

CORONIAL INQUESTS AND HOSPITAL DEATHS

By David Hirsch

A recent television report considered coronial inquests into hospital-related deaths. The segment was entitled 'Dead and Buried' and the report questioned the level of preparation of coronial cases by the police. The story made the point that the proper preparation of a brief of evidence for the coroner requires special knowledge and skill.

Lawyers are frequently asked by grieving relatives about coronial inquests following the death of a loved one in a hospital setting.

The decision whether to have an inquest does not rest with the family. Although family wishes (and religious issues) are taken into account, the coroner will decide whether to hold an inquest and, if so, what form it will take. Coroners are generally sensitive to a family's wishes to know the circumstances surrounding the death of a loved one.

Most inquests are done 'on the papers'. This means that the coroner's decision is based only on the written information in the brief prepared by the police. In only a small minority of cases – usually where serious issues arise – will the coroner direct a full coronial hearing. If there is a hearing, it proceeds in an 'inquisitorial' (not 'adversarial') manner, and the rules of evidence do not apply.

A police prosecutor usually presents the case in court, but in some cases the coroner will appoint counsel to assist. The police prosecutor or counsel will lead witnesses through their statements, present documents, and ask for explanations of medical concepts and procedures. Police prosecutors rarely conduct the kind of searching cross-examination that a lawyer acting for a family may want to see. Counsel assisting may or may not take a very proactive role. It is generally wise for the family to engage private lawyers who are entitled, with the coroner's leave, to ask questions of witnesses on behalf of the family.

The coroner's job is to determine the manner and cause of death and to make recommendations in the public interest when appropriate. It is not the coroner's job to determine whether anyone was 'negligent' in the civil sense of that word.

Nevertheless, a coroner's criticism of a hospital's management may support an eventual civil claim or lead to early settlement. Another advantage of an inquest is that the coroner can require the doctors and nurses involved to give evidence under oath and be cross-examined. That evidence may be used in later civil proceedings. Further, the coroner will often obtain expert evidence and that expert may be questioned under oath as well.

In short, there are significant forensic benefits to becoming involved in a coronial inquest where there is a prospect of a civil claim. The fact that there are no adverse costs consequences if the coroner's finding is not favourable to such a claim is an important practical benefit.

But there are significant pitfalls as well.

First, the coronial inquest will only be as thorough as the coronial brief permits. Many coronial briefs are not prepared with the kind of attention to detail and probing investigation that an experienced medical negligence lawyer would bring to the task.

Thankfully, every coroner and every police officer that I have been involved with has welcomed any assistance that can be offered by an outside lawyer specialising in medical cases (both for the family and for the health professionals). A lawyer can, for example, recommend that statements be taken from certain people, or (as I have done) actually prepare witness statements later used at the hearing. A lawyer can recommend that certain documents be included in the coroner's brief. Very importantly, the lawyer can also recommend that the coroner obtain certain expert advice and have input in the questions put to that expert. The coronial system is usually receptive to positive suggestions and assistance.

Second, as proof of the first, I have become involved in civil claims for families *after* a coronial inquest has been held and *after* a coroner made findings unfavourable to the family. Several of these civil claims were successful, despite the coroner's findings, usually because the evidence before the coroner was incomplete, or the expert evidence was not properly challenged. Therefore, an adverse coronial finding should not be taken as the last word on the prospects of a potential civil claim. ■

Note: 1 *Stateline*, ABC TV, 17 August 2007, available at <http://www.abc.net.au/stateline/nsw/content/2006/s2008525.htm>

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