

## Civil Recourse Against Food Traders Causing Food Poisoning in Malaysia – Proposals for Reforms

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### ABSTRACT

*Under the current legal regime, the only civil recourse against food traders causing food poisoning to consumers in Malaysia is through civil action under tort of negligence. A civil action is not straightforward and often fraught with difficulties. Hence, the objectives of this paper are twofold. Firstly, to examine the application of the tort of negligence in civil liability cases against food traders who cause food poisoning; and secondly, to explore alternative approaches that could be introduced to safeguard the legal rights to compensation of aggrieved consumers and/or dependants of deceased consumers. This paper employs a pure doctrinal research method where the relevant food safety legislations and relevant English case laws together with the secondary sources such as textbooks, journals articles, statistics reports, press reports, relevant online databases, and websites are referred to. This paper concludes that the only civil recourse available is by commencing a civil action under tort of negligence against food traders. In addition, it is also found that relevant food safety legislations only empower enforcement authorities to take legal action against food traders but they will not act on behalf of aggrieved consumers who suffered from food poisoning and/or dependants of deceased consumers who died from food poisoning. This paper, thus, proposes reforms by way of amendments to the Food Act 1983.*

*Keywords: Civil recourse; food consumer; food poisoning; negligence; reforms*

### INTRODUCTION

Food poisoning should be taken seriously as it could cause morbidity and mortality.<sup>1</sup> Food poisoning is due to ingestion of food contaminants which are harmful to health.<sup>2</sup> Food contaminants can be divided into three categories, namely, biological, chemical, and physical. Biological contaminants are such as harmful bacteria, viruses, and parasites. Examples of chemical contaminants are heavy metal and pesticides. While physical contaminants include plastic, metal, and glass fragments.<sup>3</sup> Food contaminants causing food poisoning can be transmitted into food through food mishandling practices of food traders.<sup>4</sup> “Food mishandling practices” refer to the incorrect handling of food during preparation, cooking, and storage that can lead to food contamination.<sup>5</sup> Some of the common food mishandling practices causing food poisoning to consumers include, amongst others, cross contamination from raw to cooked food, unhygienic processing facilities and/or environment, inadequate storing facilities, incorrect storage temperature setting, and damage packaging sealing.<sup>6</sup> Food mishandling practices have been identified as the leading cause of food poisoning

in Malaysia, responsible for more than 50% of the reported incidents.<sup>7</sup>

Food traders who engaged in food mishandling practices have caused illnesses and/or deaths to consumers in several food poisoning incidents summarised below.

1. In 2022, it was reported that a restaurant in Johor Bharu has been imposed with temporary closure order due to a consumer posted on social media alleging that he had consumed contaminated bread sold by the restaurant. The Johor State Health Department found that the cleanliness level of the restaurant’s premise was unsatisfactory.<sup>8</sup> On another note, the Perak State Health Department disclosed that there were 23 food poisoning outbreaks, affecting a total of 900 consumers, during the first eight months of the year.<sup>9</sup>
2. In 2021, a canteen at a secondary school in Negri Sembilan has caused a food poisoning outbreak involving 152 students. As a result, the canteen has been imposed with a temporary closure order.<sup>10</sup>
3. In 2020, 99 consumers reportedly contracted food poisoning where one of them died after

eating a contaminated dessert called ‘puding buih’. It was claimed that the food trader used expired eggs as one of the ingredients.<sup>11</sup>

4. In 2018, it was reported by the media that a total of 80 consumers had experienced food poisoning and two of them had died after consuming contaminated laksa sold by a food trader from Baling, Kedah. Lab tests revealed that the laksa noodles were contaminated with *Salmonella*.<sup>12</sup>
5. In 2015, two sisters had been reported to suffer from food poisoning after consuming nasi lemak and fried noodles bought from a food trader in Keningau town, Sabah. The younger sister survived the food poisoning, but the 38 years old elder sister died from it.<sup>13</sup>
6. In 2014, a 5-year-old boy died and 141 consumers were admitted to hospital due to food poisoning. It is believed that they had consumed food bought from a night market at Kuala Terengganu. Lab tests revealed that the food were infected with *Salmonella*.<sup>14</sup>
7. In 2012, there were reports of 25 consumers who were infected with food poisoning following their consumption of *nasi lemak* and *murtabak* purchased from a night market in Johor. In this incident, a 7-year-old girl died while her family was hospitalised due to serious food poisoning.<sup>15</sup>
8. In 2011, an 11-year-old girl was discovered in a bathroom, lying down with a foaming mouth and swollen eyes, just 30 minutes after consuming contaminated food bought from a Bazaar Ramadhan in Selangor. Her entire family was admitted to the hospital. Lab report revealed that the contaminated ice cubes found at the Bazaar Ramadhan are the source of food poisoning.<sup>16</sup>

