

2024 CarswellOnt 14972

Ontario Coroner

Mussa, Re

2024 CarswellOnt 14972

Inquest into the Death of Abdurazak Mussa

Selwyn A. Pieters Presiding Officer

Judgment: October 2, 2024

Docket: None given.

Counsel: Liesha Earle — Inquest Counsel

Brian G Whitehead, Rabinder S. Sidhu, for Ministry of the Solicitor General

Katharine Byrick, for Scarborough Health Network

Katelyn Leonard, for Dr. Victor Nikolsky

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Judges and courts

VII Coroners

VII.2 Coroner's inquest

VII.2.b Practice and procedure

VII.2.b.i Standing

Headnote

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

Table of Authorities

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

McKitty v. Hayani (2019), 2019 ONCA 805, 2019 CarswellOnt 16275, 439 D.L.R. (4th) 504, (sub nom. *McKitty (Litigation Guardian of) v. Hayani*) 444 C.R.R. (2d) 60 (Ont. C.A.)

Ouanounou v. Humber River Hospital et al (2018), 2018 CarswellOnt 18886, 2018 ONSC 6511 (Ont. S.C.J.)

Selwyn A. Pieters Presiding Officer:

Office of the Chief Coroner for Ontario, 2024 © Queen's Printer for Ontario. Reproduced with permission.

Introduction

1 On September 16, 2024, I issued a ruling granting party standing with respect to the scope of the inquest. I also made the following determinations regarding scope as follows:

1. The circumstances surrounding the hanging death of Mr. Abdurazak Mussa whilst incarcerated at Toronto East Detention Centre (TEDC);
2. Measures to ensure Correctional Officers have ready access to their flashlight, keys, radios and the 911 knife during patrol of living units, particularly during lights-out on the evening/midnight shifts including compliance checks by the Security Manager and/or Operational Managers, compliance with Ministry-wide and local institutional policies when an attempt suicide/suicide has been discovered;

3. Compliance with docketing shift entries into unit logbook and the availability of an electronic system for entries of Correctional Staff movements and patrols;
 4. 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; and
 5. Medical aid provided at the Scarborough General Hospital between August 30, 2020, to September 3, 2020.
- 2 On August 15, 2024, a Pre-Inquest meeting took place by videoconference on Microsoft Teams where parties identified as potentially having an interest in the inquest were invited to attend. The following persons and entities attended:
- i. Mussa Boru, Family of Abdurazak Mussa
 - ii. Hadiya Boru, Family of Abdurazak Mussa
 - iii. Rob Sidhu, Counsel SolGen
 - iv. Sheldon James, Staff Lawyer — Black Legal Action Centre
 - v. Katharine Byrick, Counsel - Scarborough Health Network
 - vi. Katelyn Leonard, Counsel - Dr. Victor Nikolsky
- 3 Subsequently, applications for standing were received from Rabinder (Rob) Sidhu, Counsel on behalf of the Ministry of the Solicitor General, Katherine Byrick, Counsel for the Scarborough Health Network and Katelyn Leonard, Counsel for Dr. Victor Nikolsky.
- 4 I granted standing to all parties that applied as follows:
1. Ministry of the Solicitor General has standing for issues arising from scope #1, #2, #3 and #4;
 2. Scarborough Health Network (SHN) has standing for issues arising from scope #5; and
 3. Dr. Victor Nikolsky has standing for issues arising from scope #5.

Discussions with Counsel for SHN and Inquest Counsel

- 5 On September 6, 2024, Inquest Counsel met with counsel for the Scarborough Health Network and counsel for Dr. Nikolsky. During that discussion, I am advised that Ms. Byrick agreed to provide both the hospital records and language around the brain death of Mr. Mussa, as well-established in case law¹.
- 6 Inquest counsel requested both the hospital record and that this language be part of the agreed statement of fact by September 9, 2024.
- 7 On September 10, 2024, Inquest Investigator Kristopher Somwaru uploaded the SHN health records of Mr. Mussa for all those who signed undertaking to receive the brief before the release of my ruling on standing.
- 8 On September 27, 2024, 11 days after the release of my standing and scope ruling, the language around brain death was provided to Inquest Counsel and forwarded to me for review and consideration.
- 9 On September 27, 2024, with that language, counsel for the Scarborough Health Network asked Inquest Counsel by email if scope 5 could now be removed with the provision of this language to be added to the agreed statement of fact previously sent to all parties on September 23, 2024:

Following transfer to Hospital

Mr. Mussa was arrived at the Emergency Department of the Scarborough General Hospital shortly after 5:00 am and was subsequently admitted to the Intensive Care Unit. Imaging showed an extensive anoxic brain injury. Mr. Mussa did not have any neurological responses. Further testing was completed and two physicians examined Mr. Mussa before confirming that, as a result of the anoxic brain injury, the criteria were met for neurological determination of death. The clinical declaration of brain death was completed at 3:20 pm on September 2, 2020. Mr. Mussa's family was informed of his brain death and arrangements were made for them to visit. Mechanical ventilation was then withdrawn and the Coroner's office was contacted.

