

MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: **Stedman v Zeffirelli Pizza Restaurant Pty Ltd**

Citation: **[2016] ACTMC 9**

Hearing Date: 4 August 2016

Decision Date: 5 September 2016

Before: Magistrate Theakston

Decision: Charges dismissed

Category: Decision

Catchwords: CRIMINAL LAW – sell food that is unsafe – food poisoning from restaurant – elements of offence - application of criminal code – intervening event or conduct – evidential onus

Legislation Cited: *Criminal Code 2002 (ACT)* ss 8, 39
Criminal Code (Cth), s 10.1
Criminal Code Harmonisation Act 2005 (ACT) (repealed)
Food Act 2001 (ACT) ss 5A, 22, 30
Food Amendment Act 2012 (ACT) (repealed)
Legislation Act 2001 (ACT) s 190, Dictionary
Magistrate Court Act 1930 (ACT) s 19
Public Health Act 1997 (ACT) s 135A

Cases Cited: *Beattie v Potts* [2015] ACTSC 350
Mayer v Marchant (1973) 5 SASR 567
Mifsud v Molnar and Mifsud v Sara [2012] ACTMC 1
Poole v Edwards [2016] ACTSC 159
R v Khazaal (2012) 246 CLR 601

Text Cited: *Explanatory Memorandum to the Criminal Code 2002 Bill*

Parties: Andrew Stedman (Informant)
Zeffirelli Pizza Restaurant Pty Ltd (Defendant)

Representation:**Counsel**

Mr Reardon (Informant)

Mr Sharman (Defendant)

Solicitors

ACT Director of Public Prosecutions (Informant)

Sharman Robertson Solicitors (Defendant)

File Numbers:

CC 40605 of 2014

CC 40606 of 2014

MAGISTRATE THEAKSON:**The Proceedings**

1. The defendant is charged with two offences contrary to section 22(2) of the *Food Act 2001* (the Food Act), namely:
 - a. CC 14/40605 – That it in the Australian Capital Territory on 11 May 2013 sold food that was unsafe, and
 - b. CC 14/40606 – That it in the Australian Capital Territory on 12 May 2013 sold food that was unsafe.
2. The charges were amended to their current form, without challenge, on 4 August 2016, the morning of the hearing. The offences are summary offences within the meaning of section 190 of the *Legislation Act 2001* and punishable upon summary conviction, and may therefore be heard and decided by the Magistrates Court as provided by section 19 of the *Magistrates Court Act 1930*.
3. Pleas of not guilty were entered on 14 October 2014, and maintained following the above amendments. The hearing was conducted and concluded on 4 August 2016.
4. The prosecution case was opened on the basis that the defendant operated the restaurant trading as The Copa Brazilian Churrasco at Dickson on the evenings of 11 and 12 May 2013. The restaurant offered an ‘all you could eat’ menu and charged each customer \$45. A potato salad was served that incorporated an aioli sauce, which in turn was prepared using raw eggs. That potato salad was contaminated with salmonella bacteria, and was consumed by a number of customers over the dinner service on 11 and 12 May 2013. A total of 161 customers consequently developed gastroenteritis, some of whom were hospitalised. Of those customers, 80 were tested and found to have salmonella bacteria in their faeces. Half of those samples were tested further, and found to contain a sub-type of salmonella bacteria identical to the bacteria found in left over aioli sauce discovered within the restaurant kitchen.

5. Mr Sharman, who appeared for the defendant, conceded that the restaurant, and therefore the defendant, had sold the potato salad containing salmonella bacteria, the potato salad was consumed by customers and, as a result, a large number of customers fell ill with gastroenteritis. These concessions allowed the hearing to focus on the issues in dispute and, no doubt, saved the court and parties time and expense. Mr Sharman indicated that the defendant relied upon the excuses¹ or defences of:

- a. mistake of fact,
- b. intervening conduct or event, and
- c. appropriate diligence – as provided at section 30 of the Food Act.

6. The defence of appropriate diligence was eventually abandoned, and I have ultimately determined that the excuse of intervening conduct or event has been made out. Accordingly, I will not consider within these reasons the defence of appropriate diligence or the excuse of honest and reasonable mistake.