Despite some food traders being found responsible for causing food poisoning, relevant food safety legislations do not mandate that they pay damages to aggrieved consumers and/or dependants of deceased consumers. At the moment, the Food Act 1983 (FA 1983), which is the primary food safety legislation, is of a public penal nature. The FA 1983 only empowers enforcement authorities, who are acting on behalf of the government, to take legal action against food traders, but they will not act on behalf of aggrieved consumers who suffered from food poisoning and/or dependants of deceased consumers who died from food poisoning caused by food traders. Nonetheless, there is only one recourse

for consumers to claim damages from food poisoning that is by commencing a civil action under the law of negligence. However, the current recourse by way of civil action through the court process is expensive, time consuming and psychologically draining.<sup>17</sup> As such, this paper seeks to demonstrate the application of the tort of negligence on civil liability of food traders causing food poisoning to consumers. In doing so, the difficulties in commencing a civil action against food traders is also highlighted. In the end, this paper suggests alternative recourses for aggrieved consumers and/or dependants of deceased consumers to claim damages against food traders causing food poisoning.

## METHODOLOGY

This paper employed a pure doctrinal research method where primary and secondary sources are gathered and analysed. Primary sources, namely, relevant food safety legislations and case law from library and online legal databases are referred to. The primary sources are such as the FA 1983 and the Food Hygiene Regulations 2009 (FHR 2009). The secondary sources referred to include textbooks, journals articles, statistics reports, press reports, and relevant websites from the libraries, journals’ archives, official websites of international and national organisations and any relevant online legal websites. These secondary sources supplemented the primary sources and facilitated the achievement of the objectives of this paper.

## APPLICATION OF THE TORT OF NEGLIGENCE ON CIVIL LIABILITY OF FOOD TRADERS CAUSING FOOD POISONING TO CONSUMERS

The crucial legal principles of the tort of negligence are shared below to highlight the difficulties that aggrieved consumers and/or dependants of deceased consumers need to overcome to discharge the burden in proving the negligence committed by food traders.

In *Lochgelly Iron and Coal Co v McMullan*,<sup>18</sup> Lord Wright explained that negligence indicates “the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing”. In simple terms, negligence is proven when three conditions are met: first, the defendant has a duty of care towards the plaintiff; second, the defendant breaches that duty of care; and third,

the breach directly causes harm or damage to the plaintiff.<sup>19</sup>

### DUTY OF CARE

The “neighbour principle”, formulated by Lord Atkin in the influential case of *Donoghue v Stevenson*,<sup>20</sup> is used to determine the presence of a duty of care. According to Lord Atkin, everyone has a duty to exercise reasonable care to prevent actions or omissions that could reasonably be foreseen to cause harm to his or her “neighbours”. In this context, a “neighbour” refers to a person who is closely and directly affected by one’s actions. When considering whether a duty of care exists, it is essential to contemplate the potential impact on these persons. Hence, Lord Atkin’s “neighbour principle” emphasises the importance of foreseeability and the obligation to consider the well-being of those who may be affected by one’s actions or omissions.

In *Caparo Industries PLC v Dickman*,<sup>21</sup> the court, in determining the element of duty of care, adopted the neighbour principle and established the threefold test i.e., foreseeability test, proximity test, and fairness test. The foreseeability test raised the question of whether it was reasonably foreseeable that the defendant’s negligence could result in harm or damage to the plaintiff. In other words, the court examined whether it was reasonably foreseeable that the plaintiff would suffer harm or injury due to the defendant’s negligence. The proximity test aimed to determine whether a relationship of proximity existed between the defendant and the plaintiff. It is important to note that proximity in this context does not necessarily refer to physical closeness, but rather the presence of a significant connection between the parties involved. The fairness test assessed whether it was fair, just, and reasonable for the court to conclude that the defendant owed a duty of care to the plaintiff.

