Advocacy in the Coronial Jurisdiction

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Introduction

Sir Owen Dixon once remarked, "For my part, I have never wavered in the view that the honourable practice of the profession of advocacy affords the greatest opportunity of contributing to the administering of justice according to law. There is no work in the law that admits of a greater contribution." [1] In the coronial jurisdiction I see that truth borne out on a daily basis.

To elaborate, I will touch in this paper on three things:

- The social significance of the coronial jurisdiction
- The inquisitorial process and the challenges it presents
- The roles of counsel in the coronial jurisdiction

The social significance of the coronial jurisdiction

Death raises troubling questions and issues. Civilised societies know that what harms one of its members may harm many others and therefore coroners, from ancient times, have sought to throw light into dark places, to allay suspicions and fears and to help the living commemorate the dead with some peace of mind. In our society, coroners are given the special role of examining unnatural, unexpected, sudden and suspicious deaths. They are not unique in this activity, especially as science has advanced, but they have a rare capacity to marshal resources from different disciplines, to test hypotheses and evidence and to embrace robustly independent analyses of disquieting facts, without fear or favour, affection or ill-will in public.

[1] Sir Owen Dixon "Address when first sitting as Chief Justice of the High Court in Melbourne, 7 May 1952" *Jesting Pilate,* Law Book Co, Sydney 1965 p.250.

Two of the marks of a civilised democratic society is that it is ruled by law and that all its citizens are entitled to certain legal rights. (If at first blush this seems platitudinous, reflect for a moment on the differences between our society and those places where Australian troops and aid agencies are engaged around the world. Contrast Sydney with Baghdad, Dili or Darfur.) How they treat their dead is another way of distinguishing civilised societies from barbarisms.

When people die violently or unexpectedly or unnaturally in some places their bodies are thrown into rivers or pits and they disappear forever. In contrast, in NSW, a police officer investigates, a pathologist examines the body and a coroner considers whether to hold a public inquest. This depends not on the person's social status, political opinions, race or religious beliefs but entirely on whether there is a satisfactory explanation of the sudden death. This is not cause for complacency or self-congratulation. It simply reflects the pervasive social acceptance of the fact that in a just democratic society the life of each citizen is and must be valued. This is not a utopian principle: each of us, rich or poor, looks for our protection to society.

Coroners are often said to "speak for the dead". Inquests recognise the living human being whose death is the subject of the inquiry. In death it is the living person who is commemorated and in whose death we seek to find meaning for ourselves and others.

This is so even in a society in which belief in a deity or the after-life has become tentative or is widely dismissed. Despite the widespread atheism and scientific rationalism, anxiety about death and the meaning of it is widespread. Julian Barnes, the English writer, personified this modern ambiguity when he began his book *Nothing to be Afraid Of*[2] by writing, "I don't believe in God, but I miss Him." Whether we believe their spirits survive the death of their bodies, our loved ones remain dear – and in some sense, perhaps poetic – alive to us. This is why we, rationalists or not, retain our taboos about mistreatment of the bodies of the deceased.

Inquests can have cathartic effects. As well as being blind to the future, we are afflicted by perfect hindsight. Those close to a deceased person, whether they are family members or friends or treating doctors or police or ambulance officers or others, are sometimes filled with regrets and remorse, even with a powerful sense of guilt or shame. I am not about to suggest that these feelings are inappropriate. Indeed, shame can be a civilising emotion. But it can also distort and cripple those who suffer from it. I have often observed in inquests that it is a release for doctors, nurses, police officers and bereaved family

[2] Jonathon Cape, London, 2008 p.1.

members to listen to one another speak about their own experiences and offer one another acceptance and understanding.

The ultimate aim of many inquests is to find ways of preventing a recurrence of whatever it was that led to the particular death. If we are lucky we will never undergo the agony that besets so many bereaved families coroners have the terrible privilege of meeting. Euripedes wrote, "What greater pain can mortals bear than this: to see their children die before their eyes."[3] This is the unfortunate experience for so many families. I am struck again and again that bereaved families want to prevent others from experiencing their experiences or, more precisely, that they want to prevent other loved ones dying in the same ways as theirs.