7. The prosecution called evidence from the following four witnesses:

- a. Mr Andrew Stedman, the informant and employee of ACT Health Protection Service;
- b. Mr Brian Jones, a former Environmental Health Operations Manager at ACT Health Protection Services;
- c. Mr Cameron Moffatt, an Epidemiologist and former employee of ACT Health Protection Service; and
- d. Mr Radomir Krsteski, the Director of Microbiology at ACT Health Protection Services.

8. The prosecution tendered the following documents, with the consent of the defendant:

Exhibit P1 – Statement by Mr Brian Jones;

Exhibit P2 – Food Business Registration Renewal;

Exhibit P3 – Certificate of Registration for a Food Business;

Exhibit P4 – Notification of Change to Food Business Registration Details form;

Exhibit P5 – ASIC Company extract;

Exhibit P6 – Food sample documentation;

Exhibit P7 – Gastrointestinal illness questionnaire;

Exhibit P8 – Statement by Dr Alexandra Greig;

Exhibit P9 – Bundle of *Public Health Act 1997* section 135A certificates;

Exhibit P10 – Statement by Arthur Pentes, a customer of the restaurant on 11 May 2013;

Exhibit P11 – Statement by Ms Faye Fearon, a customer of the restaurant on 12 May 2013;

Exhibit P12 – A report by Mr Cameron Moffatt;

Exhibit P13 – A report by Mr Radomir Krsteski;

Exhibit P14 – Records of visits and telephone conversations by Dr Alexandra Greig, a former Public Health Registrar; and

Exhibit P15 – Tax Invoice of 8 May 2013.

9. The evidence of Mr Moffat and his report (Exhibit P12) included opinions that appear to be based upon his specialist knowledge as an epidemiologist based upon his training, study and experience. This was admitted without objection. The facts and assumptions upon which those opinions were based were also described by Mr Moffat, again without any objection. Those facts were not established separately by evidence, other than, in part, by the microbiological results contained within Exhibit P9. I understand those facts were admitted, and accordingly I have relied upon the description of those facts as the truth of what they assert. Additionally, I found the reasoning of Mr Moffat easy to follow and compelling.

10. The evidence of Mr Krsteski and his report (Exhibit P13) also included opinions that appear to be based upon his specialist knowledge as a microbiologist based upon his training, study and experience. This was admitted without objection.

11. The records by Dr Greig (Exhibit P14) contained second hand hearsay representations made by persons who had not been called to give evidence, and there was no indication that they were unavailable. Additionally, the author of the document was not available to give evidence or be cross examined. Mr Sharman confirmed that the defendant consented to those records being admitted into evidence and that the defendant relied upon parts of that document, as I understand the prosecution did, including the truth of certain representations. Additionally, he submitted there were issues in relation to inconsistencies between the various representations and the inability to test that evidence. He went on to submit that there was, therefore, uncertainty about what weight could be assigned to the various representations. I make the observation that evidence in that form may be unreliable, for reasons that include:

- a. the potential to compound weaknesses in the original witness' perception, memory, narration skills and sincerity;
- b. there was no opportunity to properly cross-examine such witnesses, in order to test the reliability or completeness of their representations; and

- c. the original representations were not made in a court environment and the witness may have therefore been subject to circumstances making them susceptible to pressures that might result in a false account.²

12. The defendant did not call or tender any evidence. I reserved my decision.

13. Closing submissions were made on the basis that, other than the 'applied provisions', Chapter 2 of the *Criminal Code 2002* (ACT) (Criminal Code) did not apply to these offences. I subsequently formed the view that Chapter 2 may apply. I invited further submissions from the parties in that regard. Written submissions were subsequently received from both parties.

General Hearing Principles

14. The following principles apply to this proceeding. I must find facts, draw inferences, and apply the law to the facts that I find. I must bring an open and unbiased mind to the evidence and view it clinically and dispassionately and not let emotion enter into the decision-making process. The prosecution bears the onus of proving the guilt of the defendant.