The threefold test can be related to the civil liability of food traders causing food poisoning. For the first test, the foreseeability test, arguably, it is reasonably foreseeable that food traders’ negligence in handling food could cause harm or injury to consumers. For the second test, the proximity test, it is equally arguable that a sufficient relationship of proximity exist between food traders and consumers as food traders’ food handling practices may directly affect consumers’ health. For the third test, the fairness test, with the first and second tests fulfilled, it is fair, just, and reasonable to impose a duty of care upon food traders.

### BREACH OF DUTY OF CARE

Once the duty of care has been established, the next step is to ascertain whether the defendant’s action has breached the duty of care. Breach occurs when the defendant engages in conduct that falls below the minimum standard of care expected, which is determined by the standard of a reasonable man.<sup>22</sup> In the case of *Blyth v Birmingham Waterworks Co.*,<sup>23</sup> negligence is defined as the failure to perform an action that a reasonable person, guided by the ordinary standards that govern human conduct, would do, or engaging in an action that a prudent and reasonable person would not do. According to *Caminer v Northern and London Investment Trust*,<sup>24</sup> if a person professes expertise in a particular field, the standard of care for that person is evaluated by considering what a reasonable person possessing the same level of expertise would do or refrain from doing to prevent harm to others.

Under Regulation 30(1) of FHR 2009, a person who intends to be a food handler is required to attend a food handler training and obtain a food handler certificate before he or she is permitted to handle any food for consumer consumption.<sup>25</sup> Therefore, any food handlers may be regarded as professionals who possess the knowledge and skills for food handling. The standard of care applies to food traders is possibly of a person who professes expertise in food handling. Food traders breach the duty of care when they engage in food mishandling practices that fall below the minimum standard of care expected in food handling.

### CAUSATION AND DAMAGES

To prove the third element of negligence – damages, the plaintiff is required to first prove the element of causation where the defendant’s action has caused damages (injuries or harms) to the plaintiff. The plaintiff needs to prove the causative agent related to the food poisoning.<sup>26</sup> A “causative agent” is an agent that causes a disease. A causative agent can be any virus, bacterium, fungus, parasite or microorganism that is directly or indirectly responsible for causing diseases including food poisoning.<sup>27</sup> Common examples of the causative agent are such as *Salmonella enterica serovar Weltevreden*, *Bacillus cereus*, and *Staphylococcus aureus*.<sup>28</sup>

When a food poisoning outbreak occurs, it triggers the food poisoning surveillance system and the food poisoning outbreak investigation management. The said systems produce the

evidence that the plaintiff needs to prove the causation or the causative agent. The food poisoning surveillance system serves to discover and confirm the occurrence of a food poisoning outbreak.<sup>29</sup> While the food poisoning outbreak investigation management system serves to investigate, manage, and control the food poisoning outbreak.<sup>30</sup>

Under the food poisoning surveillance system, a medical doctor of a health facility, upon receiving a group of infected consumers who complaint about similar food poisoning symptoms, shall proceed to request for specimen. The specimen to be collected from infected consumers are stool samples and/or gastric contents.<sup>31</sup> The specimen collected are tested by the laboratory (located in the health facility) to determine the causative agent. A “culture-confirmed case” is detected if the laboratory found a causative agent such as foodborne pathogens in the specimen. The medical doctor is then required under the First Schedule of the Prevention and Control of Infectious Diseases Act 1988 to notify the District Health Office regarding the culture-confirmed case.<sup>32</sup> Once the District Health Office received the notification, it will initiate the food poisoning outbreak investigation management. As such, the evidence that can be obtained from the food poisoning surveillance system are the plaintiff’s medical report, and the lab test report confirming the culture-confirmed case.