The inquisitorial method and its challenges

It is sometimes claimed that trials are not a search for truth. Inquests, however, are. An inquest is intended to be an independent, objective, fair examination of the available evidence relating to the circumstances of a person's unexpected or unnatural death. The evidence available to a coroner is necessarily incomplete because the primary witness to the circumstances of his or her death is the deceased person. The search for truth, therefore, may not answer all the questions raised by an unexpected or unnatural death.

It follows from the fact that an inquest is a search for truth that is neither a witch-hunt nor a whitewash. Inquests are not negligence cases or disciplinary hearings. There are no parties as such. A coroner does not adjudicate rights or liabilities, does not award damages, does not impose penalties. Reputations, however, are obviously at stake. Although the proceedings are not formally adversarial, swords are frequently crossed at inquests.

An inquisition requires a substantial degree of intellectual modesty: not only are we wiser in hindsight but hindsight may give us a distorted view of how an event came about. This is known as the problem of "hindsight bias". What is clear in hindsight is rarely clear before the fact. Ordinary surgeons, aviators, boat skippers do not act recklessly, they make mistakes, often on the basis of incomplete, ambiguous or misleading information.

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Coronial proceedings are not, in general, bound by rules of evidence or procedure.[4] The hearsay and opinion rules do not apply. Evidence that would be inadmissible in trial courts is staple fare in the coronial jurisdiction subject only to the tests of relevance and procedural fairness.

The primary strategic question for coroners and counsel involved in inquests is not the admissibility of evidence but the identification of the relevant issues. In that respect inquests are exactly the same as other proceedings.

That said, the identification of the relevant issues is not necessarily a straightforward exercise. Coroners are required to investigate and, if possible, make findings in respect of the identity of the deceased person, the date and place of his or her death and the cause and manner of death. They are also entitled to make appropriate recommendations relating to the death.

Where difficulties tend to arise is in relation to either the manner of death – ie, the circumstances leading to the death – or in relation to recommendations. (In most inquests, the identity of the deceased is known as are the date and place of death. The cause of death is usually determined by an autopsy.)

"Manner of death" is an elastic concept. The answer to the question, "How did this death come about?" is, in some cases, is capable of great variety depending on how far back along the chain of causal connection one travels. Coroners and interested parties do not have free rein to engage in wide-ranging explorations of issues only tenuously connected to the death in question.[5] In setting parameters for an inquest most coroners are, in my experience, reasonably conservative but there are no fixed guidelines. General principles of causation in tort law may provide some assistance in setting the scope of the inquiry but will not be decisive.[6]

In cases raising significant issues of public health or safety, or some other important public interest question, inquests can sometimes develop into large and lengthy inquiries resulting in multiple recommendations. Depending on the circumstances, that may or may not be a good thing, but it is a challenge for all involved.

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[4] There are some exceptions to this: witnesses are entitled to object to giving self-incriminating evidence. Although I am unable to find authority on the point, it must be doubtful that a coroner could override a proper claim for legal professional privilege.

[5] *Harmsworth v State Coroner* (1989) VR 989; *Quinlan v Deputy State Coroner* [2000] NSWSC 434.

[6] See, for example, *March v E & MH Stramare* [1991] HCA 12; (1991) 171 CLR 506.

In relation to long or complex matters, it has become the practice in the NSW Coroners Court to attempt to case-manage inquests using various tools. We invite interested persons or parties to make known to us issues of concern that they wish the coroner to consider. We invite them to nominate witnesses they wish to examine. Through the Crown Solicitor's Office who act for us we send out witness lists and a list of issues we propose to consider and seek reaction from interested parties. We issue written directions and hold directions hearings.

The directions are intended to streamline the proceedings by ensuring that Counsel Assisting and the coroner control the process. This is very important in a jurisdiction in which there is no cost recovery.