15. The defendant does not have to prove that it did not commit the offences charged.

16. The standard of proof is proof beyond reasonable doubt and the defendant cannot be found guilty of an offence unless the evidence, as accepted by me, satisfies me beyond reasonable doubt of its guilt. If the evidence fails to satisfy me beyond reasonable doubt of any or all of the elements of an offence charged, then the defendant remains presumed innocent and I must dismiss that charge. If I am satisfied that there may be an explanation consistent with the innocence of the defendant for a charge, or I am unsure of where the truth lies, then I must find that charge has not been proven to the requisite standard and I must dismiss the same.

17. I can accept all, part or none of a witness' evidence.

18. The defendant did not call evidence during its hearing. No inference, adverse to the defendant, can be drawn from its decision to exercise its right to silence. Nor can the absence of evidence on behalf of the defendant be used to fill in any gaps or be used as a makeweight for any deficiency in the prosecution case.

Application of the Criminal Code

19. It was submitted by Mr Reardon, on behalf of the prosecution, that only the 'applied provisions' of the Criminal Code applied to these proceedings in accordance with section 8 of the Criminal Code. That was on the basis that section 22(2) of the Food Act was a pre-2003 offence and had not been omitted and remade after 1 January 2003. The former was said to be the case because the amendments by the *Food Amendment Act 2012* (repealed) (amending Act) caused no material change to the offence provision. The latter because the amending Act only 'substituted' the text of the offence and the expression 'omitted and remade' did not include substitution. The submission addressed, inter alia, the definition of a number of individual terms.

20. While I am assisted by those clear and concise submissions, ultimately I am not persuaded by the second argument. The precise meaning of individual terms in isolation is of little significance. It appears to me that when applying the plain meaning rule to the legislation, along with the available definition of 'omit' in the Dictionary to the *Legislation Act 2001*, the collocation 'omitted and remade' would include actions such as 'substitution'. That latter term would also mean the omission of extant text of an Act and the insertion of text in its stead. The replacement text may or may not be the same as the original text. That two step process is the same as that described by the expression 'omitted and remade', and would be adequate to trigger the application of the Criminal Code if it applied to the entire offence provision. Further, this interpretation would not offend the incomplete definition of that collocation, described at section 8(4) of the Criminal Code, which excludes mere amendment. I note that this approach appears to have been adopted by Magistrate Morrison in the unreported decision of *Mifsud v Molnar and Mifsud v Sara*.³

21. If there is any doubt about the plain meaning of those words, the Explanatory Statement to *the Food Amendment Bill 2011* provides clarification when it states:

The Bill also includes a schedule to harmonise the offences in the Act to the principles of the Criminal Code 2002. Harmonisation of the offences to the principles of the Criminal Code is required to ensure the Act can operate within the Code environment.

22. Further, the amending Act inserts a Note at a new section 5A of the Food Act that states the Criminal Code applies to offences against the Food Act. This confirms Parliamentary intention, notwithstanding that the note would not itself form part of the Act.

23. I also note, by way of comparison, that the *Criminal Code Harmonisation Act 2005* (repealed) harmonised a broad range of unrelated offences for the purpose of making them subject to the provisions within the Criminal Code. When doing so, it also used the device of substitution.

24. In the instant case, the amending Act substituted the entire Division, including the relevant offence provision. The new offence, while similar to the previous version, adopts language consistent with that of the Criminal Code. For the above reasons, I have proceeded on the basis that Chapter 2 of the Criminal Code applies to the offences created within section 22 of the Food Act.

Elements of the Offence

25. The relevant parts of section 22 of the Food Act read:

Handling and sale of unsafe food

...

(2) *A person commits an offence if the person sells food that is unsafe.*

Maximum penalty: 500 penalty units.

(3) *An offence against this section is a strict liability offence.*

26. As this offence is one of strict liability, it has the following two physical elements, without any corresponding fault elements:

- a. the defendant sold food, and
- b. the food was unsafe.