Further, the Ministry of Health (MOH) commands the food poisoning outbreak investigation management. The District Health Offices carry out the investigation under the MOH’s instruction and the State Health Department supervises it. Several units under the District Health Offices oversee the food poisoning investigation and implementing appropriate measures to identify the source and break the chain of the outbreak.<sup>33</sup> After receiving notification of a culture-confirmed case from a medical doctor, a Rapid Response Team initiates a preliminary investigation to confirm the presence of an outbreak. If criteria are met, an outbreak is officially declared, and an Outbreak Operations Room is established to coordinate all related activities.<sup>34</sup> An investigation team then carries out field investigation at the food premise, which involves epidemiological investigation, environmental assessment, laboratory investigation, and implement and control measures. The food premise is imposed with a closure order until it has been thoroughly disinfected.<sup>35</sup> As such, the evidence that can be obtained from the food poisoning outbreak investigation management

are the preliminary investigation report by the Rapid Response Team, and the field investigation reports that cover epidemiological investigation, environmental assessment, and laboratory investigation.

With the said evidence, the plaintiff can prove causation through the medical report (proving that the plaintiff did suffer from food poisoning); the lab test report for culture-confirmed case (proving that the food poisoning outbreak was caused by a species of foodborne pathogen); the preliminary investigation report (verifying the existence of a food poisoning outbreak); and the field investigation reports (epidemiological investigation – determining the true magnitude of the food poisoning outbreak; environmental assessment – evaluating the cleanliness of the food premise; and laboratory investigation – analysing food samples and/or environmental swab samples). To prove an indisputable causation, the lab test report for culture-confirmed case and the outcome of the laboratory investigation must detect the same species of foodborne pathogen.<sup>36</sup>

With the aforesaid evidence, the plaintiff can prove the third element of negligence – damages, which refers to the harm caused by a breach of duty.<sup>37</sup>

In *Livingstone v Rawyards Coal Co.*,<sup>38</sup> it is established that the purpose of awarding damages is *restitutio in integrum*, which means to restore an injured party to the original position as he would have been if he has not sustained the wrong. There are four types of damages namely, nominal damages, compensatory damages, aggravated damages, and exemplary damages.<sup>39</sup> Among the four types of damages, only compensatory damages and exemplary damages are relevant to the claim in negligence against food traders causing food poisoning.

Nominal damages are actionable *per se*, and the Plaintiff needs only to establish the wrong was committed and not that damage was caused by the wrong.<sup>40</sup> Since negligence requires the Plaintiff to suffer from some damage before the law will recognise the wrong, nominal damages are irrelevant to this paper. Aggravated damages are awarded in cases where the Plaintiff has experienced non-monetary harm or loss, such as damage to their reputation or a feeling of humiliation. Aggravated damages are commonly awarded in defamation cases and cases concerning infringement of human rights.<sup>41</sup> Therefore, aggravated damages are irrelevant to this paper.



Compensatory damages are intended to compensate for the actual losses which the plaintiff has suffered. It covers losses incurred by the plaintiff such as medical expenses, loss of earnings, pain and suffering as well as loss of amenities.<sup>42</sup> Exemplary damages, also known as punitive damages, are granted to provide compensation to the plaintiff for the harm inflicted upon him and to punish the defendant for his action that caused the harm. These damages can be awarded in addition to compensatory damages.

It comes into play when the defendant's action is sufficiently egregious and therefore, warranting punishment, such as where it demonstrates malice, fraud, cruelty, insolence etc.<sup>43</sup>

Therefore, the courts of law in deciding a civil action against a food trader who caused food poisoning may award exemplary damages to aggrieved consumers and/or dependants of deceased consumers if evidence shows that the food trader has reason to believe or know that the food were contaminated and yet, proceeded to sell them to consumers.

Further, damages can also be claimed in cases of death under Section 7 of CLA 1956 which deals with dependency and bereavement claims.<sup>44</sup> A dependency claim is a claim for loss of support suffered by deceased's dependants due to the death of the deceased caused by the defendant's negligence.<sup>45</sup> While a bereavement claim is an independent claim that can be made by the deceased's spouse or parents if the deceased was unmarried and under 18 years old.<sup>46</sup> In *Takong Tabari v Government of Sarawak & Ors*,<sup>47</sup> the deceased was in the bank when an explosion and fire occurred due to a gas leak. His dependants were his widow, four minor children, and elderly parents. The High Court granted to the plaintiff damages for dependency and bereavement claims. Similarly, dependants of deceased consumers who died from food poisoning caused by food traders could make dependency and/or bereavement claims against food traders. Although the elements of negligence may be proven against food traders, pursuing a civil claim is not an easy task. In what follows, the difficulties of pursuing a civil action are identified.

