

Ontario Superior Court of Justice

A.M. Molloy J.

Heard: October 21, 2021.

Judgment: October 22, 2021.

Court File No.: CR-21-50000347-0000

[2021] O.J. No. 6144 | 2021 ONSC 7043

RE: R., and Dimitrios Avgerakis

(12 paras.)

## Case Summary

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**Criminal law — Evidence — Documentary evidence — Disclosure of records of complainant or witness to accused — Medical records — Application by the accused Avgerakis for disclosure of medical records of the complainant allowed in part — Avgerakis was charged with assault — The complainant sustained a number of injuries — The Crown and complainant conceded that the records of Dr Aboobaker met the "likely relevant test" for an initial review by the Court but objected to all other relief sought — The Aboobaker records were relevant and were to be produced, subject to redactions for the complainant's personal information not relevant to the case — With respect to the other records sought, the likely relevance threshold was not met.**

## Counsel

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*P. Carlisi*, for the Defendant/Applicant D. Avgerakis.

*M. Coristine*, for the Crown/Responding Party.

*C. Mazgarean*, for the Complainant.

*G. Holder*, for the Co-Defendant Lisbet Salinas-Jiminez.

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## ENDORSEMENT

**A.M. MOLLOY J.**

## **1. Introduction**

1 Dimitrios Avgerakis was charged with assaulting Jose Fernando Garcia Mendoza on February 10, 2019. The complainant sustained a number of injuries, the most serious of which was to his right eye. On this application, Mr. Avgerakis sought the following:

- (a) disclosure by the Crown of the identity of an ophthalmologist, referred to as a potential expert witness in the Crown's pretrial memorandum, and production of his/her records;
- (b) the medical records of the complainant held by Dr. Shaheer Aboobaker;
- (c) the medical records of the complainant held by Dr. Kavita Randhawa;
- (d) the medical records of the complainant held by the doctor who became his family doctor after Dr. Randhawa;
- (e) confirmation of the spelling of an individual referred to by the complainant at the preliminary inquiry as Hayotha Thillia Thillairajan and disclosure of her address and telephone number;

2 The Crown and counsel for the complainant conceded that the records of Dr. Aboobaker met the "likely relevant test" for an initial review by me as a first step in the production process. Both objected to all other relief sought. Counsel for the co-accused took no position on any of the issues before the court. I reviewed the records of Dr. Aboobaker, determined they were relevant and ordered them produced, subject to redactions for the complainant's person information not relevant to this case. The Crown and counsel for the complainant had no objection to the production of those records. Apart from that, I dismissed the application, stating that brief reasons would follow. Those reasons are set out below.

## **2. The Test**

3 For the most part, these are third party records in which the complainant has a clear privacy interest. The parties agreed that the test as developed in *R. v. O'Connor*<sup>1</sup> applies. This is a two-step process. Only the first step is relevant for present purposes. At the first stage the applicant must show that the records are "likely relevant" to some issue at trial. This is not a heavy onus, but it must be based on something more than conjecture or speculation. It is not enough to simply assert that the documents sought "might" be relevant to credibility. There must be some grounding in evidence to show the "likely relevant" standard is met.

## **3. Analysis**

### **(a) Disclosure of identity and records of unknown treating ophthalmologist**

4 After the altercation between the complainant and Mr. Avgerakis, the complainant attended the Emergency Department at the Michael Garron Hospital for treatment. Those records have already been disclosed to the defence by the Crown. There is no "mystery" ophthalmologist. After being seen in the ER, the complainant was referred to the Ophthalmology clinic at Michael Garron, where he was seen by Dr. Sigismund. Those documents were included in the

disclosure already given to defence counsel, although Mr. Carlisi was unable to find them in his files. If Mr. Carlisi is still unable to locate them after a further review of his file, the Crown has undertaken to produce a second copy. The Crown has not yet decided whether to call Dr. Sigismund as a witness at trial, but will provide the appropriate notice and disclosure if it is determined that his evidence is required. Accordingly, there is no merit to this aspect of the application.

*(b) Dr. Aboobaker's Medical Records*

**5** Not long after his emergency treatment at Michael Garron, the complainant had further treatment for his eye injury from Dr. Aboobaker. Dr. Aboobaker's records in relation to his treatment of the complainant were produced to the Ontario Court of Justice in response to a subpoena, were sealed by a judge of that Court, and then transferred to the Superior Court. Both the Crown and counsel for the complainant agreed that likely relevance was established and that I should review the records to determine if the further requirements for production were met. I obtained those records and reviewed them. There are 20 pages in total, but some of the information therein is duplicative. The records relate entirely to the complainant having laser surgery to repair a tear to the retina of his right eye.