10 Counsel for the SHN has specifically noted the following in the same email message:

Now that the hospital records have been reviewed and there is clarity on standing, is the issues set out in #5 of the draft scope (Medical aid provided at the Scarborough General Hospital between August 30, 2020, and September 3, 2020) still necessary for this inquest?

The proposed ASF addresses the who, how, when (subject to adding the time of 15:20) and where of Mr. Mussa's death.

As indicated in Decision on standing, it is not anticipated that there will be recommendations directed at the hospital. I note that SHN did not "take over care" of Mr. Mussa but that he was admitted to the hospital in accordance with orders of his treating physician(s), and they were responsible for managing and directing his medical care. I appreciate the there was a concern that the jury may need to hear about this care.

In light of the ASF, the clarity of the information necessary to answer the 5 questions and the lack of proposed recommendations that may be directed to SHN, and in particular if scope issue #5 is not necessary, might it be more efficient for your process and for hospital / coroner resources if SHN (and Dr. Guo represented by Katelyn) are not required at this inquest?

11 Considering the above request, I decided to issue a ruling in response to SHN's request to remove scope 5 and, further, amend my ruling regarding scope for Dr. Nikolsky.

12 On October 1, 2024, I became aware of more email correspondence between Ms. Byrick, counsel for SHN and Inquest Counsel. On October 1, 2024, Inquest Counsel sent the parties an amended agreed statement of facts reflecting the accurate language provided by counsel for SHN. In response, Ms. Byrick requested to speak to Inquest Counsel. I am aware that Inquest Counsel contacted Ms. Byrick and explained the issues that arose with her request to delete scope 5. Ms. Byrick then wrote a more detailed evidentiary explanation about the admissions process and the administration of care in hospital and copied counsel for Dr. Nikolsky, Ms. Leonard.

13 On October 2, 2024, Inquest Counsel received an email from Ms. Leonard, counsel for Dr. Nikolsky, that her client was only seeking standing on scope 4 and further agreed with Ms. Byrick's detailed evidentiary explanation as cited above.

Scope 5 Issue

14 First, scope 5 will remain as part of the scope because originally Dr. Nikolsky was also granted standing on scope 5 and would have been directly impacted by its removal. Second, today's confirmation by Ms. Leonard about her client not wishing to have standing on scope 5 but seeks it on scope 4 has now been considered. While this new position is acknowledged, it does not persuade me that scope 5 should be removed and as such will remain.

15 As Ms. Byrick has cited in the portion of the email dated September 27, 2024, there may be a factual issue that jury needs to decide with respect to "the hospital taking over care versus being admitted to hospital in accordance with the orders of the treating physicians". In my standing ruling, I wrote the following regarding SHN's implementational interest:

i. Implementational interest: While it is not foreseen that there will be jury recommendations directed at SHN, **the hospital took over care once Mr. Mussa was transported to hospital and as such there is a possibility that the jury may make recommendations related to that care.**

16 Based on this and additional information provided by Ms. Byrick on October 1, 2024, there is a requirement for factual clarity around this issue and as such, scope 5 should remain as it is currently drafted. Any further additions to an agreed statement of fact on the complexities of admissions when under a detention order is unfair to the other parties at this late date. The inquest is set to begin on October 7, 2024, at 9:30 am and the jury has been selected. I have decided it would be beneficial for the jury to hear evidence about this process. In preparation for this inquest, Inquest Counsel had decided to call a policy spokesperson from the Ministry of the Solicitor General and Dr. Guo, who was involved in the treatment of Mr. Mussa in hospital, regardless of what was agreed as facts by the parties to provide testimony about this process.

17 I also note the following: while the standing ruling indicates that the jury **may not have** recommendations, the jury is still the fact finder of the 5 questions including what if any recommendations it wishes to make. This also includes, necessarily, a factual understanding of what happened in hospital up until the point of death being declared. Simply because the parties and I do not anticipate any recommendations regarding SHN, it is only an anticipation, and it does not amount to a presumption.

Dr. Victor Nikolsky

18 Upon review, I have also decided that Dr. Nikolsky should be granted standing with respect to scope 4; he was part of the medical staff at the Toronto East Detention Centre and in that role and at that location, he met with and made treatment recommendations to Mr. Mussa during his incarceration. He also has now asked for standing on scope 4 through email correspondence dated October 2, 2024. The private law test as it relates to standing applies as he could be subject to implicit criticism through the inquest process.

19 While Dr. Nikolsky no longer wishes to have standing under scope 5, I have decided to not restrict his questioning of witnesses on the transfer of care should an issue arise during the inquest. Ms. Leonard may wish to clarify factual issues concerning scope 5 as I note that Dr. Guo, who appears to be the most responsible physician for Mr. Mussa's care in hospital, does not have standing in the inquest.

Ministry of the Solicitor General

20 As a result of the above revisions, I have also decided in the interest of fairness, that the Ministry of the Solicitor General should be granted standing with respect to scope 5; Mr. Mussa was still under their authority while he was in hospital due to his incarceration. The private law test as it relates to standing applies as the Ministry could be subject to implicit criticism through the inquest process.

Footnotes

- 1 See *McKitty v. Hayani*[2019] O.J. No. 5134Ont. C.A. (OCA) and *Ouanounou v. Humber River Hospital et al*[2018] O.J. No. 5871Ont. S.C.J. (SCJ)