#### DIFFICULTIES IN COMMENCING A CIVIL ACTION AGAINST FOOD TRADERS

It is a common knowledge within the legal fraternity that civil action can be expensive, time-consuming, and psychologically draining. As a result, most

aggrieved consumers and/or dependants of deceased consumers are unable to commence a civil action against food traders.

Civil action is expensive due to several factors including court fees, the need to take time off from work or other obligations to attend the court proceedings, and the need to cover expenses for traveling to court.<sup>48</sup> Since a civil action involves complicated procedures, parties normally need to engage lawyers who have expertise in civil litigation to advise and represent them. Legal services and representation lead to exorbitant costs that most people cannot afford. In addition, the losing party shall pay the winning party's costs as well as his own lawyer's cost. There are also costs of expert testimony or witnesses. In some cases, the litigation costs may exceed the amount of damages being sought.<sup>49</sup>

Further, civil action is time-consuming as it could take months or even years to conclude, depending on the complexity of the case, the court's schedule, and other factors.<sup>50</sup> The losing party may appeal the decision to a higher court which further prolongs the litigation process and increase costs. Such lengthy court process takes up much of the parties' time where they could have spent those time for more profitable or enjoyable activities.<sup>51</sup>

Also, civil action is psychologically draining as it can interfere with the parties' daily mental, emotional, and physical lives.<sup>52</sup> There are incidents where parties who were involved in court proceedings experienced psychological conditions such as panic attacks, litigation-induced anxiety, appetite disturbances, depression, and insomnia.<sup>53</sup> As a result, the parties' relationships with their families and friends may be affected by the stress of having to deal with the parties' psychological conditions.<sup>54</sup>

In addition, even if the court of law decided in favour of aggrieved consumers and/or dependants of deceased consumers, food traders may be unable to afford the damages, especially if the damages is an enormous sum. This situation renders the judgment obtained as merely 'paper judgment' unless the winning consumer proceeds with proceedings to execute the judgment which involves further expenses.

Due to the aforesaid difficulties, aggrieved consumers and/or dependants of deceased consumers rarely commence civil actions against food traders in Malaysia. The authors, to the best of their ability, found only two civil cases in which aggrieved

consumers commenced civil actions against food traders. These two civil cases are explained below:

In *Soundra Rajan Vadivelu & Ors v Gardenia Bakeries (K.L) Sdn Bhd*,<sup>55</sup> the plaintiffs sued the defendant for negligence after consuming bread manufactured by the defendant, which was allegedly contaminated by a dead lizard. The 2nd and 3rd plaintiffs claimed that they suffered from food poisoning after consuming the bread. The plaintiffs alleged that the defendant failed to take reasonable precautions in manufacturing, packaging, and distribution. The defendant's defence was that they had engaged reputable pest control companies to conduct regular hygiene inspections in its factories and as such, breads manufactured by its factories surpassed hygiene standards. The defendant investigated the bread and found that the dead lizard was not embedded, damp, and had recently been crushed by an external force. They claimed that the bread was contaminated due to the plaintiffs' negligence in ensuring that the bread packaging was securely fastened at all times. The High Court referred to the neighbour principle and held that the defendant has been taking reasonable precautions and the dead lizard was not present at the defendant's factory. Therefore, the defendant did not breach its duty of care to the Plaintiffs.

In *Goh Sze Ching v Pizza Hut Restaurants Sdn. Bhd.*,<sup>56</sup> the plaintiff sought damages from the defendant as she suffered from food poisoning after consuming a plate of spaghetti which contained a cockroach leg at one of the defendant's outlets. The Sessions Court held that the defendant, as a fast-food chain, owes a duty of care towards the plaintiff. The defendant has a duty to prepare and serve safe food to consumers, including the plaintiff. Since the food served by the defendant caused food poisoning to plaintiff, the defendant has breached the duty of care. Hence, the plaintiff suffered harm due to the defendant's breach of duty of care. The defendant was ordered to pay damages to the plaintiff.

Therefore, to ensure the accessibility of justice for aggrieved consumers and/or dependants of deceased consumers, it is crucial to consider the implementation of alternative approaches in Malaysia. The subsequent section provides a detailed explanation of these proposed alternative approaches.

