Inquests: their role in medical negligence actions

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The following article takes inquests in NSW as an example of the way the plaintiff lawyer can use an inquest in a medical negligence action.

The Nature of the Inquiry

In important respects, an inquest resembles a mini Royal Commission. The coroner, while conducting the proceedings, has his terms of reference dictated by the relevant *Coroner's Act*, for example ss22 and 22A of the *Coroner's Act* (NSW)(to determine whether a death has occurred; if so, identity, date and place of death, manner and cause of death; make recommendations). The rules of evidence do not apply (s.33). One must seek leave to appear there being, save in the case of deceased's relatives, no automatic right for any party to appear (s.32). The inquiry may become wide reaching, and involve criticism of the activities or the inactivity of a large number of people, many of them in fact blameless. And when, finally, the coroner's findings and any recommendations are delivered, they typically receive ill informed press coverage and then are assigned to a filing cabinet. Whether recommendations have any effect on improving such things as health facilities, one cannot judge, but it is easy to be cynical on the topic.

The Coroner's Role

Though the coroner's role covers *inter alia* administrative and investigatory matters, we mainly come into contact with the judicial and educative roles. The coroner must try to determine manner and cause of death. The educative role is discretionary, in the sense that recommendations may or may not be made at the conclusion of the inquest.

For the purpose of this paper I shall confine my comments to deaths occurring through medical misadventure. The role of the plaintiff's solicitor or barrister is typically to ascertain whether there is a cause of action to be found, so the relatives can launch a compensation to relatives or a nervous shock claim or both. The role of the health carer's representative is damage control, attempting to show his/her client is not to blame for anything or if he or she is, then that someone else should share the blame. There is a potential tension between the coroner's role and the relatives' representatives' role. The coroner will typically and correctly wish to confine the inquiry by reference to statutory obligations and powers, whereas lawyers for the relatives will wish to go further and have the inquiry deal with matters which relate to negligence. Usually, but not always, the inquiry will satisfy both needs.

Though if of the view a serious criminal offence has caused the death, the coroner must adjourn the inquisition until criminal charges have been dealt with (NSW - s.19) in practice that will rarely apply to a hospital death.

Whereas in deaths caused by motor or factory accidents, the average intelligent plaintiff's lawyer will be able to form a view at an early stage about whether or not negligence has caused the death, the picture will often be different in the case of a hospital death. Thus there is a greater need for an inquest if relatives of a deceased who has died in hospital are contemplating a common law action.

Preparing the Clients

Inquests tend to engender a great degree of emotional tension. Doctors and nurses, probably more through ignorance than any other reason, tend to feel that they are on trial, not fully appreciating the difference between criminal and civil proceedings and the inquisitorial nature of the inquest. Relatives, often having had a good rapport with hospital staff and doctors at the time of the deceased's death, sit appalled whilst listening to what they regard as the health carers running for cover, giving evidence of a kind quite contrary to what they had said at the hospital ("Dr X is a butcher: he should not be allowed to operate: this has often happened before" or "The nursing staff here are hopeless and I am always telling the administrators that"). Because by the time of the inquest these otherwise caring people will have reflected on their own positions, received legal advice or been "spoken to" by their fellow health carers, remarks made to relatives at the time of the deceased's death may never be heard again. This is not to say they perjure themselves. But rather, in comforting relatives at a time of sadness, they may say things without foundation but which nevertheless give the relatives the idea that the death may have been caused by negligence when in fact it was not. Relatives should be warned that they should expect to hear things and see records which are not in accordance with their memories and which conflict with things said to them at the time of their relative's death. They should be warned when being in court to keep a poker face, to be polite to all who they come into contact with, including the health carers, and to understand that the health carers will often (though wrongly) feel they personally are on trial for the death. Though many relatives will be angry and bitter, most will understand this, if the system is properly explained to them. They should be made to understand too that like most injured plaintiffs they will start with a considerable degree of sympathy from the bench and that counsel appearing for the hospital or doctors will need to tread a careful path so as not to lose sympathy for their own clients; that if relatives give evidence, generally speaking, they will not receive the rough and tough treatment given to plaintiffs by defendants' counsel in common law actions. Indeed, the relatives frequently will not have

much to say at all at the inquest save perhaps where hospital procedures are in question and they can throw some light on those procedures as observed in relation to treatment given to the deceased.

The Officer Assisting the Coroner

Typically, the coroner is assisted by an experienced police prosecutor, who will have worked with an investigating officer who has taken statements from the major witnesses. The degree to which officers assisting become involved will vary widely. Some will become involved to a fanatical degree, especially if they sense a wrongdoing of a criminal kind. Others, either because of an excessive workload or lack of interest or perhaps a combination, will take an almost passive role, doing nothing more than calling the witnesses and having them verify their statements. As representatives of the deceased's relatives, your interests will often be similar to those of the officer assisting. Often, a competent and zealous officer assisting will do your job for you, leaving you very little to ask or submit. A good rapport with the prosecutor is usually a bonus. This can help where, for example, the relatives cannot afford transcript or to retain an expert. Often a prosecutor can be persuaded to allow his/her copy of the transcript to be borrowed, or will retain and call an expert suggested by you.

Documents

It is important to ensure all relevant documents are in court. Typically these will include hospital records and often the medical records kept by the treating doctors. As, until leave is given to appear, representatives for the deceased have no standing to issue subpoenas, you should ensure, by liaison with the officer assisting, that he/she has caused summonses to be issued to produce all relevant documents. You may need to offer to draft the summonses to ensure they are sufficiently wide. If unhappy with the degree to which the officer assisting has dealt with subpoenas you may need to raise this problem at the beginning of the inquest and the coroner will usually be sympathetically inclined and direct that supplementary subpoenas be issued and served if appropriate.

The hospital notes should be the subject of a freedom of information application as soon as possible after the death. It occasionally happens that medical records are tampered with and it is useful to have an early version of the records. Hospital authorities are not always helpful in dealing with freedom of information applications and will often attempt (not necessarily deliberately) to pass off an incomplete set. But you should insist on at least:

(a) all documents signed by the deceased;
(b) surgeon's notes;
(c) anaesthetist's notes;
(d) nursing notes;
(e) drug/temperature and other charts;
(f) X-ray reports;
(g) all other documents held by the hospital relating to the deceased.

The protocols of the relevant hospitals may also be relevant and should be available for scrutiny. Most visiting medical officers have written arrangements with hospitals governing the terms of their visiting rights. These also should be available if necessary by summons as they can occasionally throw light on matters relevant to the death.

In dealing with documents, it should be appreciated you may not know until well into the inquest what is or is not relevant. So if in doubt, obtain copies of everything.

For the private hospital the FOI mechanism does not apply. But under regulations pursuant to other Acts, for example in NSW, the *Nursing Homes Act 1988* and *Private Hospitals and Day Procedure Centres Act 1988*, access to some medical records is permitted.

Prior to the inquest the officer assisting will usually give solicitors appearing for the relatives copies of all statements. The investigating officer will not necessarily have interviewed your clients. If not, and your clients have relevant matters to put, you should take statements and provide them to the officer assisting. You should bear in mind that copies will be given to representatives for the health carers whose representatives will have the right to cross examine, which they will often wish to exercise.

Types of Death

In general terms, a negligent hospital death will involve:

a) failure to recognise in accident or emergency, quickly or at all, a life threatening condition and to treat it promptly;
b) surgical misadventure such as an undetected perforated bowel during a laparoscopic procedure;
c) an anaesthetic misadventure such as incorrect intubation;
d) incorrect after care such as failure on the part of nursing/medical staff to notice an infection, warning of some shortcoming in the surgical procedure;
e) incorrect administration of drugs; incorrect drugs or incorrect dosages;
f) a breakdown of communication of one kind or another such as a failure to record a result or a recommendation for treatment;
g) poor supervision of medical or nursing staff.

The Inquest/Negligence Trial Conflict

Naturally, not all deaths in hospitals can be classified as negligently caused or even preventable.

Relatives should be warned that though the death was unexpected or that they found shortcomings in the way they or the deceased were treated, there may have been no negligence. Often, however, they will wish to take advantage of the inquest to find out exactly what happened and to publicise the death in the hope some good to others will ensue. That relatives and their lawyers recognise that not all deaths are negligently caused is ▶

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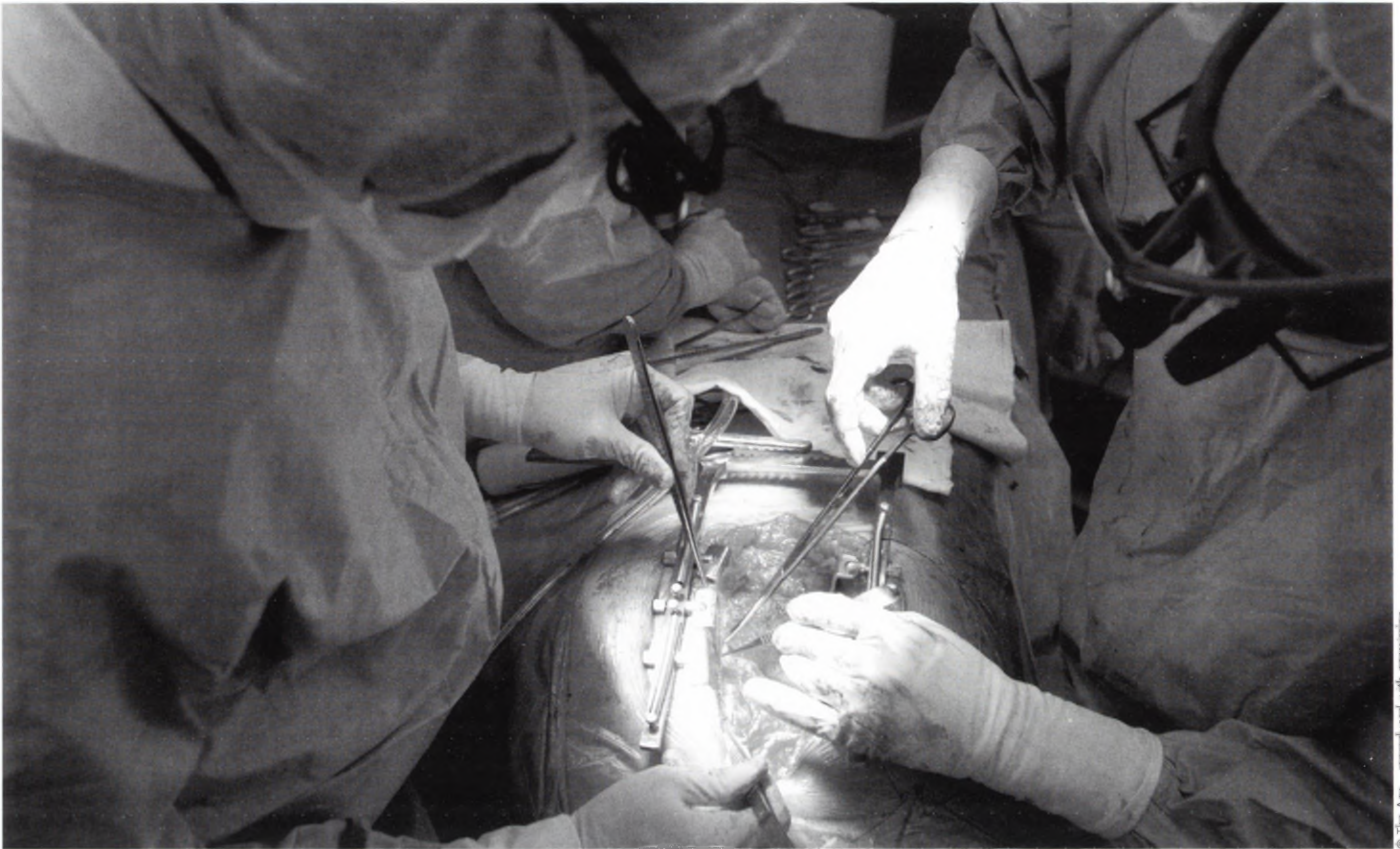

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frequently not appreciated by health carers, some of whom find it hard to see the relatives having any altruistic motives. But I have frequently acted for people who have been more than happy to have an inquest so their views can be given and procedures publicised even though they know no negligence action can possibly follow. And I have attempted to convince health carers when appearing for them that such altruistic attitudes do exist, that they do not necessarily need feel they are on trial and that hospitals and the medical profession can benefit from examination of their procedures. But it is often difficult to convince them of this.

The Course of the Inquest

Typically the first witness is the investigating police officer whose statement will give an overview of the inquiries. Where there are specific allegations to be made against the health carers, the relatives or their witnesses (sometimes doctors) with criticisms to make, will then be called. The stage is then set for the inquiry and all sides can see what the issues are likely to be. Then a series of nurses, interspersed with doctors, may be called. As frequently the real issues do not immediately become apparent, new medical opinion may be sought along the way by the officer assisting, or the relatives of the health carers, and their evidence then given.

Planning for the Negligence Action

Though views differ on this subject, and it might be supposed that harm may come to the relatives' cause by showing their hand at an early stage by calling evidence to support their thesis of negligence, generally speaking this procedure is preferable in my view. Counsel for the health carers may in cross-examination expose weaknesses not otherwise apparent. So the relatives can then be better prepared for their common law action by exploring these weaknesses and dealing with them. Alternatively, the relatives may realise at a much earlier stage, because of these exposed weaknesses, that they in fact have no cause of action.

If no real weaknesses are exposed, insurers will take the subsequent common law proceedings more seriously, and raise estimates of reserves at an earlier stage, easing the path to a speedy and sensible settlement.

Further, with the assistance from experienced specialists in the relevant field, the coroner may be more inclined to make recommendations for the change of various hospital procedures. So public good may come as well as the satisfaction to the relatives of knowing their representation has helped achieve that, therefore indirectly saving other lives.

Legal Aid

Typically, relatives will not be able to pay fancy fees for representation at inquests. Legal Aid will rarely be given. Under current NSW guidelines, for example, (operative since 1/7/98) representation will be funded where it is a preliminary step to civil proceedings for which aid is available or where the public interest will be advanced. Aid for civil proceedings will only be available for a person at a special disadvantage, such as a child, or a person with intellectual impairment. So in most cases Legal Aid will not be granted. Aid grants when made should be requested to cover the costs of obtaining expert medical opinions. The health carers' insurers will have obtained such opinions and their advisers will be on top of the medical issues. Those representing the relatives should be put in a similar position. Sometimes the deceased's treating general practition-

er will be the source of assistance. Often the only place to go for help is one of the medico-legal groups now proliferating. The medical libraries of the Sydney Hospital and the University of Sydney as well as the Internet are excellent sources of research assistance.

Submissions

Finally, when the evidence is complete, all parties have the opportunity to make submissions. Coroners typically are overworked though diligent and caring. Some country coroners are not magistrates and have had little experience in analysing evidence, dealing with witnesses, and objections and making findings. Experienced or inexperienced, they all appreciate assistance from counsel or solicitors appearing before them. Written submissions are helpful and their substance more likely to find their way into a coroner's findings or recommendations than oral ones, especially if relevant, sensible and in accordance with the evidence. Remember to consult the relatives when making submissions. This is their one chance to criticise the system or the doctors or nurses so they can feel they have had their day in court. That does not mean that your position as advocate should be usurped by their views, especially if ill founded. However, as relatives of the deceased, having sat through all of the evidence, they will often have helpful suggestions for additional submissions which you might not have thought of but will readily accept.

A coroner will not always accept submissions that recommendations should be made. But that does not mean you have not done your job. The mere fact that the inquiry has been held will often be the most important achievement and may well prove to have provided the basis for a sound claim in negligence.

After the Inquest and Before the Action

Once the inquest is completed, a full transcript and set of copies of all statements and other documents tendered in evidence should be obtained. They will play an important role in any subsequent negligence action, providing an excellent set of potentially prior inconsistent statements with which to damage potential defendants (or which can damage potential plaintiffs). That is quite apart from the assistance they will provide in enabling you to obtain expert opinion based on the proper premises.

Conclusion

Because the rules of evidence do not apply, it is sometimes thought, incorrectly in my view, that inquests are easy learning grounds for the unskilled or that they do not really matter. In my view the opposite is true. Handled skilfully by relatives' counsel, they can result in settlements or judgments much more favourable than would otherwise have been the case. Handled skilfully by those representing health carers, they can cause relatives to lose heart and either not sue at all or sue but settle for significantly discounted sums. ■

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