27. As indicated above the defendant admitted selling the potato salad on the two nights in question, the potato salad contained salmonella bacteria and as a result made a large number of people ill. Additionally, the statements of Mr Pentes and Ms Fearson describe the sale to them of the potato salad at the restaurant on the evenings of 11 and 12 May 2013, the consumption of the potato salad, and that Mr Pentes and Ms Fearson, and others, later became ill with gastroenteritis. Exhibits P3, P4 and P5 evidence that the defendant conducted the business at the restaurant.

28. Additionally, the evidence of Mr Moffatt described ACT Health Protection Service attempts to identify all patrons of the restaurant for the two nights, and that all patrons who were identified participated in an epidemiological Case Control Study. That study involved the completion of questionnaires designed to elicit information from the patrons about their demographic details, illness, food consumed and attendance at the restaurant. The study revealed that 194 people were known to have eaten at the restaurant on the two nights in question, 161 developed illness, 81 of which were confirmed by laboratory testing to be salmonella infections. As a result of that study and associated analytical calculations, Mr Moffatt concluded that persons who attended the restaurant on either 11 or 12 May 2013 were significantly (8 times) more likely to develop symptoms of gastroenteritis if they reported eating the potato salad than if they did not. He described that as a significant finding for epidemiological purposes.

29. In light of the above admissions and evidence I find beyond reasonable doubt that the defendant sold food, namely potato salad, on 11 and 12 May 2013, and that the same was unsafe, in that it contained sufficient salmonella bacteria to cause illness.

Intervening Conduct or Event

30. Section 39 of the Criminal Code reads:

Intervening conduct or event

A person is not criminally responsible for an offence that has a physical element to which absolute or strict liability applies if—

- (a) the physical element is brought about by someone else over whom the person has no control or by a non-human act or event over which the person has no control; and*
- (b) the person could not reasonably have been expected to guard against the bringing about of the physical element.*

31. This provision is almost identical to the corresponding provision within section 10.1 of the *Criminal Code* (Cth) that preceded the ACT Criminal Code by approximately seven

years. The Explanatory Memorandum for the Criminal Code, adopted part of the Commonwealth Explanatory Memorandum that made reference to the common law authority on the subject, namely *Mayer v Marchant*,⁴ and purported to quote Bray CJ from that decision:

It is a defence to any criminal charge to show that the forbidden conduct occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he or she could not reasonably have been expected to guard.

32. For completeness I note that, rather than the above text, the SASR reported Bray CJ as saying:

*I would prefer to formulate the proposition in this way: that normally speaking it is a defence to a criminal charge, whether under the provisions of the common law or of a statute, to show that the forbidden act occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he could not reasonably have been expected to guard.*⁵

Evidential Burden

33. The excuse of intervening conduct or event requires the defendant to meet the evidential burden of proof. That is, the defendant needs only present or point to evidence, including evidence within the prosecution case, that suggests a reasonable possibility that the matter exists or does not exist. It then falls to the prosecution to disprove any essential component of the excuse to the standard of beyond reasonable doubt: sections 56, 57 and 58 of the Criminal Code.

34. In the unreported decision of *Beattie v Potts*,⁶ Burns J adopted, for the purpose of the Criminal Code, the reasoning of French CJ in *R v Khazaa*⁷ who considered the meaning of the expression 'evidence that suggests a reasonable possibility that the matter exists or does not exist' as provided within the *Criminal Code* (Cth). French CJ said (citations omitted):

*The statutory collocation "evidence that suggests a reasonable possibility" is not readily amenable to translation into other terms. But ... [it] requires evidence that is at least capable of supporting the inference that the matter to which the evidential burden applies "exists or does not exist." This approach reflects the general law position with respect to the evidential burden. If no such inference is able to be drawn from the evidence there is no logical basis for saying that the evidence suggests that inference as a reasonable possibility. Evidence which is merely consistent with or not inconsistent with such a possibility does not "suggest" it. The interaction of the "evidence" and the "possibility" in such a case may be like that of ships passing in the night. Importantly, as s 13.3(5) provides, the question whether an evidential burden has been discharged is one of law. In that respect also the Code and the general law coincide.*⁸

Evidence

35. Mr Jones gave unchallenged evidence that on 14 May 2013 and after the food poisoning outbreak, he attended the restaurant and observed the state of the kitchen. He observed the kitchen was not operating, as the restaurant had voluntarily stopped trading, and explained that he did not conduct a full inspection. In any event, the kitchen appeared clean and hygienic. He described the owners and staff as being helpful in their approach and quite disturbed about what was occurring. They were open to answering any questions that he put to them.