Recommendations provide a particular challenge for coroners but also for counsel. Coroners will often circulate drafts of proposed or possible recommendations for comment by interested parties. It is critical that coronial recommendations be realistic and reasonable. It is self-evident that for counsel to address on the question of recommendations they need to be well prepared and to be fully instructed.

Sometimes interested parties appear to take the view that a coronial recommendation is to be regarded as a 'loss' or an 'own goal'. This can lead to a dogged defensiveness that is often against the interests of that party. One of the challenges of the jurisdiction is for counsel and interested parties to recognise the therapeutic role of the coronial jurisdiction and to turn that to advantage.

The roles of counsel in inquests

Advocates have an indispensable role in conducting effective inquests. In NSW barristers appearing in inquest are instructed as either Counsel Assisting or to represent persons whose interests are enmeshed in the inquiry. Counsel Assisting are invariably instructed by the Crown Solicitor's Office.

Counsel Assisting

Before instructing counsel in any inquest, the Crown will consult the coroner with carriage of the matter about counsel. The CSO has a panel or list of barristers whom they recommend to the coroners but the coroners may also nominate counsel they request as Counsel Assisting.

The relationship between coroner and Counsel Assisting is unusual in that there is no bar to discussions before, during and after the evidence. Counsel Assisting (and the instructing solicitor) will liaise with the police investigator with carriage of the matter on behalf of the coroner as well as with other legal representatives and witnesses.

Unlike other judicial officers, a coroner is not a passive recipient of a case brought before him or her. Without prejudging the issues, the coroner must drive the inquest towards answering the critical questions.

It is, therefore, critical that coroners provides guidance to Counsel Assisting as to how he or she wishes to conduct the inquest and that Counsel Assisting assists the coroner in keeping the inquest focussed on the issues. Counsel Assisting is the coroner's adviser but, ultimately, the coroner must make the decisions about issues to be explored, witnesses to be called, conclusions that will be drawn and recommendations that will be made. Confidence and trust and a mutual recognition of their proper roles between is therefore imperative for both coroner and Counsel Assisting.

Counsel Assisting, in consultation with the coroner, will identify the issues to be explored, draw up a witness list for the coroner's approval, open the proceedings, call the evidence, and, usually after close consultation with the coroner, address the court as to the findings and possible recommendations the coroner could make. One principal purpose of Counsel Assisting's final address is to outline for the benefit of counsel representing interested parties the coroner's tentative or preliminary views on the findings and conclusions to enable them to address the relevant questions.

How should Counsel Assisting and the coroner prepare for an inquest?

For a coroner and Counsel Assisting, preparation for an inquest involves at least the following steps:

- analysis of the brief and identification of the issues and witnesses to be called. Note that Coroners have the latitude to include or exclude witnesses and that latitude should be used to make the inquest as succinct and focussed as possible;

- consultation with Counsel Assisting to ensure that all relevant issues have been identified;

- identification of the need for expert evidence (if this has not been done during the course of the investigation) and the obtaining of relevant expert reports. The coroner will usually consult Counsel Assisting on this subject;

- before the inquest begins, the identification of persons who may have an interest in the proceedings. Some of these may be, for example, next of kin or statutory authorities or government authorities. Others will be "persons of interest". (While the term "persons of interest" is not used in the *Coroners Act*, it is a label applied in practice to those who may be the subject of a referral to the Director of Public Prosecutions or to a disciplinary body.) Again, this is a matter on which Counsel Assisting's advice will be sought by the coroner;

- "persons of interest" will be notified in writing by the court registry before the inquest that their interests may be adversely affected by the anticipated evidence and suggesting that they seek legal advice and representation;

- other persons who may be the subject of criticism will also be notified and advised that it may be in their interests to obtain legal advice and representation;

- copies of the brief will be sent to interested persons (unless there is a compelling reason not to do so). Whether a brief ought be given to a "person of interest" before the commencement of the inquest is another question for discussion between Counsel Assisting and the coroner. The principal reason to withhold the brief is to limit the opportunity of a "person of interest" to tailor his/her evidence. They should be requested to identify any issues that they wish the coroner to consider and to nominate any witnesses they request the coroner to call for examination and to provide reasons for desiring the witness(es) to be called;

- if the matter is of any complexity, a directions hearing is desirable to sort out any interlocutory issues or controversies, to outline (if appropriate) the coroner's list of issues to the interested parties and to set any "ground rules" the coroner proposes for the conduct of the hearing. This will help the coroner estimate the likely length of the hearing;

- it is frequently useful for a coroner to conduct an informal view with Counsel Assisting and the OIC to enable him or her to grasp the evidence better. (This is not a substitute for a formal view during the inquest which then becomes part of the evidence);

- if the case involves questions of public health or safety, the coroner and Counsel Assisting will turn their minds to potential policy issues and recommendations. A list of possible recommendations may be drafted at this stage;

- if recommendations are contemplated, a check should be made with the State Coroners Office and a further check conducted on the National Coronial Information System for recommendations made in similar matters. (This can be done through the State Coroner's Office);

- subpoenae will be issued for witnesses required and for any further documents not already obtained under a s.53 notice to produce;

- interpreters will be ordered if required;

- any necessary or appropriate technology (AVL links, video equipment) will be organised.

Counsel for other parties

The role of other counsel is not to present a case on behalf of a client but to protect that client's interests. Too frequently those interests are neglected to some degree by an interested person's legal representatives until very late. Counsel ought become involved in settling the issues list, the witness list and the course of the evidence as early as is practicable.

Because the fundamental document in the inquest is the coronial brief, and because interested persons do not have an automatic right to lead or tender evidence, careful preparation is needed well before the commencement of the hearing. If gaps are identified in the coronial brief, precise tactical consideration must be given to this depending on the nature of the inquest. In some cases, it may be advantageous to fill the gaps by, for example, obtaining expert reports or locating witnesses. In others, leaving the gap may be to the client's advantage.

The need for shrewd tactical thinking was emphasised by Chester Porter QC in an unpublished paper[7]:

[7] "Appearing at a coronial inquest: The functions of an advocate." (1993)

> As in all advocacy it is necessary for the advocate to decide beforehand the objectives sought to be achieved. Every question asked carries a risk, and should only be asked if the likely advantage will exceed the risk. Sometimes, of course, risks have to be taken. Sometimes it may well be in the interests of the party represented to know the truth as early as possible.
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> Appearing before the coroner therefore carries the usual risks where too many questions are asked. There is a natural desire to impress the client, but it is unwise to sacrifice good advocacy in the interests of simply impressing one's clients. In particular, having obtained the right answer, many experienced advocates make the mistake of asking the question again in order to emphasise the point made, and finish up with the witness changing the answer.
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> The advocate must decide before he or she asks questions, where the questions may lead. Is it really desired that a particular subject matter should be opened up. Many good advocates say very little at inquiries.

It is only when that party's interests are affected by the evidence given that counsel have a right to examine a witness or take issue with evidence being adduced by Counsel Assisting.

Counsel for interested parties do not have rights to cross-examine at large, to call evidence or to tender documents. They do not have rights to address on all the issues (although coroners may indulge them in doing so). Their rights are circumscribed by the interests they represent.

In practice, Counsel Assisting may be expected to ask most of the questions with supplementary questions being asked by counsel for interested parties.

In addresses, counsel for interested parties ought confine themselves (unless otherwise invited by the coroner) to putting forward arguments concerning the interests he or she represents.

Challenges for counsel

The challenges for counsel vary according to the party they represent. The primary challenge for Counsel Assisting, apart from the usual one of assembling the case, is to develop good working relationships with the coroner and counsel for interested parties. The best Counsel Assisting are usually able to settle disputes and problems outside the courtroom without involving the coroner.

Counsel representing bereaved families may have the difficult problem of managing hopes and expectations that are be unrealistically high. Bereaved families sometimes, perhaps understandably, are quite vengeful in their attitudes or hope to see sweeping changes introduced in some field following the inquest.