## SUGGESTIONS

To provide aggrieved consumers and/or dependants of deceased consumers with alternatives to claim damages against food traders causing food poisoning, several amendments to the FA 1983 are suggested as follows:

### PRODUCT LIABILITY INSURANCE

Food traders should be required to sign up for a mandatory product liability insurance scheme with yearly renewal. At the time of writing this paper, the signing up of product liability insurance is not a requirement but only an option for food traders who are operating in Malaysia. Currently, many insurance companies in Malaysia are providing the product liability insurance. For ease of reference, the authors refer to the product liability insurance provided by Chubb Insurance company. Chubb's product liability insurance covers any legal liability, which the insured person is legally obliged to pay as damages related to personal injury, death or property damage arising from an insured person's products that are manufactured, sold, handled, distributed, or disposed of by insured person.<sup>57</sup> The sum insured will depend on the insurance plan chosen and premium paid. It could range from RM250,000 to RM1,000,000 and above.<sup>58</sup> The amount of premium is determined by four factors, namely, type of business, location of business, type of business premise, and prior claims history.<sup>59</sup> The duration of cover of the product liability insurance is one year and it needs annual renewal.<sup>60</sup>

As an alternate to the product liability insurance, the authors advocate that it should be mandatory for food traders to sign up for an insurance akin to the motor insurance that provides option of comprehensive or third-party cover. At the very least, food traders should sign up for an insurance with third-party cover in case any food poisoning incidents occur.

Under Section 90(1) of the Road Transport Act 1987 (RTA 1987), it is illegal for any person to use or allow any other person to use a vehicle on the road unless the vehicle has been insured with a third-party insurance.

Section 90(2) of RTA 1987 provides that any person who violates the aforesaid provision commits an offence and shall be liable to a fine of up to RM1,000 or to imprisonment for maximum of 3 months or to both. In addition, he will be

disqualified from holding or obtaining a driving licence for a minimum of 12 months starting from the date of conviction. Similar provisions from the RTA 1987 should be introduced and inserted into the FA 1983 where it should be illegal for any person to prepare or sell food to consumers unless he has signed up for a product liability insurance and/or an insurance with third-party coverage. A person who is found preparing or selling food to consumers without the aforesaid insurance should be deemed to have committed an offence and should be liable to a fine or to imprisonment or to both; and suspension of the food business licence. Once the said proposed amendment is implemented, the aggrieved consumers and/or dependants of deceased consumers (aggrieved party) can claim for damages from the insurance company rather than from the food trader via civil proceedings.

Finally, a new provision should be inserted into the FA 1983 prohibiting food traders from applying and/or renewing their business registration certificates with the Companies Commission of Malaysia (CCM) if they fail to sign up and/or renew the product liability insurance or an insurance with third-party coverage. This suggested measure could ensure a high degree of compliance by food traders.

#### NO CLAIM DISCOUNT (NCD) MODEL

The mandatory requirement of the product liability insurance or an insurance with third-party coverage could lead to increase of food prices. Thus, to prevent this consequence, the 'No Claim Discount (NCD)' bonus that is used for motor insurance should also be made available for the food industry. The NCD determines how much an insured person should pay for his motor insurance in the ensuing years if there was no claim submitted.<sup>61</sup> It is essentially a reward scheme to encourage insured persons to drive safely and not get involved in any accident.<sup>62</sup> With the NCD bonus, the insured persons can save a lot of money on their yearly renewals of their motor insurance premiums. The longer a claim is not made against the insured person's insurance, the higher the discount the insured person will be entitled to until it reaches a ceiling of 55% or 25 % of the total payable premium depending on whether the vehicle is a private car or commercial vehicle. The NCD rates specified by the Persatuan Insurans Am Malaysia (PIAM) Motor Tariff are shown in Table 1 below.

TABLE 1. No Claim Discount Rates by Persatuan Insurans Am Malaysia (PIAM).

| No Claims Period | Private Car | Commercial Vehicle |
|------------------|-------------|--------------------|
| 1st year         | 0%          | 0%                 |
| 2nd year         | 25%         | 15%                |
| 3rd year         | 30%         | 20%                |
| 4th year         | 38.33%      | 25%                |
| 5th year         | 45%         | 25%                |
| 6th year onwards | 55%         | 25%                |

Source: Persatuan Insurans Am Malaysia (PIAM).<sup>63</sup>

As seen in Table 1 above, insured persons who have safe driving records are entitled to substantial discounts for their motor insurance premiums. This similar approach could also be used in the food industry. With the NCD, premiums for the product liability insurance or an insurance with third-party coverage for food traders will decrease with time which in turn will ensure that food prices are reasonable priced and kept low for the benefit of the consumers. At the beginning of its implementation, food prices should be continuously monitored by the relevant authority namely the Ministry of Domestic Trade and Cost of Living Malaysia in order to prevent food traders from hiking their food prices.