36. Both Mr Jones and Mr Krsteshi gave evidence that salmonella bacteria cannot be detected by sight or smell.

37. Mr Moffatt gave evidence that he was part of a national working group, set up in 2011, which looked into a number of Australian food poisoning outbreaks occasioned by the consumption of eggs that occurred between 2001 and 2011. He indicated that raw eggs were often associated with such events and could not recall an event involving pasteurised eggs. He indicated that it was common for some eggs to be contaminated and others not. He indicated that cafes and restaurants were a common setting for such events, and that in the past such events had originated in high end kitchens. He opined that it was not necessary to have a messy kitchen, and it was more about the handling of the eggs, which I understood to refer to the handling of eggs, both before and after the eggs arrived at the restaurant.

38. Mr Moffatt explained that salmonella bacteria may grow due to the handling of the eggs after they have left the farm and, as I understand his evidence, before they reached the restaurant. He explained that salmonella bacteria may exist at levels that do not trigger illness, but with multiplication, the salmonella bacteria could cause illness. He opined that if the eggs were handled inappropriately, it was possible that only one or two eggs could have been involved in contamination at the restaurant.

39. Mr Moffatt indicated that he was aware of a number of outbreaks within Australia due to the use of raw eggs, but there were no guidelines in the Territory relating to the use of raw eggs, particularly in commercial settings such as restaurants and cafes.

40. Mr Krsteski's report explained that birds infected with salmonella bacteria can shed large numbers of the bacterium in their faeces. Eggs can become contaminated during laying and the subsequent steps in primary production, such as washing and grading. Cracked eggs have a higher likelihood of being contaminated and provide the opportunity for the bacteria to multiply inside the egg, to large numbers. Mr Krsteski recommended the following methods be used during the preparation of any raw egg product to minimise the risk of salmonella bacterial contamination and multiplication:

- a. use only clean and non cracked eggs;
- b. produce only small batches that are made daily;
- c. use a sanitised egg yolk separator, rather than the egg shell;

- d. use clean containers for the product;
- e. discard batches at the end of the day;
- f. store below 5⁰C; and
- g. acidify the product to below pH 4.2 and confirm that acidity.

41. During his evidence in chief, Mr Krsteski agreed that following such methods would not guarantee the product was free of salmonella bacteria. These methods only reduced the risk of the bacteria being present and multiplying within the product.

42. During cross examination, Mr Krsteski agreed that a crack in an egg could be difficult to see, and that if stored above 5⁰C, any salmonella bacterial contamination could multiply within an egg quickly and grow to a large number of cells. One contaminated egg could cause a lot of problems and the salmonella bacteria could not be detected by sight or smell.

43. Mr Krsteski agreed that the only way to absolutely avoid a bad egg, would be to cook the product or use pasteurised egg product.

44. As described above, the notes of Dr Greig (Exhibit P14) contain a number of representations that were admitted into evidence, by consent.

45. Representations were attributed to Mr Paolo Milanesi, the Chief Chef, first from a telephone conversation of 15 May 2013, and then a visit to the restaurant of 16 May 2013. During the telephone conversation, Mr Milanesi is reported to have said:

- a. When they make the aioli sauce, it is enough for two days. A batch contains 30 raw egg yolks.
- b. The aioli sauce is used in potato salad and as a sauce.
- c. The aioli sauce is stored in metal dishes in the cool room.

46. During the site visit, Mr Milanesi is reported to have said:

- a. He worked Saturday night, only prepared food for Sunday night and dined in the restaurant with his partner on Sunday night.
- b. The aioli sauce was prepared on site and is used, amongst other things, in the potato salad.
- c. He made regular batches of the aioli sauce at approximately 4pm each day, including on Saturday and Sunday. An additional batch was made on Sunday by the junior chefs.
- d. His method of making the aioli sauce involved confiting 1 kilogram of garlic in 2.5 litres of oil and 2 litres of vinegar, which is later blended with 30 raw egg yolks. This makes approximately 6 litres of aioli sauce.

- e. The aioli sauce is stored in stainless a steel bin in the refrigerator at a temperature between 2 and 5⁰C
- f. The potato salad is made using the aioli sauce and portioned into 500ml containers.
- g. The potato salad is stored in the cool room until service, and then stored in the refrigerator below the serving area. Those refrigerators are maintained between 0 and 5⁰C.
- h. When an order comes in, the potato salad is transferred to a side dish.
- i. Everything left on the front servery at the end of the evening and salads, are either kept for staff meals or are thrown out.

47. Dr Greig attributed representations made by Mr Gary Xu, another chef at the restaurant, during a telephone conversation on 15 May 2013. Mr Xu is reported to have said:

- a. He did not work Saturday night, but worked Sunday night.
- b. While he was not involved in making the aioli sauce himself, no aioli sauce was made during preparation on Sunday, as there was aioli sauce in the refrigerator.
- c. The aioli sauce is used in the potato salad.
- d. On Sunday they did not need to make potato salad as there were between 15 and 20 unopened containers remaining in the cool room. That potato salad was used on Sunday night.

48. Dr Greig attributed representations made by Mr Bryan Zhong, a kitchen hand, during a telephone conversation on 16 May 2013. Mr Zhong is reported to have said:

- a. He was not sure when the aioli sauce was made, but thought almost all was used on Saturday night and that a new batch was made on Sunday.
- b. He thought that some potato salad may have been left in the fridge on Saturday night, but is not sure what happened to that salad. More potato salad was made fresh on Sunday.

Consideration of the Evidence and Intervening Conduct or Event

49. The prosecution case included evidence that the food poisoning outbreak may have been caused by only one or two eggs, contaminated with the salmonella bacteria before being delivered to the restaurant's kitchen, and that contamination was not detectable by sight or smell. There was also evidence that a range of hygienic practices had been employed within the kitchen of the restaurant, which aligned generally with the practices suggested by Mr Krsteski. There was no direct evidence establishing that the contamination was caused by the conduct of the defendant's staff within the restaurant kitchen.

50. While it was suggested by Mr Krsteski that salmonella bacterial contamination was best avoided by the use of a pasteurised egg product instead of raw eggs, there was evidence that raw egg products were still used routinely within high end kitchens. I note that Mr Krsteski is not a chef and no evidence was led from him, or anyone else, establishing that, from a culinary perspective, pasteurised egg product was a suitable alternative to raw egg. There was evidence that there was no standard in place at the time, which provided guidance about how to produce raw egg products within a commercial kitchen. There was no evidence to suggest that the practices adopted by the kitchen departed from industry standards.

51. The above evidence, if accepted, would support an inference that the salmonella bacterial contamination occurred by the use of eggs that were contaminated before their arrival at the restaurant. That contamination was brought about by someone else or by a non-human act or event over which the defendant had no control. Further, an inference remains available that the defendant could not reasonably have been expected to guard against that contamination. The defendant has therefore pointed to evidence that suggests a reasonable possibility that those circumstances existed and I find, as a matter of law, that the defendant has met the evidential burden for the excuse of intervening conduct or event. It then falls to the prosecution to prove beyond reasonable doubt that the excuse is not made out.

52. For the same reasons as described above, the prosecution is not able to exclude the possibility that the salmonella bacterial contamination and multiplication occurred before the eggs arrived at the defendant's kitchen. For the same reasons, the prosecution is also not able to exclude that the defendant had no control over that initial contamination.

53. I turn now to the question whether the prosecution has established that the defendant could reasonably have been expected to guard against the contamination of its potato salad by salmonella bacteria.

54. Mr Krsteski gave evidence that the only way to avoid, with certainty, such contamination was to use pasteurised egg product. However, as described above, there was no evidence that such an ingredient was equivalent from a culinary perspective. There was also evidence that raw eggs continue to be used in high end kitchens, and there was no evidence that the use of such eggs breached any statutory standard or industry accepted practice. Accordingly, the prosecution has not established that the defendant could reasonably have been expected to follow such a practice, and refrain from using raw eggs.

55. Mr Krsteski provided a number of methods that he suggested would minimise the possibility of salmonella bacterial contamination and multiplication in raw egg products. There is some unfairness to the defendant in assessing the defendant's conduct strictly against that description of best practice by a microbiologist, in the absence of a contemporary standard or evidence of an industry accepted practice. However, Mr Krsteski's methods are the only evidence before the court that explain how the contamination may be minimised. I now address each of those methods.

56. There was simply no evidence that dirty or broken eggs were used, or that the eggs were separated using their shells. Accordingly, a finding of the same is not open on the evidence.

57. The representations suggested that 6 litre batches of aioli sauce were produced using 30 raw egg yolks. While it is axiomatic to suggest that smaller batches, containing fewer eggs, would reduce the risk of contamination due to a single egg, the suggestion by Mr Krsteski was not otherwise quantified or made with, or later put in, any context with respect to a commercial kitchen. On the available evidence, I could not find beyond reasonable doubt that the defendant could reasonably have been expected to guard against the contamination of the potato salad by producing batches using less than 30 eggs.

58. There was evidence that a 1 litre squeeze bottle was used to serve to aioli dipping sauce, that the bottle may have been simply topped up from time to time, and that salmonella bacteria was found within the bottle days after the incidents. However, due to the conflicting and unreliable nature of the representations reported in Dr Greig's notes, I have reservations about making a finding that the squeeze bottle was simply topped up from time to time with the aioli sauce. In any event, the prosecution case was opened on the basis that the contamination was due to the consumption of the potato salad, not the aioli dipping sauce contained within the 1 litre squeeze bottle. There was no other evidence to support a finding that unclean containers had been used.

59. There were conflicting representations within Dr Greig's notes about whether any leftover aioli sauce or potato salad was disposed of after Saturday night's service and retained for the following evening's service. In such circumstances a finding that the same had not been disposed of, but used the following night could not be made to the requisite standard.

60. The representations within Dr Greig's notes consistently referred to the aioli sauce and potato salad being stored in refrigerated conditions or on ice. While there were conflicting representations about whether the temperature of the product was monitored, there was no evidence that the aioli sauce or potato salad were stored above 5°C.

61. Mr Krsteski suggested that an important method was to maintain the pH of the product below 4.2. There was a representation that the aioli sauce was prepared with a significant proportion of vinegar, which I take judicial notice is an acidic ingredient. However, there is no evidence that the pH of the aioli sauce or the potato salad had a pH above 4.2. Further, Mr Krsteski's evidence was that a pH of 4.2 was on the threshold of palatability. It is therefore questionable whether strict compliance with such a method would be appropriate for a commercial kitchen. Accordingly, I could not find beyond reasonable doubt that the aioli sauce or potato salad had a pH above 4.2 or that the defendant could have reasonably been expected to guard against the contamination by maintaining the potato salad at a pH below 4.2.

Ultimate Finding

62. For the above reasons I find the prosecution has not established beyond reasonable doubt that the defendant could reasonably have been expected to guard against the contamination of the potato salad with salmonella bacteria in the circumstances of this case.

63. Accordingly, I find the offences not proved and dismiss the charges.

I certify that the preceding sixty three (63) paragraphs are a true copy of the Reasons for Decision of Magistrate G. Theakston.

Associate: Taden Kelliher

Date: 5 September 2016

¹ See Refshauge J's characterisation of honest and reasonable mistake as an 'excuse' rather than a 'defence' in *Poole v Edwards* [2016] ACTSC 159 (11 July 2016)[47]

² See Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 13th ed, 2016), 1360

³ *Mifsud v Molnar and Mifsud v Sara* [2012] ACTMC 1 (13 June 2012) [30]

⁴ *Mayer v Marchant* (1973) 5 SASR 567

⁵ *Ibid* [573]

⁶ *Beattie v Potts* [2015] ACTSC 350 (10 December 2015)

⁷ *R v Khazaal* (2012) 246 CLR 601

⁸ *Ibid* [606]