Sometime they have the impression that an inquest is either a wide-ranging Royal Commission-type inquiry or a criminal trial. Lawyers who encourage such impressions do them a disservice. The giving of clear advice as to the parameters of the inquest and what is practically achievable is an obligation lying upon counsel representing families.

Counsel for other parties may feel the brunt of the emotions generated by a sudden or unexpected death. A natural response is to be defensive. But experience suggests that it is counter-productive. Lawyers appearing for parties such as hospitals, doctors, police or others who may have been involved in some way in the death do well to advise the client to take a conciliatory approach to bereaved families, offering condolences and showing respect. Such an approach cannot be construed adversely to the client and tends to smooth the process substantially.

"Persons of interest" very frequently face the dilemma whether to give evidence or to object on the grounds of self-incrimination. Advising such a client on the choice is not necessarily clear cut. Chester Porter QC again:

> The temptation is to take advantage of the Fifth Amendment and close the client's mouth. It is a course which has all the attractions of safety. However it must be appreciated that for certain persons in the community to take such a course will subject them to considerable criticism within their professional calling, e.g. a doctor who refuses to describe how an operation was performed, or a police officer who refuses to answer a suggestion of assault. The decision as to whether to take the Fifth Amendment cannot be published in the media (S.45 (3) (b). without the coroner's express permission, that permission may well be given. In any event the recourse to the Fifth Amendment quickly becomes known in the witness's profession or calling.[8]

Finally, there is inevitably the challenge for all counsel of mastering certain subjects. I suggest that counsel who appear in inquests on a regular basis (and coroners) over time need to become familiar with the rudiments of:

- Anatomy
- Aspects of psychiatry and psychology, especially the features of suicidal ideation and behaviour
- Pharmacology
- Aspects of surgery and medicine
- Hospital management

[8] Porter (1993).

- Risk analysis and management (or "Human Factors") especially relating to hospital and various forms of transport[9]
- The theory of Hindsight Bias
- Public sector management

Conclusion

In a speech to the 2008 Conference of the Asia-Pacific Coroners Society in Adelaide, Julian Burnside QC in discussing "The Role of the Inquest in a Decent Society"[10] argued that 'coroners are sometimes the only agency which can expose the existence of humiliating institutions in Society, because vested interests often prefer to leave them unnoticed or unexplored.'

After outlining a number of examples of important inquests, he went on to say:

> In all these cases [of sudden, unexpected death], and many others, the community has a legitimate interest in knowing the truth of the matter. However, these things will not be investigated by the police unless a criminal offence is suspected. They will not be investigated in litigation unless someone has the resources and the incentive to bring proceedings. They will not be investigated by a Royal Commission unless the government of the day is fairly confident that it will not be implicated in anything politically unmanageable.
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> In short, in most cases the only investigation will be by the coroner. The work of coroners is not only important for the better protection of the State: it is a means of seeing whether the bargain between citizen and State is being honoured. It is the mechanism by which citizens can see why the State's promise of protection failed, and whether responsibility for that failure is a failure of the State.

Burnside overstates the singularity of the coroner's importance but these comments encapsulate an important truth not only about coroners but about the role of independent advocates in maintaining the rule of law and a civilised society.

From a coroner's point of view, and no doubt this is so for practitioners in the field too, the jurisdiction is a privileged one. We are dealing with what are literally life and death issues. Coroners and counsel appearing inquests have the

[9] See, for example, Prof. James Reason "Human error: models and management" (2000) British Medical Journal 320ff.
[10] Unpublished paper, Adelaide, November 2008.

honour of serving our fellow citizens by trying to find answers for them to some of the most troubling questions a human being can face.

Somewhat more prosaically the comments of another lawyer are apt. A barrister friend telephoned me shortly after my appointment as a Deputy State Coroner. "Mate," he said, "it's the most interesting jurisdiction in NSW." I believe that he is right. I commend it to you.