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2024 CarswellOnt 15172

Ontario Coroner

Mussa, Re

2024 CarswellOnt 15172

Inquest into the Death of Abdurasak MUSSA

Selwyn A. Pieters Presiding Officer

Judgment: October 7, 2024

Docket: None given.

Counsel: Liesha Earle — Inquest Counsel

Brian Whitehead, for Ministry of the Solicitor General

Katelyn Leonard, for Dr. Nikolsky

Katharine Byrick, Heather Webster, for Scarborough Health Network

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Judges and courts

[VII Coroners](#)

[VII.2 Coroner's inquest](#)

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[VII.2.b.iv Evidence](#)

Headnote

Judges and courts --- Coroners — Coroner's inquest — Practice and procedure — Evidence

Table of Authorities

Cases considered by *Selwyn A. Pieters Presiding Officer*:

Gentles v. Ontario (Regional Coroner) (1998), 1998 CarswellOnt 3899, (sub nom. *Gentles v. Gentles Inquest (Coroner of)*) 165 D.L.R. (4th) 652, (sub nom. *Gentles v. Gentles Inquest (Coroner of)*) 129 C.C.C. (3d) 277, (sub nom. *Gentles v. Béchard (Coroner)*) 114 O.A.C. 245, 22 C.R. (5th) 343 (Ont. Div. Ct.)

R. v. Abbey (2009), 2009 ONCA 624, 2009 CarswellOnt 5008, 246 C.C.C. (3d) 301, 68 C.R. (6th) 201, 97 O.R. (3d) 330, 254 O.A.C. 9 (Ont. C.A.)

R. v. Abbey (2017), 2017 ONCA 640, 2017 CarswellOnt 12134, 350 C.C.C. (3d) 102, 39 C.R. (7th) 303, 140 O.R. (3d) 40 (Ont. C.A.)

R. v. Evans (2019), 2019 ONCA 715, 2019 CarswellOnt 14412, 377 C.C.C. (3d) 231, 147 O.R. (3d) 577 (Ont. C.A.)

R. v. Giles (2016), 2016 BCSC 294, 2016 CarswellBC 876 (B.C. S.C.)

R. v. Hason (2024), 2024 ONCA 369, 2024 CarswellOnt 6705, 95 C.R. (7th) 302, 171 O.R. (3d) 225, 438 C.C.C. (3d) 143 (Ont. C.A.)

R. v. Johnson (2019), 2019 ONCA 145, 2019 CarswellOnt 2546, 373 C.C.C. (3d) 194, 145 O.R. (3d) 453 (Ont. C.A.)

R. v. Prasad (2024), 2024 ONCA 601, 2024 CarswellOnt 11728, 97 C.R. (7th) 1 (Ont. C.A.)

Sargent, Re (2023), 2023 CarswellOnt 9683 (Ont. Coroner)

White Burgess Langille Inman v. Abbott and Haliburton Co. (2015), 2015 SCC 23, 2015 CSC 23, 2015 CarswellINS 313, 2015 CarswellINS 314, 383 D.L.R. (4th) 429, 18 C.R. (7th) 308, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants*) 470 N.R. 324, 67 C.P.C. (7th) 73, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants*)

1135 A.P.R. 1, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants*) 360 N.S.R. (2d) 1, [2015] 2 S.C.R. 182 (S.C.C.)

Statutes considered:

Coroners Act, R.S.O. 1990, c. C.37

Generally

s. 44(1)(b)

Selwyn A. Pieters Presiding Officer:

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Overview

1 This is the Inquest into the Death of Abdurazak Mussa. Mr. Mussa, 41 years old, died in hospital on September 2, 2020, after being transferred from the Toronto East Detention Centre in Scarborough. An inquest into his death is mandatory under the *Coroners Act*.

2 The inquest will begin at 9:30 a.m. on Monday, October 7, 2024, and is estimated it will last approximately 5 days.

3 On October 4, 2024, I received an expert report and CV of Dr. Marco L.A. Sivilotti presented by Ms. Leonard, counsel for Dr. Nikolsky.

4 Out of procedural fairness and natural justice,¹ I directed Inquest Counsel to canvass the positions of the parties prior to ruling on the admissibility of the report and CV, since upon admission both will be placed in the Exhibit Binder to be left with the jury.

