobia and consequent conditions, including mild dizziness and fatigue). The plaintiff claimed interest payable on the proportion of past damages at the rate of  $\frac{1}{2}$  of four percent since the date of the infection. The defendant did not submit that such interest was not payable, nor that the rate claimed was unreasonable.
265. Accordingly, I will award the plaintiff \$35,000 for general damages, with an additional \$4,401.22 for interest.

### *Economic loss*

#### Past economic loss

266. At the time that the plaintiff contracted salmonella poisoning, she was working at the café. Her base rate was \$11.25 per hour, with a higher rate payable on weekends and public holidays. The plaintiff did not return to work at the café after contracting salmonella poisoning.
267. The plaintiff next worked as a kitchenhand between July and August 2018, at the [redacted] café. This would have been during year 12. It was not clear from the evidence whether the plaintiff hours were after school and/ or during school holidays, or whether the plaintiff had left school by this time. The plaintiff worked at the café approximately 14 hours a week at a rate of \$17.00 per hour (presumably excluding penalty rates).
268. Between September 2018 and 24 December 2019, the plaintiff worked as a casual sales assistant at [redacted]. She worked approximately 23 hours per week (to some experts, she reported that her hours varied between 15 and 40 hours per week) and earned approximately \$20 per hour.
269. The plaintiff gave oral evidence, and reported to Dr Allnutt, that at some point between December 2019 and September 2021, she worked at a "[redacted]" for approximately one month. This conflicts with the particulars filed on 10 June 2022, which indicated that from December 2019 to September 2021, the plaintiff was unemployed and received Centrelink payments.
270. The plaintiff informed Dr Sutton that she worked as a casual sales assistant at [redacted] from September 2021 for approximately 15 months.

271. For approximately six months in the latter half of 2022 the plaintiff was employed full-time in a roadside assistance call centre. She worked from 8:00am to 5:00pm, five days a week. She left her employment for reasons unrelated to any condition relating to the salmonella poisoning.
272. I note that when Dr Knox examined the plaintiff in November 2018, he concluded that the plaintiff's psychological features did not directly impact on her capacity for employment, although her poor energy levels restricted her ability to carry out more vigorous activity. When Dr Allnutt examined the plaintiff in August 2002, he likewise concluded that the plaintiff "was not compromised" for employment.
273. I accept that if the plaintiff had not become unwell, it is likely that she would have continued to work as a kitchen hand at the café or in other like premises from February 2017. I accept that by reason of her food phobia, the plaintiff did not have the capacity to work as a kitchen hand in the months immediately following her illness. I also accept that in circumstances where had she residual tiredness from the food phobia, she did not have the capacity to work in other part time employment at this time.
274. The plaintiff claims \$100 per week (that is, between two and three shifts) until the end of year 12 (99 weeks). The amount claimed per week (\$100) is reasonable. However, as noted above, the plaintiff obtained work as a kitchen hand at the [redacted] café in July and August 2018. I therefore find that the plaintiff was fit to work as a kitchen hand, or in like employment, from July 2018. Accordingly, I will only award the plaintiff damages for her loss of income until July 2018 (73 weeks). Exclusive of interest, this will be \$7,300. With interest, this amounts to \$8,783.14.
275. After the plaintiff left school, she had some periods of unemployment and more lengthy periods of part-time employment until she commenced full time employment in 2022. I do not accept that these periods of unemployment were attributable to the salmonella poisoning, including the psychological sequelae of that illness. I do not accept that the plaintiff's earning capacity after July 2018 was reduced by reason of her illness.

#### *Future economic loss*

276. The plaintiff's counsel contended that if the plaintiff had not contracted salmonella, she would have completed year 12, albeit with a modest Senior High School Certificate.
277. I do not accept this submission. The plaintiff's school records demonstrate that she had significant issues with attendance prior to contracting salmonella poisoning. In 2015, she was absent for 33 days, late for 61 days and truant on 1 day. In 2016, she was absent for 38 days, late for 51 days and truant for three days.



278. The plaintiff did not adduce any school records relating to her attendance after contracting salmonella poisoning. However, the police records demonstrate that the plaintiff was by the lake, and attending various shops, on at least some days when she should have been at school. These events indicate that the plaintiff was fit to attend school at this time.
279. I do not accept that any school absences, or the plaintiff's failure to obtain her High School certificate, were attributable to the ongoing effects of her salmonella poisoning.
280. As outlined above, since the plaintiff left school, she has been variously employed as a kitchenhand, a sales assistant at three different businesses, and in a call centre. She has worked full-time for at least 6 months during this period, in a position that did not continue for reasons that were unrelated to the illness or its aftermath. The plaintiff has not demonstrated that she has any ongoing loss of earning capacity.
281. In these circumstances, I will not afford any damages for future economic loss.