The FA 1983 should also include new provisions penalising food traders who are found to have increased food prices unreasonably with hefty fines and/or suspension of food business licence.

#### MEDIATION

Next, another provision that can be included in the FA 1983 is about compulsory mediation for parties in the event the insurance company's decision relating to pay-out is not acceptable by the aggrieved party. The new provision will empower the Malaysian Ombudsman for Financial Services (OFS) which is an independent body to mediate disputes between a

financial customer (aggrieved party as complainant) and a Financial Service Provider (FSP) (insurance company). This OFS' dispute resolution service

should be free of charge. Figure 1 below illustrates the OFS' dispute resolution process.

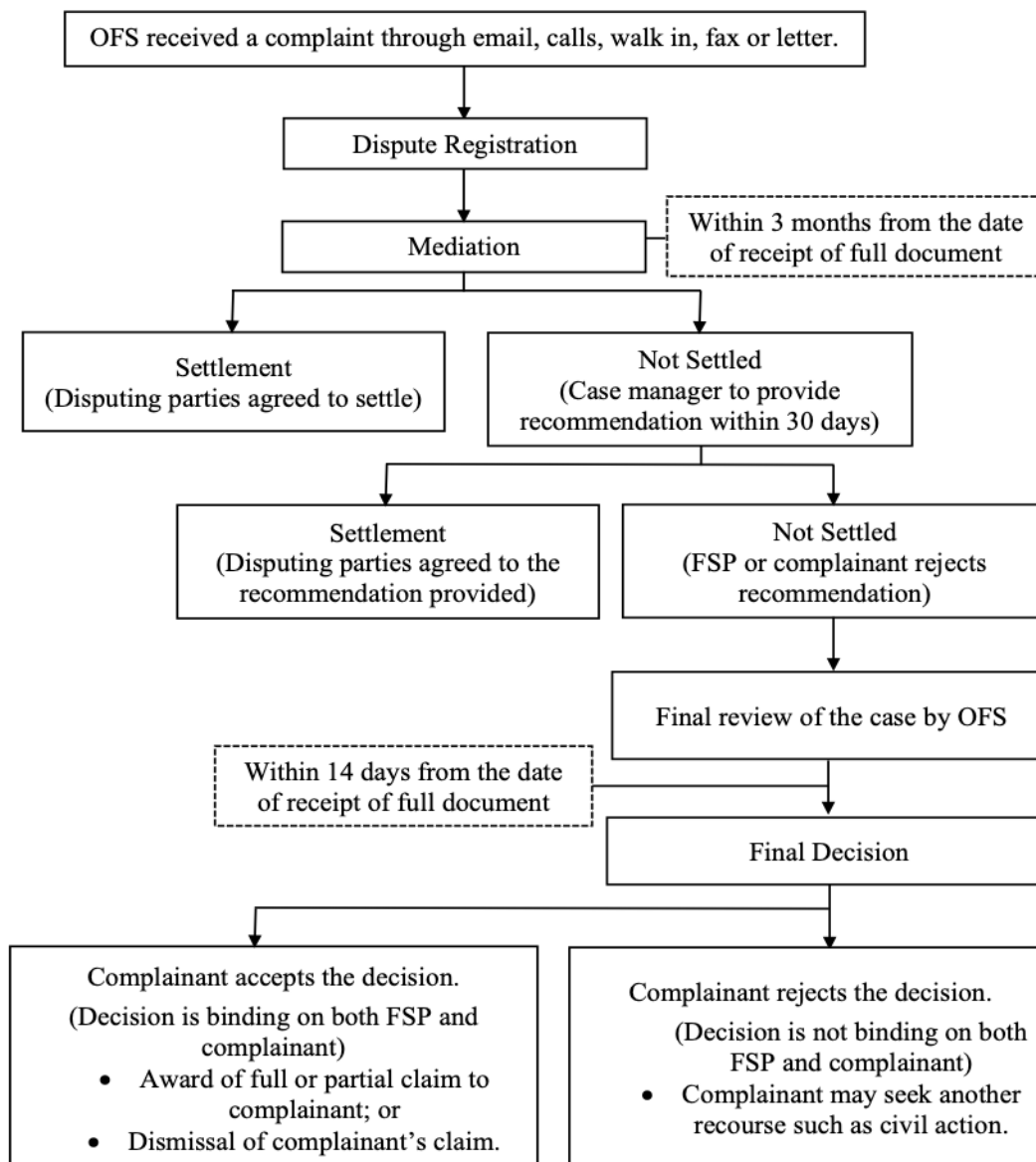


FIGURE 1. Dispute Resolution Process by the Ombudsman for Financial Services Malaysia.  
Source: Ombudsman for Financial Services Malaysia.<sup>64</sup>



The procedure begins with the aggrieved party (complainant) making a complaint to the OFS either by email, calls, walk in, fax or letter. The complaint / dispute received by OFS will then be registered. Mediation will be conducted to facilitate settlement of dispute between disputing parties i.e., the insurance company and the complainant. If the disputing parties are unable to reach settlement through mediation, a case manager from OFS will provide a suitable recommendation for settlement. However, if the recommendation provided is not acceptable by one of the disputing parties, the OFS will then conduct a final review of the complaint and make a final decision. Only the complainant can accept or reject the final decision. If the complainant decides to reject the final decision, he or she may seek another redress, for instance, commencement of civil action against the insurance company.

The OFS' dispute resolution process could be a useful platform to resolve any insurance claim disputes. Unfortunately, the OFS currently has no jurisdiction to resolve disputes involving third-party bodily injury or death (including disputes related to claims for product liability insurance or an insurance with third-party coverage).<sup>65</sup> Therefore, the OFS' jurisdiction should be extended so that they have the jurisdiction to resolve any disputes involving third-party bodily injury or death.