5 This ruling addresses the admissibility of the expert report.

Brief Facts

6 On August 30, 2020, Abdurazak MUSSA was found by the night shift officer, CO Fantinato hanging in his cell with a ligature around his neck. Staff responded to the emergency and Mr. MUSSA was transferred to hospital for treatment. He suffered brain anoxia and never made any meaningful movements.

7 On September 2, 2020, he was declared brain dead and mechanical interventions were removed.

8 On July 24, 2020, when Mr. MUSSA was admitted to the Toronto East Detention Centre (TEDC), alcohol withdrawal was a concern noted in the medical record by health care staff. Mr. MUSSA had reported frequent alcohol consumption prior to his incarceration. He was provided with medication to address possible symptoms of withdrawal namely mild tremor of the hand and insomnia. Vital signs were noted to be within normal range generally.

9 In May 2020 when he was also detained at the TEDC, Mr. MUSSA was formally assessed for alcohol withdrawal by using the Clinical Institute Withdrawal Assessment for Alcohol Scale.

10 From May 18-21, 2020, he was assessed daily using this scale. The medical record for this period also indicates that his vital signs were within normal range generally.

The Expert Report by Dr. Marco L.A. Sivilotti dated October 3, 2024 — Positions of the Parties

11 On behalf of Dr. Nikolsky, counsel, Ms. Leonard has asked that this report and curriculum vitae of Dr. Sivilotti be admitted as evidence for the jury's consideration in this inquest. Scope 4 of the inquest is as follows:

The extent to which Mr. Mussa was assessed for alcohol withdrawal and/or suicidal ideations upon admission and periodically by medical/psychiatric staff at the TEDC.

12 Counsel submits that this report and the curriculum vitae of Dr. Sivilotti address scope 4 directly to assist the jury in addressing whether alcohol withdrawal played a role in Mr. MUSSA's death. The forensic toxicology report (Exhibit of the Binder) addresses toxicology at the time of death but not what Mr. MUSSA would have experienced while incarcerated. In contrast, this report reviews the medical record and the health care Mr. MUSSA received at the TEDC. It speaks to the level of physical discomfort that Mr. MUSSA would have experienced, including any mental distress experienced through that withdrawal. Ultimately, this report would assist the jury in its assessment of scope 4. Dr. Sivilotti is currently out of the country and if required, could be available to testify.

13 I am advised that counsel for the Scarborough Health Network consents to the admissibility of both documents.

14 I am advised that counsel for the Ministry of the Solicitor General also consents to the admissibility of both documents.

The Law on Admissibility of Expert Evidence

15 The *Coroners Act* provides that I may admit any oral testimony, document or other thing that is relevant to the inquest if that evidence meets the "standard of proof commonly relied upon by a reasonably prudent person in the conduct of their own affairs."²

16 Rule 6.2 of the Chief Coroners Rules of Procedure for Inquests ("the Rules") provides that:

6.2 A person with standing may make an application to call evidence under [Subsection 41\(2\)\(b\) of the Coroners Act](#). The application shall include:

- (i) The document or item, or in the case of a witness, an adequately detailed statement or summary of the witness' anticipated evidence, and in the case of an expert witness, the documents required under [Rule 8](#).
- (ii) The reasons for which the proposed evidence meets the evidentiary tests applicable at an inquest.

17 Further, Rules 8.11, 8.12 and 8.13 specifically impose duties and obligations on proposed expert witnesses as follows:

8.11 It is the duty of every expert engaged by or on behalf of the Coroner or a party to;

- (i) provide opinion evidence that is fair, objective and impartial,
- (ii) provide opinion evidence that is related only to matters that are within the expert's area of expertise, and
- (iii) provide such additional assistance as the court may reasonably require to determine a matter in issue.

8.12 The duty in Rule 8.11 prevails over any obligation owed by the expert to the person by whom or on whose behalf he or she is engaged.

8.13(1) The expert report shall contain:

- (i) The expert's name, address and area of expertise.
- (ii) The expert's qualifications, including employment and education in his or her area of expertise.
- (iii) A brief summary of the issues upon which the expert opinion was requested.
- (iv) The expert's opinion and reasons for the opinion.

(v) An acknowledgment of the expert's duty in Form 5 signed by the expert.

(2) In addition to the above, depending upon the nature, complexity and contentiousness of the issues, some or all of the following may also be required:

(i) A summary of the range of the opinion which other qualified experts might draw from the facts, and the reasons for the expert's own opinion within that range.

(ii) The expert's reasons for his or her opinion, including the factual assumptions on which the opinion is based, and any research conducted by the expert that led him or her to form the opinion.

18 It is the Presiding Officer's obligation to ensure that these duties and obligations are met.

19 The Court of Appeal has set out the well-established principles governing the admissibility of expert evidence in *R. v. Johnson*, 2019 ONCA 145 and *R. v. Evans* 2019 ONCA 715 (following *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 as follows:

- There are two components. The threshold stage and the gatekeeper stage.³
- At the threshold stage, for the proposed evidence to be admissible, the proponent of the evidence must establish on a balance of probabilities that the proposed evidence is relevant, necessary to assist the trier of fact, not subject to an exclusionary rule and be given by a properly qualified expert.⁴
- "At the threshold stage, *relevance* refers to logical relevance, the relationship between the evidence and the fact in issue it is tendered to establish. Evidence is relevant where it is probative of the fact its proponent seeks to establish by its introduction."⁵
- "To satisfy the *necessity* requirement at the threshold stage, the proposed evidence must be more than helpful to the trier of fact in its decision. A standard of "helpful" sets the bar for the requirement of necessity too low. Although necessity is not to be judged by too strict a standard, the proposed opinion must be necessary in the sense that it provides information which is likely to be outside the experience of the trier of fact. The evidence must be necessary to enable the trier of fact to appreciate the matters in issue because of their technical nature. Put in another way, the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge"⁶
- A properly qualified expert is a witness who is shown to have acquired special or peculiar knowledge of a subject through study or experience, that the average trier of fact lacks. If the proposed expert's special or peculiar knowledge of the subject on which he or she is tendered to testify is minimal, he or she should not be qualified as an expert on that subject.⁷
- At the gatekeeper stage, the trial judge must balance the potential risks and benefits of admitting the evidence to determine whether the potential benefits justify the risks associated with its reception.⁸
- This is "a cost-benefit analysis" in which the trial "judge balances on the one hand the potential risks, and on the other the potential benefits of admitting the evidence. The judge does this in order to decide where the balance settles — whether the potential benefits justify the risks."⁹

20 Having regard to the *Coroners Act*, the Rules and the caselaw, a Presiding Officer is vested with the role as a gatekeeper with respect to the evidence that will be presented to the jury at an inquest.¹⁰

21 To find that this first stage has been met, I must find that:¹¹

- 1) The evidence is relevant to the inquest;
- 2) The evidence is necessary to assist the jury, in that the jury would not have the specialized experience or knowledge to form the conclusions on their own;
- 3) The evidence is not subject to any other exclusionary rule;
- 4) The expert is properly qualified and is willing and able to fulfill the expert's duty to the court to provide evidence that is impartial, independent, and unbiased; and,
- 5) Where an opinion is based upon novel science, the science underlying the opinion is reliable for the purpose it is utilized.

22 If the proposed evidence does not meet the threshold requirements for admissibility, then it must be excluded. If it does meet the threshold requirement, the Presiding Officer must move on to the second stage. This stage involves the Presiding Officer's discretionary gatekeeping function and requires a weighing of whether the benefits occasioned by the admission of said evidence outweigh any risks of admission. If the Presiding Officer finds that they do, then the evidence must be admitted. If the Presiding Officer finds that the risks are too great, such that they outweigh any benefits, then the evidence must be excluded.¹²

23 At the threshold stage, there are no bars to admission in relation to the first three factors (relevance, necessity, and absence of an exclusionary rule).¹³

24 At the second stage, the gatekeeping role, referred to above, I am to assess the evidence of the expert and consider whether that evidence, in light of all the other factors, is sufficiently beneficial to the inquest process to warrant its admission despite any potential harm that its admission may entail. I must take into consideration the specific circumstances of the inquest before me. I must consider consumption of time, whether the evidence is necessary to forward the intentions of the inquest, prejudice, confusion, and, most importantly, the potential danger that the jury will be unable to make an effective and critical assessment of the evidence.¹⁴

Application to this case

Qualification of Dr. Sivilotti

25 I find that Dr. Sivilotti is an expert in the fields of:

- i. Medical toxicology, and
- ii. Substance withdrawal.

26 Dr. Sivilotti is a physician licensed for independent practice in the Province of Ontario since 1994. He is a professor in the Department of Emergency Medicine, with a cross-appointment to the Department of Biomedical & Molecular Sciences, at Queen's University. He has also served as the Deputy Head of the Department of Emergency Medicine at Queen's from 2011 to 2017. He currently holds fellowship certification from the Royal College of Physicians and Surgeons of Canada in this specialty since 1994.