#### *Domestic assistance*

282. I accept that the plaintiff was seriously ill for a period of two weeks following her hospitalisation, and that she required significant care during this period. I accept that the plaintiff required 8 hours of care per day during this period. This is slightly less than the 10.5 hours submitted by the plaintiff, but more than the 5 hours per day of care that the defendant submitted was appropriate.
283. I note that the police attended the plaintiff's residence on 20 February 2017 in response to a complaint that the plaintiff was having a tantrum, screaming and slamming doors because her mother would not permit her boyfriend to stay over. That evidence demonstrates that the plaintiff had recovered from the acute phase of the illness by 20 February 2017.
284. The plaintiff's mother has provided significant domestic assistance, including cooking and cleaning, for the plaintiff since that time. However, that domestic assistance did not relevantly differ from the domestic assistance that the plaintiff's mother provided the plaintiff before her illness, nor does it appear to differ from the chores that the plaintiff's mother provides to the plaintiff's other siblings.
285. In light of these findings, and my finding above regarding the extent of the plaintiff's ongoing illness and incapacity (notably, that she experiences only mild ongoing symptoms, is able to work full time and has a good prognosis) I do not accept the evidence of Mr Woolley that the plaintiff requires 2.25 hours of ongoing domestic and garden care, weekly shopping delivery, and car cleaning per week. I find that the plaintiff

has not required domestic assistance attributable to the infection since she recovered from the acute phase of the illness.

286. It is appropriate for the plaintiff to be compensated for the two weeks (14 days) of care that she required during the acute phase of the illness. The parties agreed that the appropriate rate for domestic assistance is \$45 an hour. This amounts to \$5,040. With interest, this equates to \$6,063.98.

#### *Out of pocket expenses*

##### Past out of pocket expenses

287. The plaintiff claimed \$1,000 for out of pocket expenses, which were said to include reimbursement for nappies, pull ups, medication and travel to medical appointments. In the Statement of Particulars filed 10 June 2022, this was particularised as follows:

- (a) \$150 for over the counter medication;
- (b) \$300 for travel to and from appointments;
- (c) \$100 for five adult nappies per day for ten days following the poisoning, at an estimated cost of \$2 per nappy;
- (d) \$200 to replace towels and clothing soiled as a result of her illness;
- (e) \$150 for the purchase of toilet rolls and disinfectant cleaner, and the increased use of water and power;
- (f) \$15 for the purchase of hydrolyte;
- (g) An unspecified amount of hospital costs, less a Medicare reimbursement.

288. The particularised expenses total \$915. The plaintiff did not provide any receipts for these expenses.

289. I have found that the plaintiff was seriously ill for two weeks. During that time, she suffered both vomiting and diarrhoea. The claim for the adult nappies, and the replacement of towels and clothing is reasonable.

290. The evidence includes the notes of two attendances on the plaintiff's general practitioner in 2017 and 2019 respectively in which salmonella poisoning was mentioned, and a referral to a dietician from the latter appointment. The plaintiff indicated in oral evidence that she had attended that dietician appointment. Hospital notes also indicate that the plaintiff attended hospital on 11 January 2019 in relation to vomiting, diarrhoea, and gastroenteritis and reported a background of milder nausea/dry-retching over the previous two years since her salmonella poisoning. There is no evidence of the plaintiff

attending any other medical appointments (as opposed to medico-legal appointments) in respect of illnesses subsequent to her salmonella poisoning.

291. I will allow a buffer of \$1,000, inclusive of interest, for out of pocket expenses.

Future out of pocket expenses

292. The plaintiff claimed \$10,325 for future out of pocket expenses for the following:

(a) Consultations every two weeks with a psychologist for 9 months (18 consultations at \$250 each): \$4,500.

(b) Consultations every five weeks with a psychiatrist for 9 months (7 consultations at \$350 each): \$2,450.

(c) 15 Consultations with a dietician (\$195 per hour): \$2,925.

293. The plaintiff has not accessed any form of treatment since she contracted salmonella poisoning in 2017. The defendant submitted that the plaintiff is “obviously reluctant to do so in the future”. I do not accept this submission. It was plain that both the plaintiff and her mother have limited financial means.

294. I accept that the plaintiff has a residual, albeit not severe, food phobia. Various of the experts (in particular, Dr Knox and Ms Embry) have recommended that the plaintiff receive psychological and psychiatric treatment and treatment from a dietician. Although the plaintiff’s food phobia has improved, proper compensation to the plaintiff for the effects of the defendant’s negligence requires that the plaintiff receive the treatment that is required for her to fully recover from this illness.

295. I will allow the full amount of future out of pocket expenses claimed.

**Total Damages**

296. The total sum of damages to be awarded will be:

General damages:	\$35,000
Interest on past general damages:	\$4,401.22
Past economic loss:	\$7,300
Interest on past economic loss:	\$1,483.14
Past domestic assistance:	\$5,040
Interest on past domestic assistance:	\$1,023.98
Past out of pocket expenses:	\$1,000 (inclusive of interest)

Future out of pocket expenses: \$10,325

**Total: \$65,573.34**

### **Costs**

297. On the basis that the usual order is for costs to follow the event, and the event is clear, I will award costs to the plaintiff. If either party seeks a different costs order, they are to notify the court within 7 days.

### **Orders**

298. For the above reasons, the following orders are made:

- (1) Judgment is entered for the plaintiff in the sum of \$65,573.34.
- (2) The defendant is to pay the plaintiff's costs.
- (3) If either party notifies the Court within 7 days of the making of these orders that a different costs order is sought, order 2 is stayed until further order.

I certify that the preceding two hundred and ninety eight [298] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Justice Baker

Associate:

Date: