

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CRI-2017-009-007857
[2019] NZHC 942**

THE QUEEN

v

HAYDEN ANTHONY GRAY

Hearing: 20, 21, 22, 25, 27 March 2019

Appearances: D L Elsmore and R E Harcourt for the Crown
E C Bulger for the defendant (at trial), J M Stringer for the
defendant (at verdict)

Verdict: 1 May 2019

VERDICT OF OSBORNE J

[1] Mr Gray, you were charged with three offences. You elected trial by Judge alone, which took place before me over a five day period and at the conclusion of the Crown's case one charge fell away.

[2] For reasons I have recorded in writing which will be given to you by Ms Stringer after this hearing, I have reached verdicts on each of the two remaining charges, which I will come to.

[3] First I will summarise the background and my reasons. To the extent there is any difference between this summary and my full reasons, the full reasons will prevail.

[4] You may be seated for the time being.

The charges

[5] Hayden Anthony Gray faced three charges in relation to his conduct towards his infant son, Carter Hutton. Carter was born on 24 June 2017. He suffered injuries in the first month of his life. He subsequently died, at home under palliative care, on 25 July 2018.

[6] Mr Gray initially faced a third charge, that on or about 14 July 2017 at Christchurch with intent to injure Carter Hutton he injured Carter Hutton. I dismiss that further charge under s 147 Criminal Procedure Act 2011 for reasons set out in a Reasons Judgment which I hand down today.

[7] The remaining charges are:

Charge 1

Wounding with intent to cause grievous bodily harm, under s 188(1) Crimes Act 1961, alleging that Mr Gray, between 24 June and 24 July 2017 at Christchurch, with intent to cause grievous bodily harm to Carter Hutton, caused him grievous bodily harm.

Charge 2

Wounding with intent to cause grievous bodily harm, also under s 188(1), alleging that Mr Gray on 24 July 2017 at Christchurch with intent to cause grievous bodily harm to Carter Hutton, caused him grievous bodily harm.

[8] To prove each charge, the Crown must prove that on that occasion or period:

- (a) the defendant intended to cause grievous bodily harm to Carter; and
- (b) he did cause grievous bodily harm.

[9] “Grievous bodily harm” means really serious hurt or harm.

Carter's birth and homecoming

[10] Carter's parents were Mr Gray and Megan Hutton. He was their first child.

[11] Carter was a full-term baby. After his birth at Christchurch Hospital on 24 June 2017 he was discharged in healthy condition on 28 June 2017 to his parents' care at their home in Christchurch.

[12] The couple settled into a routine of care and feeding. Ms Hutton took maternity leave from her job to be a full-time carer. Mr Gray continued in his employment which saw him on weekdays leave for work around 6.00 am and return home around 6.00 pm.

[13] Carter was initially breast-fed but soon afterwards was fed with expressed breast milk, supplemented with formula. Ms Hutton attended to most feeds but Mr Gray generally attended to a feed around 10.30 pm after Ms Hutton had gone to bed. The couple over those weeks felt sleep deprived. It transpires that Mr Gray, particularly at nights, was spending prolonged periods online in chat rooms and similar.

The 24 July 2017 incident

[14] On 24 July 2017, exactly one month after Carter was born, Ms Hutton went out for a lunch with a friend, her first such outing since Carter's birth. She had initially intended to take Carter with her. But that morning (a Monday) Mr Gray had not gone to work, having had some neck and back pain on Sunday. He suggested that Ms Hutton leave Carter with him while she went out and that is what happened.

[15] Ms Hutton left their house at around 12.40 pm. She had lunch with her friend. She was travelling home at 2.45 pm, a matter of minutes from home, when she received a cell phone call from Mr Gray. She could tell from Mr Gray's voice that something was not right. He explained that Carter was gasping for air. Ms Hutton told Mr Gray to call an ambulance.

[16] When Ms Hutton reached home minutes later, there followed a period of CPR administration by Mr Gray and Ms Hutton before ambulance officers arrived and took over. During this period Carter was limp and turning blue.

[17] Carter was transferred to Christchurch Hospital where he came under the care of Dr Alison Jane Daniell, who is a Fellow of the Royal Australasian College of Physicians and a paediatric consultant.

[18] In the days which immediately followed, Carter had numerous clinical examinations and radiographic studies. The Crown has called evidence from a number of medical experts covering paediatrics, paediatric radiology, neurology and ophthalmology.

