

**PUBLIC VERSION**

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF FAMILY MEMBERS UNDER THE AGE OF 18 YEARS WHO APPEARED AS WITNESSES PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF FINE DETAIL EVIDENCE OF THE CARE PROVIDED BY THE FAMILY MEMBERS PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA753/2021  
[2022] NZCA 552**

BETWEEN	MALIA UNALOTOKIPEA LI Appellant
AND	THE KING Respondent

Hearing:	22 August 2022
Court:	Goddard, Brewer and Edwards JJ
Counsel:	M W Ryan and J E Tulloch for Appellant S C Baker for Respondent
Judgment:	17 November 2022 at 11.00 am

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**JUDGMENT OF THE COURT**

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**The appeal against conviction is dismissed.**

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**REASONS OF THE COURT**

(Given by Goddard J)

**Introduction**

[1] On 1 July 2021, following a trial before Wylie J and a jury, Mrs Li was convicted of manslaughter by failing to provide her husband, Mr ‘Epenisa with the

necessaries of life, thereby causing his death. Mrs Li was sentenced to five years and seven months' imprisonment.<sup>1</sup>

[2] Mrs Li appeals against her conviction. She also filed an appeal against sentence, but that appeal was abandoned.

[3] Mrs Li submits that the jury's verdict was unreasonable or could not be supported having regard to the evidence, in particular the expert medical evidence given by Mr Peat, a plastic and reconstructive surgeon. The immediate cause of Mr 'Epenisa's death was a number of pressure sores that had become infected, resulting in sepsis. Mr Peat gave expert evidence about the time frame within which those pressure sores were likely to have developed. The essence of the argument presented by Mr Ryan, counsel for Mrs Li, was that:

- (a) Mr Peat's evidence was that the pressure sores became overwhelmingly infected in a short time frame and rapidly caused Mr 'Epenisa's death; and
- (b) in the circumstances there was nothing Mrs Li could have done to protect him from the development of sepsis, and from death.

[4] As we explain in more detail below, it is in our view clear that it was open to the jury to reach a verdict of guilty on the basis of the evidence before it in this case. The Crown's case did not depend on Mrs Li being actively aware of the pressure sores, or of their full extent. The Crown did not suggest that Mrs Li's failure to provide the necessary care to Mr 'Epenisa began at the point in time when the sores began to be apparent. Rather, the Crown invited the jury to find that Mrs Li's failure to provide necessary care related to allowing, or not alleviating, the conditions that enabled the pressure sores to happen in the first place. It was open to the jury to accept the Crown case, and reach a guilty verdict on that basis, even if Mr Peat's evidence about the minimum time for the pressure sores to develop and become infected was accepted. It was also open to the jury not to accept Mr Peat's evidence, and to prefer other evidence suggesting that the sores had developed over a longer time frame in this case.

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<sup>1</sup> *R v Li* [2021] NZHC 3354 at [69].

[5] The appeal must therefore be dismissed.

### **The charge against Mrs Li**

[6] The charge Mrs Li faced was that she:

[B]etween 29 January 2016 and 2 October 2016 at Mangere, having the actual care or charge of Lanitala ‘Epenisa, a vulnerable adult unable to provide himself with the necessaries, caused Lanitala ‘Epenisa’s death by omitting, without lawful excuse, to perform legal duties to provide him with necessaries and to take reasonable steps to protect him from injury, those omissions being a major departure from the standard of care expected of a reasonable person to whom those legal duties apply.

[7] The particulars of the charge were as follows:

Failure to provide necessaries, including adequate nourishment, hydration, medical care, and/or hygiene;

and/or

Failure to take reasonable steps to protect from injury, those reasonable steps including preventing pressure sores from developing or worsening through adequate care, movement and hygiene; cleaning of wounds to prevent infection; accepting assistance from other friends or relations of the deceased; and/or seeking medical assistance.

### **Relevant facts**

[8] Because the appeal is presented on the basis that the verdict was unreasonable or could not be supported having regard to the evidence, it is necessary to set out in some detail the circumstances of the offending and the expert evidence called at trial.

#### *Background*

[9] Mrs Li and Mr ‘Epenisa had been married for some years. [Redacted].<sup>2</sup>

[10] Prior to Mr ‘Epenisa’s death, Mrs Li was employed as a health care assistant for a period of almost three years. In this role, she received basic health care training — including on how to look after the elderly and infirm.

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<sup>2</sup> Identifying particulars of family members have been redacted to ensure compliance with ss 204 and 205 of the Criminal Procedure Act 2011.

[11] In September 2014, Mr ‘Epenisa suffered a stroke and was admitted to hospital. He was discharged in late 2014. At the time he was able to walk independently with the aid of an ankle splint and a crutch. He was continent and able to manage his own toileting. Shortly after his discharge, he suffered a second stroke and was readmitted to hospital. He was discharged for a second time in February 2015. He was then capable of feeding himself with adaptive cutlery but he required assistance with showering and dressing.

[12] Before Mr ‘Epenisa was discharged from hospital for the second time, he was referred to Taikura Trust so that his needs could be assessed and care arrangements put in place. Mrs Li was advised that a Healthcare NZ support worker could be made available to assist Mr ‘Epenisa with things such as toileting, showering, cleaning and rehabilitation. A support worker from Healthcare NZ visited initially, but Mr ‘Epenisa was reluctant to accept assistance from a stranger and Mrs Li told the health care authorities that he did not want somebody who he did not know caring for him.

[13] Initially, the family lived at a community-owned house in Vine Street in Māngere. A number of people visited the house to see Mrs Li and Mr ‘Epenisa. They often found that Mr ‘Epenisa was the only person at home, that on occasion he was hungry and that he looked unwell and untidy. Some said there were smells — one witness said of urine — in the house. Another witness said that when she visited, the house was locked and Mr ‘Epenisa was inside. She had to get her son to climb in through the window so that they could gain access to the house. Mr ‘Epenisa then complained that Mrs Li had left in the morning and that he had not eaten. On one occasion one of Mr ‘Epenisa’s cousins visited the house. She gave evidence that Mr ‘Epenisa told Mrs Li that he needed to go to the bathroom, that Mrs Li did not help him, and that he ended up soiling himself. [Redacted].

[14] In addition to his strokes, Mr ‘Epenisa had other comorbidities. He suffered from serious diabetes, high blood pressure and kidney failure. His condition deteriorated markedly after his second stroke. He had to be assisted to get from the bedroom to the lounge; he had to be fed; he had to be toileted and cleaned; and he needed help to take his medications. Mr ‘Epenisa was highly vulnerable.

*Events in 2016 leading up to Mr 'Epenisa's death*

[15] The family moved to a property in Kivell Close, Māngere, in early 2016. Various family and church members visited Mrs Li and the family at the property. Mrs Li would on occasion tell visitors that they could not see Mr 'Epenisa, saying, for example, that he was asleep or that he had been visited by his doctors and was receiving treatment. Some visitors did manage to see Mr 'Epenisa. They observed that he was always seated in a La-Z-Boy chair, that he looked skinny and that he smelt of urine. The room in which Mr 'Epenisa spent most of his time started to smell. It was described as smelling of faeces and urine. In about September 2016, Mr 'Epenisa was visited by two people from his church. They said that he was unable to talk. They commented that the room Mr 'Epenisa was in was dirty. One witness said that the room smelt of someone who was sick. The other said that the smell was like "flesh that ha[d] been ... rotting" or "meat that is not good".

[16] [Redacted].

[17] Various witnesses said that they offered to help but that Mrs Li declined their offers.

[18] At one point, Mrs Li advised Taikura Trust that she would act as a caregiver for Mr 'Epenisa if she could be paid. Mrs Li was told that she was not eligible to receive any funding as a support worker for Mr 'Epenisa while she was living with him.

[19] On 29 January 2016, a Healthcare NZ co-ordinator visited Mrs Li and Mr 'Epenisa at Kivell Close. Mrs Li advised that she was no longer living with Mr 'Epenisa but that she was prepared to be his support worker. A further service plan was prepared and discussed with Mrs Li. The plan included the provision of assistance for Mr 'Epenisa, including moving him from the bed to the shower, showering and washing him, assisting with daily exercises and assisting with toileting. Mrs Li was initially paid for providing care, but in April 2016, further funding was put on hold because it was discovered that Mrs Li was still living permanently with Mr 'Epenisa. From that time Mrs Li was not being paid, but she remained the primary caregiver for Mr 'Epenisa.

[20] Mr ‘Epenisa was initially a registered patient at a medical clinic in Hillsborough. Mr ‘Epenisa’s doctor saw him only three times between December 2014 and May 2016. He should have been seeing his doctor much more regularly. The doctor tried to contact both Mrs Li and Mr ‘Epenisa. She left messages but they were not returned.

[21] Mr ‘Epenisa’s registration was then transferred to a medical clinic in Māngere. Nurses from that health care centre tried to arrange home visits with Mr ‘Epenisa. They could not however make satisfactory arrangements and no home visits occurred. Records from the medical centre show that Mr ‘Epenisa was never seen by a doctor from the Māngere Health Centre.

[22] On 1 October 2016, the day before Mr ‘Epenisa died, his aunt and cousin visited him. They described the smell in the bedroom — one said it was “really disgusting” and that it smelt like a “dead animal”. The other said it smelt of “piss” and “dirty piglets”. The carpet in the bedroom around the La-Z-Boy chair was soaked. The aunt asked Mrs Li several times if she could wash and bathe Mr ‘Epenisa that night. Mrs Li refused to let her do so but said that she could come back and bathe him the following morning.

#### *Circumstances of Mr ‘Epenisa’s death*

[23] At approximately 1.45 am on 2 October 2016, Mrs Li called 111 and reported that Mr ‘Epenisa had passed away. Ambulance officers arrived shortly thereafter and confirmed that Mr ‘Epenisa was dead. The police were notified. Mr ‘Epenisa’s body was found in the La-Z-Boy chair in the bedroom. The police conducted a preliminary examination. They smelt urine and faeces in the bedroom. They found medication at various locations and a black plastic bag containing soiled and maggot-infested clothing. They observed a stench of urine and decay when they moved a mat on the floor, and a wet stain on the floor. A mouse ran out of the La-Z-Boy chair when it was moved. They also found mouse droppings and a rodent’s nest in a cupboard next to the chair. They found a green and grey top with what the police officer thought were strips of skin attached to it.

[24] A pathologist, Dr Glengarry, visited the scene shortly afterwards. She observed that Mr 'Epenisa was in poor physical condition with relative emaciation. His back, arms, legs and the side of his torso had multiple deep and extensive pressure ulcers. Large wounds were found on his buttocks.

[25] A post-mortem examination was completed on 3 October 2016. Dr Glengarry noted the extensive bed sores. The pathologist concluded that Mr 'Epenisa had died from sepsis, due to the infected pressure wounds on his sacrum and buttocks.

[26] When Mrs Li was spoken to by the police, she said that she first saw a wound on Mr 'Epenisa's buttocks the day before his death but that at that point it was not very big. [Redacted].

### **Expert evidence at trial**

[27] The Crown called Dr Glengarry to give evidence about Mr 'Epenisa's condition, and the cause of his death. Her evidence in chief included the following:

- (a) Mr 'Epenisa had an extensive medical history. He had had previous strokes, and had considerable impairment of movement, type 2 diabetes, advanced kidney failure, and high blood pressure.
- (b) The cause of death was sepsis due to deep pressure ulcers of the sacrum and buttocks, arising due to immobility as a complication of multiple remote cerebral infarcts.
- (c) The autopsy had shown a man in poor physical condition with relative emaciation. His skin had embedded dirt, his nails were long and dirty, and the umbilicus/belly button was crusted and oozing. A maggot pupa was adherent to the right side of the hip. There was crusting of the eyelashes. The back, arms, legs and side of the torso had multiple deep and extensive pressure sores.
- (d) The pressure ulcers were deep. In most, they were to the subcutaneous tissues (the layer beneath the skin), but in the region of the sacrum and

buttocks there was almost total death of the skin with exposure of muscle and bone in the depths of the wound. There was connection to this ulcer to the area adjacent to the anus and rectum, and the examination showed heavy contamination of the wound by faecal material. This led to an infection with bacteria normally resident in the gut and stool. There was infection of not only the wound but systemically. Systemic infection is also known as sepsis and is infection that is spread in the bloodstream. Sepsis is a significant illness if untreated, particularly in a person who was in poor physical condition where even maximal treatment may not give a successful outcome.

- (e) Whilst it was acknowledged that immobility in a person with severe disease of the cardiovascular system, as in this case, is a risk factor for developing ulcers, the extent of the ulceration over the body, the depth of the ulcers and the general poor physical condition were in excess of what one would see with adequate care. It could not be determined based purely on the pathological assessment if these findings were a complication of neglect or of self-neglect and only assessment of the full background and circumstances could assist with this.
- (f) Common areas of the body that are prone to developing pressure sores include the tail bone on the lower back, the buttocks or the back of the hips, the heels, the elbows or the back of the head. However, any area subject to pressure may develop the pressure injury. The constant pressure on the skin can cause injury because it means the blood flow to that area is reduced which causes an area of tissue death. This may be exacerbated by urine or faecal material on the skin, because that creates a moist environment promoting tissue breakdown or infection. Any form of moisture will do it.
- (g) The pressure injuries to the sacrum and buttock were stage 4 (the most serious). The ones on the back all demonstrated exposure of underlying fat and would be stage 3. Those to the outer thigh showed exposure of fascia and muscles and would be stage 4. There were also areas of

stage 1 and stage 2 to the right and left torso. There was fat exposed on the right hip, so this injury would be stage 3.

- (h) In relation to indicating how old the ulcers were, given their extent, size and degree of infection, there is no firm basis to give accurate time frames for the development of ulcers. One can give perhaps broad time frames, hours, days, weeks. But saying it is two versus three hours, two versus three days, two versus three weeks, is not possible. The reason one can give broad time frames but not be completely specific is because the factors predicting when the pressure outweighs the tissue resistance is variable and differs for each individual. The extent of the ulceration seen in Mr 'Epenisa was unlikely to have developed over minutes or hours.
- (i) Pressure injury can start and come on very quickly. The pressure sores would have taken more than six hours. Given the presence of multiple stage 3 and 4 ulcers, the extent of the ulceration would have taken "a great deal longer than six hours".
- (j) Dr Glengarry disagreed with Mr Peat's observations that the dead black tissue had not separated from the healthy tissue to form an ulcer. On the buttocks there was a large deep ulcer with bone and muscle exposed.
- (k) There was no pus in the pressure sores but there was certainly microscopic evidence of inflammation in those pressure sores.

[28] In the course of cross-examination, Dr Glengarry gave the following evidence:

- (a) Dr Glengarry could not say how soon after the pressure sores developed the sepsis would be expected to start. Dr Glengarry also could not say how long Mr 'Epenisa would have stayed alive after the start of the blood poisoning, because she does not treat patients with sepsis. The diagnosis of pressure sores is well within the expertise of a forensic pathologist, but the treatment of them is not part of her role.

She advised the police that they should probably consult a geriatrician, internal medicine physician, neurologist or plastic surgeon.

- (b) Dr Glengarry accepted she is not an expert in timing and treatment of pressure sores. She does not treat them, she sees them at a single point of time and there is often no history of how long they have been there. She felt that the deep ulcers would have taken longer to develop than a period of one to two days, but she would defer to Mr Peat's statement.

[29] Mr Peat was initially contacted by the police to provide advice about Mr 'Epenisa's medical condition, in particular the pressure sores. He answered a number of questions put to him by the police. However the Crown did not rely on Mr Peat's evidence. Instead, he was called as a defence witness.

[30] Mr Peat's evidence-in-chief included the following:

- (a) Pressure sores are formed when pressure is applied to soft tissues of the body that is high enough and continuous enough to stop the blood flow to the tissues. Pressures roughly twice the capillary pressure applied for more than two hours result in irreversible damage to tissues. There are four stages of pressure sores (stages 1 to 4).
- (b) Mr 'Epenisa's pressure sores will have all developed at the same time. The pressure sores were very recent. They would be more than six hours old, since this is the time that it takes to get to death of tissue from severe pressure. The pressure sores were not weeks or months old. The pressure sores had been there for a few days rather than weeks or months.
- (c) Mr 'Epenisa did not move from the time when he first started to develop the pressure sores until the time that he died. He had suddenly stopped moving, then he developed the pressure sores.

- (d) Mr 'Epenisa could well have developed the pressure sores within 24 or 48 hours of his death.
- (e) Mr Peat did not agree that there is no firm evidence basis for accurate timelines in relation to aging the pressure sores, based on his knowledge of pressure sores, wound healing and infections. He could not give a time frame to an hour but thought he could give a time frame based on whether it is a few days as opposed to several weeks or several months.
- (f) The depth of the pressure sores and the extent of the pressure sores in Mr 'Epenisa indicated that there was severe, unrelenting pressures on the tissues, enough to obstruct the blood flow for more than six hours.
- (g) After six hours, the tissue dies and would change colour and eventually turn black. When there is dead tissue in the body, this will likely become infected, especially if there is incontinence and diabetes.
- (h) The pressure areas would have very rapidly become infected, especially when there is urinary or faecal incontinence. They would very rapidly have caused Mr 'Epenisa to become very unwell, especially in the presence of his diabetes and his other medical problems. The pressure sores were the terminal event. The pressure sores rapidly became infected, and this infection rapidly caused his death.

[31] In the course of cross-examination Mr Peat elaborated on his evidence about timing, and suggested that the process of the pressure sores developing and becoming infected could take as little as 10 hours. His evidence included the following:

- (a) Mr Peat thought the pressure sores were one to three days old. They could be less than 24 hours old. A minimum time frame would be six hours to develop the dead tissue and maybe another six hours to become infected, or it could be four hours. The process is so rapid that even a healthy person can actually die four to 24 hours after the

infection, so it could be four hours. The minimum time frame could be 10 hours.

- (b) Mr Peat said that at a maximum the photographs would be consistent with something that could be three days old. The time frame may be as short as 10 hours or as long as three days. Mr Peat said, “he’s got to be at the shorter end of that time frame.” Mr Peat could not say exactly the number of hours as he did not know the pressure Mr ‘Epenisa was lying on. The maximum period was not known exactly.
- (c) Mr Peat confirmed that he had sent an email to Mrs Li’s counsel the night before, which included “[a]ll of these pressure sores would be consistent with them developing at the same time over the last one to three days”.
- (d) When Mr Peat was asked where the evidence was, prior to cross-examination, that he had said that it had to be at the shorter end of the time frame, Mr Peat referred to having said in his brief of evidence:

These pressure sores are very recent, they would be more than six hours old since this is the time that it takes to get death of tissue from severe pressure. These pressure areas would very rapidly have become infected, especially when there is urinary or faecal incontinence. They would very rapidly have caused the person to become very unwell, especially in the presence of diabetes and other medical problems such as kidney failure.

- (e) Mr Peat agreed that he had also said in his brief of evidence, that Mr ‘Epenisa “[c]ould well have developed a pressure sore within 24 to 48 hours of his death that then caused overwhelming sepsis”. Mr Peat said the pressure sores could well have developed within 24 to 48 hours, and they were not weeks or months old.
- (f) Mr Peat was further questioned about the reason for the shorter time frame mentioned by him in cross-examination. He referred to being able to go into more detail now and that he had been asked the wrong

questions by the police. When Mr Peat was asked why he had not in his brief said “between one to three days and most likely at the lower end of that scale”, Mr Peat said:

I don't know why I didn't say it like that, no, I could have said it like that, but I think the inference is there and I don't think it's actually substantially changed what I'm saying.

- (g) Mr Peat agreed that the difference between one to three days could be significant in this case, but that what he was trying to explain was that they were dealing with something that was one to three days old and not three weeks or three months old, and he did not think that the one to three days range was significant.
- (h) Mr Peat agreed that moisture is one of the risk factors of pressure sores and that it was correct if someone was sitting on a wet surface for a long period of time that this would contribute to the creation of pressure sores. Mr Peat said that urinary incontinence is a contributor to pressure sores.
- (i) Mr Peat agreed that full thickness down to the bone tissue death would not be caused in under six hours on a cushioned surface, and depending on how much cushioning the time frame would tend to be longer.
- (j) Mr Peat disagreed with Dr Glengarry when she said that there was a deep ulcer down to the bone on the buttocks, and he went on to refer to the liquefaction process. He agreed it was a stage 4 pressure sore.
- (k) Mr Peat was questioned about an email from Dr Glengarry sent in response to recent material from Mr Peat. Dr Glengarry said that she had sampled the tissues of the pressure ulcer to examine under the microscope. Dr Glengarry said:

This was aimed at trying to establish how long the ulcer and infection had been present. The histologic findings were of acute necrotising inflammation. That is there was inflammation of some days duration (how many days can't be stated) and tissue death.

When Mr Peat was asked if he disagreed with Dr Glengarry saying that she could see inflammation of some days' duration and tissue death in her histological findings, he said "I would accept her statement".

### **The Crown case at trial**

[32] At trial, the Crown accepted that Mrs Li's care of Mr 'Epenisa up to a few months prior to his death was poor but sufficient, and was not grossly negligent. The Crown case was that the last few months were the critical period, when there were clear signs that Mr 'Epenisa's condition was significantly deteriorating. It was then, the Crown submitted, that Mrs Li's care became grossly negligent. Mr 'Epenisa was getting noticeably worse. His last visit to the doctor had been in January 2016. He stopped eating as much. There were far more frequent toileting accidents. His speech ability stopped. He stopped being bathed properly. His skin was embedded with dirt. Any washing was taking place in the chair, which was why it was wet.

[33] [Redacted].

[34] [Redacted].

[35] The Crown case was that Mrs Li was actively aware of the injuries that were developing, and that she should have done something to try to prevent Mr 'Epenisa's death. Mrs Li had said in interview that she had taken Mr 'Epenisa to the toilet the day before he died, and she "recognised the wound there". Mrs Li said that it was on Mr 'Epenisa's "bum", and it looked "like the skin had come off".

[36] The Crown argued at trial that more weight should be given to Dr Glengarry's opinions than to Mr Peat's. Mr Peat's opinions had changed in a number of respects over time. The Crown referred to the fact that Mr Peat's initial report had stated that the pressure sores were probably about three days old. Subsequently this had changed to one to three days. The absolute minimum of 10 hours now referred to would require all the conditions to be at their worst possible. There was evidence from Dr Glengarry that there was inflammation of "some days duration". The Crown submitted that this pushed the timing to the upper end of the three-day estimate.

[37] The Crown had to prove that Mrs Li failed to provide Mr ‘Epenisa with necessaries and/or failed to take reasonable steps to protect Mr ‘Epenisa from injury.<sup>3</sup> These are separate legal duties, and breach of either duty is sufficient. The jury only needed to be sure of one.

[38] In relation to providing Mr ‘Epenisa with necessaries, the Crown’s case was that there was evidence of inadequate nourishment and of inadequate medical care and hygiene. Mr ‘Epenisa had inadequate medication over the last few months of his life. He was in poor general condition and sitting in a soaking wet environment.

[39] In relation to Mrs Li’s failure to protect Mr ‘Epenisa from injury, the Crown’s case was that all of the factors listed in the particulars of the charge were relevant. Her liability arose well before the pressure sore injuries started to happen.

[40] The Crown argued that Mrs Li’s failures to fulfil the two duties represented a major departure from the standard of care of a reasonable person. The major departure came in the last few weeks or months when it became apparent that Mr ‘Epenisa was deteriorating, and particularly when she noticed his pressure sore injuries.

[41] The Crown case was that Mrs Li’s failure to provide Mr ‘Epenisa with necessaries and/or to take reasonable steps to protect him from injury were a substantial and operative cause of his death. In closing, the Crown said:

But ultimately, the defendant’s actions or inactions in the circumstances of this case, given her responsibility in the care of Mr ‘Epenisa, her ability to control his environment and change what was happening and reach out for help if necessary, her leaving him sitting in wet, filthy conditions, left home alone without adequate medicine or medical care were, the Crown say, the direct cause of the pressure injuries that were suffered that led to the sepsis, which led to the death. This is not a complicated causation case. The failures led directly to what occurred, in an entirely predictable and preventable fashion.

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<sup>3</sup> Crimes Act 1961, s 151.

## **Appeal on grounds that verdict unreasonable**

[42] In *Owen v R* the Supreme Court said: “A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty”.<sup>4</sup>

[43] The Supreme Court endorsed the following propositions drawn from this Court’s decision in *R v Munro*:<sup>5</sup>

- (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
- (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
- (c) The weight to be given to individual pieces of evidence is essentially a jury function.
- (d) Reasonable minds may disagree on matters of fact.
- (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
- (f) An appellant who invokes s 385(1)(a) [now s 232(2)(a) of the Criminal Procedure Act 2011] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

## **Mrs Li’s submissions on appeal**

[44] Mr Ryan submitted that the jury’s verdict was not reasonable in light of the expert evidence on pressure sores given by Mr Peat. Dr Glengarry had acknowledged that the issue of pressure sores and the treatment of them was outside her professional expertise. By contrast, Mr Peat was an expert on the timing and treatment of pressure sores.

[45] Mr Peat’s evidence was that the pressure sores around Mr ‘Epenisa’s buttock area became overwhelmingly infected in a short time frame and rapidly caused

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<sup>4</sup> *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [5] and [17].

<sup>5</sup> At [13], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

his death. In the circumstances, Mr Ryan submitted, there was nothing Mrs Li could do. The maximum time frame between the first evidence of pressure sores appearing and death was between 24 and 48 hours. The minimum time frame could be 4–10 hours. Due to Mr ‘Epenisa’s existing comorbidities and poor health, once the sores became infected there was nothing Mrs Li could have done to prevent death occurring as Mr ‘Epenisa would have succumbed to infection rapidly.

[46] Mr Ryan submitted that having regard to Mr Peat’s expertise, and the relative lack of expertise of Dr Glengarry in relation to pressure sores, the jury was effectively required to accept Mr Peat’s evidence. That evidence meant that the jury could not have reasonably answered yes to two of the questions in the question trail provided by the Judge. Those questions were whether the jury was sure that:

- (a) Mrs Li’s failure to provide Mr ‘Epenisa with necessities and/or to take reasonable steps to protect him from injury was, in the circumstances, a major departure from the standard of care expected of a reasonable person?
- (b) Mrs Li’s failure to provide Mr ‘Epenisa with necessities and/or to take reasonable steps to protect him from injury caused Mr ‘Epenisa’s death?

[47] Mr Ryan accepted that the standard direction relating to expert evidence had been given to the jury in this case:

In assessing the opinions expressed by the experts, you must have regard to their qualifications and experience ... remember this is a trial by jury, not a trial by experts. It is for you to decide how much weight or importance you give to the opinions, or indeed, whether you accept the experts’ opinions at all in the context of all the evidence you have heard.

[48] In this case, Mr Ryan submitted, a reasonable jury should not have disregarded Mr Peat’s evidence. However it must have done so. This rendered the verdict unreasonable on the grounds that it could not be supported having regard to the evidence.

## Discussion

[49] There are two main difficulties with the basis on which this appeal has been advanced.

[50] The first is that it was open to the jury to answer the questions set out at [46] above, and reach a guilty verdict, even if they accepted the evidence of Mr Peat that in this case the pressure sores could have appeared and caused Mr ‘Epenisa’s death within a period as short as 10 hours. The Crown case was not dependent on the jury finding that Mrs Li was aware of the pressure sores, and had had sufficient time after they appeared to take action to seek medical attention and prevent the sores from worsening and causing her husband’s death. Rather, the Crown’s case was that Mrs Li failed to provide Mr ‘Epenisa with necessities and/or to take reasonable steps to protect him from injury over a period of some months. Her failure to care for him extended to allowing, and not alleviating, the conditions that enabled the pressure sores to develop in the first place and to progress swiftly. Her failures related to the inadequate conditions in which Mr ‘Epenisa was living, and the inadequate hygiene and medical care that he was receiving.

[51] Put another way, there is no inconsistency between Mr Peat’s evidence, even at its highest, and the verdict arrived at by the jury.

[52] The second difficulty with the basis on which the appeal was advanced is that it was well open to the jury not to accept that the pressure sores had developed in as little as 10 hours in this case. [Redacted]. Mr Peat’s view about the theoretical minimum period for pressure sores to develop could well have been seen by the jury as inapplicable in this case, in particular in light of Mr Peat’s acceptance of Dr Glengarry’s statement that in her histological findings she could see inflammation of some days’ duration and tissue death.<sup>6</sup>

[53] As Mr Ryan acknowledged, the Judge gave the usual direction that the trial was a trial by jury, not a trial by expert. It was for the jury to decide how much weight or importance they gave to the opinions of the experts, in the context of all of the

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<sup>6</sup> See [31](k) above.

evidence they had heard. It was open to the jury to conclude that on all the evidence they heard, they were satisfied beyond reasonable doubt that the pressure sores had developed over an appreciably longer period in the present case than Mr Peat's minimum of 10 hours, and that Mrs Li was aware of those sores in time to take action before they became infected.

[54] These reasons, taken individually and together, confirm that the jury's verdict was not unreasonable. The jury could reasonably have been satisfied to the required standard that Mrs Li was guilty of the charge on which she was convicted.

### **Result**

[55] The appeal against conviction is dismissed.

Solicitors:  
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