**6** I summarized for counsel the content of these records. I advised that there is a two-page that is almost entirely irrelevant. This document is titled "Patient Registration Form." It includes considerable personal information about the complainant, such as his personal particulars, residence, contact information, and history of various medical conditions. This is private information and irrelevant to anything at issue in this case. There is some potential, albeit tangential information on the form under the heading "Eye History." Mr. Carlisi indicated he wanted this form, even if heavily excised, stating he would take "whatever he can get." Both the Crown and counsel for the complainant had no objection to these medical records being disclosed subject to the personal information I had identified being redacted. In light of current COVID restrictions, the easiest course of action is for me to simply do the redactions myself and then provide the records to the Crown for disclosure to the other parties. I will do that upon my return to the courthouse at the beginning of November.

*(c) Dr. Randhawa's Medical Records*

**7** Dr. Randhawa was the complainant's family doctor in February 2019. There is no evidence whatsoever that Dr. Randhawa ever treated the complainant for any injury related to this matter. The only available evidence is that no such treatment was provided by Dr. Randhawa. The likely relevance threshold is not met. The mere speculation that there might be useful information relating to credibility contained in those records is not sufficient to cross even that low bar. This aspect of the application is dismissed.

*(d) New Family Doctor's Medical Records*

**8** By the time of the preliminary hearing in January 2021, the complainant had changed his place of residence and had a new family doctor. Again, there is zero evidence to support the bald allegation that there "might" be relevant evidence in this doctor's records. Mr. Carlisi also argued that there "might" be medical evidence in some of these medical files to demonstrate that his client was not the aggressor in the altercation underlying the charges he is now facing,

but rather was merely defending himself. That argument is utterly devoid of merit. This aspect of the application is dismissed.

(e) Orders Relating to an Alleged Witness

**9** The complainant testified at the preliminary hearing that immediately after the altercation he made his way to a gas station and tried to call somebody who could help him. He managed to contact an ex-girlfriend, Ms. Thillairajan, who assisted him by taking him to the Emergency Department at Michael Garron. Under cross-examination at the preliminary, the complainant was asked to spell all of her names, which she did. Mr. Carlisi relies on a portion of his cross-examination of the complainant for his hypothesis that Ms. Thillairajan was an eye witness to the altercation in which the complainant was injured, as follows:

Q. Now, this altercation between you and Mr. Avgerakis, did Ms. Jiminez [the co-accused who allegedly lured the complainant to site of the altercation], did she - was there to see what happened? Was she present?

A. Was she there to see what happened?

Q. Yes.

A. She brought me to this.

Q. No, I'm asking, though, did she...

A. And she ...

Q. ...did she see what happened with - between you and Mr. Avgerakis?

A. Yes.

Q. Now you went - you went to the hospital - to now called Michael Garron, this - did you tell Hayotha [Ms. Thillairajan] what happened?

A. I told her when we came home from the hospital.

**10** I agree with the submission of Mr. Cristine, for the Crown, that this passage from the transcript does not establish that Ms. Thillairajan was an eye witness to the altercation that is the subject of the charges before the court. This is particularly so when looked at within the context of the transcript as a whole. It does not even seem possible that Ms. Thillairajan could have been there at the time.

**11** The police did not consider her to be a relevant witness and she was not interviewed. Neither the Crown nor the police have any contact information for her. The complainant gave what he believed to be the correct spelling of her name at the preliminary hearing. He was in the best position to do that. The Crown does not have better information. When Mr. Carlisi sought contact information for her, the Crown made inquiries of the complainant to see if Ms. Thillairajan was prepared to speak with defence counsel, but the complainant declined to provide the information, stating he did not wish to involve her.

**12** Mr. Carlisi seeks to compel the Crown to disclose this potential witness' contact information to the defence so that he can interview her. The Crown cannot disclose what the Crown does not have. I therefore will not make that order. Mr. Carlisi further sought an order directing the

complainant to turn this contact information over to the police. I see no basis for doing that, in fact or in law. Mr. Carlisi was unable to direct me to any legal authority supporting such a proposition. Further, Mr. Carlisi asked me to issue an order directing the complainant, the Crown and the police to tell Ms. Thillairajan that she should cooperate to permit him to interview her. That is an improper suggestion. Even if Ms. Thillairajan had been an eye-witness (which is highly unlikely), there is no basis for the orders sought. There is no merit to any of the relief sought in relation to this individual and this aspect of the application is therefore dismissed.

A.M. MOLLOY J.

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<sup>1</sup> *R. v. O'Connor*, [\[1995\] 4 S.C.R. 411](#). See also, *R. v. Batte* [\(2000\), 49 O.R. \(3d\) 321](#) (C.A.).