[19] Carter was found to have suffered extensive retinal haemorrhaging in all areas of the retinas in both eyes. He was found to have suffered diffuse brain swelling and widespread severe brain insult which affected virtually every part of his brain. Carter's brain was found to have suffered recent subarachnoid haemorrhaging and subdural haematoma at the likely track to his spinal column.

[20] He was found to have suffered a life-threatening head injury which ultimately resulted in severe permanent neurological damage which interfered with his normal functions of living. Carter died, on 25 July 2018, from the complications arising from that.

[21] Mr Gray on the day, 24 July 2017, gave explanations of what had happened to Carter to others. He also gave explanations to the Police in interviews conducted on 26 and 27 July 2017. Mr Gray explained that after feeding and burping Carter, he had settled down on the couch watching television with Carter in his arm. He had woken up to find that he was now lying on top of Carter. He heard Carter gasp. He explained that there was then a period of panic during which he whacked Carter's back a few times and stuck his fingers down his throat. When Police subsequently reported to him that the medical advice was that Carter had been subjected to a very rapid acceleration and deceleration event, involving significant shaking, Mr Gray repeatedly stated that he did not remember shaking Carter.

[22] On the basis of the evidence adduced, and particularly the medical evidence, I am satisfied beyond reasonable doubt that Carter Hutton on 24 July 2017 suffered very serious head injuries at his home in Christchurch. I am further satisfied, in the absence of any evidence of accidental trauma of a nature which would have been observed had it occurred, that Carter Hutton's head injuries that day were caused by Mr Gray applying very severe acceleration/deceleration forces to Carter's body either by severely shaking him or by violently throwing him against a soft object. I am further satisfied that Mr Gray intended to cause really serious hurt or harm to Carter in that it must have been obvious to Mr Gray (and would have been obvious to anyone observing) that the harm which resulted was a certain or near-certain outcome of the conduct.

[23] In reaching these conclusions I have been satisfied that the explanation proffered by Mr Gray as to having overlaid Carter does not account for the extent and pattern of injuries suffered by Carter. While asphyxia may have resulted from an overlaying and may have contributed to the injuries sustained it would have done so to a modest degree only. It would not have contributed at all to the haemorrhaging.

[24] I also find on the evidence that Mr Gray's putting his fingers down Carter's throat did not result in the material injuries.

[25] Having regard to these findings, I find charge 2 proven.

Carter's skeletal fractures

[26] The radiographic studies conducted at Christchurch Hospital from 24 July 2017, and in particular a skeletal survey conducted on 27 July 2017, established that Carter had suffered multiple bilateral rib and long-bone fractures.

[27] On 27 July 2017 Carter was found to have 15 fractures which showed signs of healing. Of those, eight were to the posterior right ribs, six to the posterior left ribs and one to the left distal tibia. The medical evidence was that the fact that healing was observed meant that each fracture under consideration must have occurred more than 10 days earlier.

[28] The skeletal survey established that Carter had an additional 25 fractures which showed no signs of healing, which are medically described as “acute” fractures. Those fractures were to:

- (a) ten anterior right ribs;
- (b) ten anterior left ribs;
- (c) right distal tibia;
- (d) right distal femur;
- (e) left proximal femur, and
- (f) right distal radius.

[29] All the rib fractures except two were metaphyseal, being a reference to the end of the bone. The medical evidence was that injuries to that part of the bone in children are rarely seen in accidental trauma and are highly specific to injuries which have been inflicted. The evidence, based on expert opinion, was that the rib injuries in particular are consistent with a lot of pressure being applied by adult hands positioned all the way around the chest, squeezing the chest. The non-metaphyseal fractures, on the medical evidence, are most probably caused by pulling and twisting injuries or by acceleration/deceleration forces, where the bone is moving faster in one direction than the other direction, causing a shearing force to make the layers of the bone come apart. As described by one witness the baby must have been shaken so violently to build up such a speed that the limbs would be whiplashing backwards and forwards.

[30] I am satisfied beyond reasonable doubt that on at least one occasion before 24 July 2017 Carter Hutton suffered very serious injuries in the form of multiple rib fractures at his home in Christchurch. I am further satisfied, in the absence of any evidence of accidental trauma which would have been observed had it occurred, that all the fractures to Carter’s posterior ribs were caused by Mr Gray severely squeezing Carter’s chest after encircling it with his hands. I am also satisfied that the injury to Carter’s left ankle was caused by Mr Gray applying very severe

acceleration/deceleration forces to Carter's body either by severely shaking him or by violently throwing him against a soft object. I am further satisfied that Mr Gray, in inflicting these injuries, intended to cause really serious harm to Carter in that it must have been obvious to him (and would have been obvious to anyone observing) that the harm which resulted was a certain or near-certain outcome of the conduct.

[31] In concluding that it was Mr Gray who caused the injuries, I have had regard to the fact that the only people left in charge of Carter during this period were Mr Gray and Ms Hutton. There is no evidence to suggest that Ms Hutton at any point behaved inappropriately towards Carter. To the contrary, the evidence is that when Ms Hutton observed on Carter signs of something which might be wrong (both in relation to what proved to be an infection and in relation to marks around his eyes, which the midwife and the GP considered to be benign) Ms Hutton had immediately raised them with the appropriate professionals for consideration. In addition, there falls to be taken into account on charge 1 Mr Gray's conduct on 24 July 2017, which I have found to be established beyond reasonable doubt. It is strong evidence of a propensity, when alone with Carter, to lose control in a very violent fashion and to cause really serious harm to Carter through the application of severe acceleration/deceleration forces.

[32] In reaching my conclusion that charge 1 has been proved, I have found other posited explanations of Carter's injuries to be excluded.

[33] The medical evidence is that the administration of CPR, in the manner it was conducted, could possibly explain some of Carter's anterior rib fractures but would not have caused them all.

[34] For Mr Gray, Ms Bulger explored in cross-examination of the medical witnesses the suggestion that Carter may have suffered osteogenesis imperfecta, also known as brittle bone disease. I am satisfied on the medical evidence that the nature and level of Carter's injuries, and the fact that he did not suffer a single similar injury in the following 11 months, excludes osteogenesis imperfecta as a cause of the pattern and extent of injuries suffered by Carter both on 24 July 2017 and in at least one incident earlier.

[35] My conclusion that the Crown has proved the charges beyond reasonable doubt is informed by the uncontradicted medical evidence including the evidence of Dr Daniell and Dr Christian. The latter is a Professor of Paediatrics at the Perelman School of Medicine at the University of Pennsylvania and has extensive qualifications. She is a board certified general and child abuse paediatrician in practice. She holds the Children's Hospital of Philadelphia Endowed Chair in the Prevention of Child Abuse and Neglect. The medical witnesses, in interpreting Carter's injuries, spoke variously of the "pattern" of injuries he had sustained and the "constellation of injuries". I am satisfied beyond reasonable doubt that Carter's injuries were caused by intentionally inflicted rather than accidental harm, not only by reason of the assessment in relation to individual aspects of the injuries but also by reason of the fact that the pattern of injuries is inconsistent with one-off, accidental harm.

Outcome

[36] The Crown has proved both Charges 1 and 2.

Result

[37] Mr Gray, would you please stand.

[38] Mr Gray, I find you guilty as charged, namely:

- (a) On charge 1, that between 24 June and 24 July 2017 at Christchurch with intent to cause grievous bodily harm to Carter Hutton, you caused him grievous bodily harm; and
- (b) On charge 2, that on 24 July 2017 at Christchurch with intent to cause grievous bodily harm to Carter Hutton, you caused him grievous bodily harm.

[39] I convict you of the charges on which I have found you guilty.

[40] These charges are stage 1 offences, being offences which are defined in the Sentencing Act 2002 as serious violent offences which were committed by you at a

time when you did not have a record of a first warning given under s 86B of the Act, and when you were over 18 years of age.

[41] I therefore now give you a warning in respect of both charges. If you are convicted of and sentenced to imprisonment for any serious violent offence other than murder that is committed after this warning, you will serve that sentence without parole or early release. If you are convicted of murder after this warning, you will be sentenced to life imprisonment, and you will serve that sentence without the possibility of parole unless that would be manifestly unjust. In that event, the Judge must sentence you to a minimum term of imprisonment. Ms Stringer, as your counsel, will explain these matters to you and you will be given a written notice outlining the warning I have just given you and listing what the law says are serious violent offences for these purposes.

[42] On both these charges for which you have been convicted, I remand you to appear in the Christchurch High Court for sentencing at 9.30 am, Thursday 23 May 2019.

[43] Please be seated.

ADDENDUM

[44] Following the delivery of my verdict Ms Stringer on behalf of the defendant has applied for bail. I decline the application. I will deliver my reasons in writing later today.

Osborne J

Solicitors:
Raymond Donnelly & Co, Christchurch
E C Bulger, Barrister, Christchurch