In addition, the Asian International Arbitration Centre (AIAC) in Malaysia has recently launched a pro bono mediation initiative that aims at providing to low-income individuals an easy and affordable access to mediation.<sup>66</sup> Individuals meeting the eligibility criteria for the AIAC's pro bono mediation service enjoy several benefits, including a full exemption of the AIAC's mediation fees, covering the registration fee and administrative costs. Further, they are also eligible for a complete waiver or reduction of mediator's fees, as well as access to AIAC's facilities at a discounted rate. Hence, aggrieved consumers and/or dependants of deceased consumers who are lacking the financial means to commence a civil action against insurance companies could opt for the pro bono mediation service provided by the AIAC.<sup>67</sup>

## CONCLUSION

To summarise, food traders clearly owe a duty of care to consumers who patronise their establishments. This clear duty of care is breached when they mishandle the food which subsequently causes food poisoning to unsuspecting consumers. Under

the current legal regime, for civil liability, food traders causing food poisoning to consumers are only liable if aggrieved party elects to commence a civil action against them in the court of law. However, as explained in this paper, the option of commencing a civil action against food traders in the court of law is rarely exercised since it is expensive, time-consuming, and psychologically draining. Moreover, even if the court of law awards damages, food traders may not be able to afford the damages pay-out. As such, the whole exercise could be futile with both sides having to fork out a lot of money towards the civil action. Therefore, this paper suggests that legislative reforms be done to the FA1983. The reforms proposed are that a mandatory insurance scheme be introduced to protect both the aggrieved party and the food traders. The insurance scheme should also have the NCD bonus to ensure that food prices could be kept low and to reward food traders who have been diligent and responsible in food handling. Appropriate penalties should be inserted in the FA 1983 to penalise food traders who do not comply with the new provisions. With the introduction of mandatory insurance scheme, it is pertinent that an independent body like the OFS be appointed as a mediator to facilitate resolution of any insurance claim disputes between the aggrieved party and the insurance company. The AIAC's pro-bono mediation service is another viable option for aggrieved party with low-income to resolve any insurance claim disputes with the insurance company. In a nutshell, legislative reforms to the FA 1983 are a must as food traders who caused food poisoning to consumers should be made accountable.

## NOTE

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