27 Dr. Sivilotti graduated from medical school at Queen's University in 1988. Dr. Sivilotti also completed a fellowship in Medical Toxicology at the University of Massachusetts in 1999 and has been U.S. board-certified in both the specialty of Emergency Medicine (1998) and the subspecialty of Medical Toxicology (2000) by the American Board of Medical Specialties. He was designated as a "Founder" of the subspecialty of Clinical Pharmacology and Toxicology by the Royal College of Physicians and Surgeons of Canada, and until recently served as the Vice Chair of the College's Specialty Committee for Clinical Pharmacology and Toxicology. In addition, Dr. Sivilotti has practiced emergency medicine and provided medical toxicology consultations at the Kingston Health Sciences Centre in Kingston, Ontario for over 20 years.

28 Dr. Sivilotti has also served as medical consultant to the Ontario Poison Centre based at the Hospital for Sick Children in Toronto for over two decades, and in this role provided emergency telephone consultations to physicians and to nurses caring for poisoned or potentially poisoned patients in Ontario, Manitoba and Nunavut. He trained physician residents from several disciplines, including residents pursuing specialty training in Emergency Medicine or Clinical Pharmacology and Toxicology, and residents from other disciplines rotating through the emergency department. He has served on the Royal College Examination Board for the specialty of Emergency Medicine, and currently serve on the College's Examination Board for the subspecialty of Clinical Pharmacology and Toxicology.

29 Dr. Sivilotti has not only cared for many patients in acute withdrawal from substances but also has spoken at national and international conferences in his specialty. He has also published research and authored chapters in his area of expertise.

The Report

30 The report prepared by Dr. Sivilotti outlines his experience, the material he reviewed and provides an analysis of those facts, forming his opinion. His opinion is that Mr. MUSSA had "at most very mild alcohol withdrawal early in his final admission in July 2020, and that its assessment and management was medically appropriate" (see page 5 of the report).

31 In my role as gatekeeper, I find that the report methodically outlines and explains medical terms, assessment tools and an opinion that reflects the facts of this case. It would assist the jury in its fact finding in this case in answering the 5 questions. It would further assist the jury in determining whether any recommendations should be directed to medical staff regarding the care of similarly situated inmates. Of course, the jury will ultimately make the decision about whether they accept some, all, or none of the report's contents.

Conclusion

32 I find, following the test and guidance set out in the Supreme Court of Canada decision in *White Burgess*, as well as the Court of Appeal decisions in *Abbey*, *Johnson and Evans* reviewed above, and having regard to his impressive CV, that Dr. Marco L. A. Sivilotti is qualified as an expert in the field of medical toxicology and substance withdrawal. His report and curriculum vitae are admitted as evidence for the jury's consideration.

Footnotes

1 *R. v. Hason* 2024 ONCA 369 Ont. C.A. (ONCA), para 97. See, as well, *Re: Inquest in the Death of Shannon Sargent* 2023 CarswellOnt 9683, which discuss timing of the disclosure of expert reports and procedural fairness to the other parties.

2 Section 44(1)(b) of the *Coroners Act*, RSO 1990, c C.37 and *Gentles v. Gentles Inquest (Coroner of)* 1998 CanLII 19472 ON SCDC.

3 *Johnson*, at para. 50; *Evans*, at para. 132

4 *Johnson*, at para. 50-51; *Evans*, at para. 134

5 *Johnson*, at para. 52; *Evans*, at para. 135-136

6 *Johnson*, at para. 53

7 *Evans*, at para. 137

8 *Johnson*, at para. 55; *Evans*, at para. 138-139

9 *Johnson*, at para. 55; *Evans*, at para. 138-139

10 *Inquest into the Death of Shannon Sargent* 2023 CarswellOnt 9683, para 18.

- 11 See, *R. v. Prasad* 2024 ONCA 601 Ont. C.A. (ONCA) at para 31; *White Burgess Langille Inman v. Abbott and Haliburton Co.* 2015 SCC 23 (S.C.C.).
- 12 *R. v. Abbey* 2017 ONCA 640, paras 48 - 50. See also, *Shannon Sargent, supra*, para 22.
- 13 *White Burgess*, para 25.
- 14 *R. v. Giles* 2016 BCSC 652 at para 66; *R. v. Abbey* (Abbey #1) 2009 ONCA 624 at para 90. See also,
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