



Queensland University of Technology
Brisbane Australia

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Title: Arguing the Autopsy: mutual suspicion, jurisdictional confusion and the socially marginal

Authors : Belinda Carpenter, Gordon Tait, Carol Quadrelli

Abstract

Vulnerable and marginalised populations are not only over-represented in the criminal justice system, but also in civil jurisdictions like the coronial system. Moreover, many of the personnel who deal with criminal matters, especially in rural and regional areas, are also those who manage the coronial death investigation. This movement back and forth between civil and criminal jurisdictions is difficult for the both professional personnel and the families, but especially for those families who may also have had dealings with these personnel in the criminal justice system, or who present as suspicious due to larger historical and global issues. While coronial legislation now allows families to raise cultural and religious concerns about the process, particularly to do with the autopsy of their loved one, this also requires them to identify themselves to police at the initial stage of the death investigation. This paper, part of a larger body of work on autopsy decision making, discusses the ways in which this information is gathered by police, how it is communicated through the system, the ways in which families are supported through the process, and the difficulties that ensue.

Introduction

The coronial investigation sits between civil and criminal jurisdictions, as an inquisitorial system which focuses on finding the facts of the matter without the allocation of blame or liability. For this reason, the coroner has wide powers of inquiry, and is not bound by the usual rules of evidence, being able to admit hearsay for example, and extend privilege to witnesses in inquests (Scott Bray 2010). Nevertheless, all of the key players in the coronial death investigation have experience (sometimes the majority of their experience) in criminal investigations and proceedings, and until 2003 in Queensland, a direct link between coronial and criminal investigations was in place, since Coroners could refer matters to trial (Freckleton and Ranson 2006). Moreover, Coroners are appointed as magistrates and many act concurrently - as coroners, investigating deaths, and as magistrates, ruling on criminal behaviour. Similarly, the vast majority of policing work is investigation of criminal matters with most police rarely investigating more than a few coronial deaths each year (Drayton 2011), while most pathologists who work in the coronial jurisdiction are forensically trained and appear in court as specialist witnesses in both inquests and criminal trials (Kramar 2006). The important issue here, which this paper seeks to address, is how wider social assumptions about the dangerousness of some populations and the visibility of others in the criminal justice space, can impact on assessments of suspicious deaths.

At the same time, research supports the fact that vulnerable populations are over-represented in coronial death investigations (predominantly the elderly, Indigenous people and those from low socio-economic status), some of whom are also over-represented in the criminal justice system (most notably those from low socio-economic and Indigenous communities) (Carpenter and Tait 2009). This means that many of the bereaved families who are caught up in a coronial death investigation also move between the criminal and coronial systems. This paper also seeks to engage with the implications of this, where families may bring with them pre-existing relationships (if the family is known to the local police or magistrate), as well as 'innuendos of suspicion' and the 'general impression' by both the bereaved family and the wider community 'that it is wrongdoing rather than tragedy that is being investigated' (Clarke and McCreanor 2006:33).

A final consideration is the legislative requirement, variously enacted in all Australian states, that a family's religious and cultural status and concerns about the autopsy – also a legislative requirement of a coronial investigation – be communicated to the police at the time of the death notification. In Australia, those cultures and religions with a known objection to autopsy are the Indigenous population and members of Islam and Judaism. This requires bereaved families to not only identify themselves to police but to understand and negotiate, in the traumatised state of a sudden bereavement, the medical and legal implications of a challenge to the internal autopsy of a loved one (Drayton 2011). This is complicated by the fact that the Coroner has the final determination as to whether or not an internal autopsy will proceed and that a family's objection may, despite their strongly held beliefs, be over-ruled.

This involvement of families can be situated as a relatively recent addition to coronial legislation, influenced by an increasing multicultural tolerance of difference by public authorities, supported as a last resort through laws against discrimination (Humphrey 2007:10). However, such adjustments to coronial law also fit with the 'jurisdiction's pro-therapeutic potential ... and its capacity to produce social benefits and restorative outcomes from tragic circumstances' (Scott Bray 2010:567). This is related to the evolution of the coronial investigation from a reactive to a proactive jurisdiction, with a statutory basis for the prevention of avoidable deaths through recommendations to relevant public authorities (Scott Bray 2010:570-571). Embedded in a larger research project on autopsy decision making and interviews with key professionals in the Queensland coronial system, this paper explores these related ideas, especially the way in which a push toward therapeutic jurisprudence and 'the wishes of the family' creates a 'dissonance between representing the dead body in medico legal discourse and remembering or memorialising the dead in culture' (Scott Bray 2006:42).

Vulnerable populations

In coronial legislation, the expectation that religion and culture will serve as a means for objecting to an invasive internal autopsy, can bring vulnerable populations to the forefront of a death investigation. In Australia the three main groups in this regard – Indigenous, Jewish and Muslim – find themselves at different locations within both social and coronial assumptions about suspicious deaths.

Islam.

... and I've found that Muslims have a tendency to object big time. It's not that I hate Muslims it's just that they are prominent on the objection side, 'oh you don't need to do this because you're cutting up the body' and well hang on, I immediately get suspicious when somebody, 'oh no you shouldn't you shouldn't'. What have you had to do with this death in that case, I think we need to look at this a little bit further if you're objecting so strongly and putting it under the guise of religious or cultural concerns (Police Officer).

In general terms, Islamic objections to autopsy are based on the importance of body wholeness at death (Campbell 1998:295). Three further beliefs support such a proscription against autopsy. The first is a general concern that the autopsy procedure will delay burial, which according to Islamic law should occur within 24 hours of the death. The second proscription comes from the Islamic belief in the sacredness of the body and this is due to the religious belief that the body belongs to God. The third is the perception that the dead perceive pain, with such a belief based on the words of the prophet Mohammed who claimed that “the breaking of the bone of a dead person is equal in sin to doing this while he is alive” (Gatrad 1994:523, see also Al-Adnani 2006; Lynch 1999).

While the Islamic objection to autopsy is well founded, the suspicion inherent in such an objection is also apparent, and in our interviews, missing from discussions of other cultural or religious objections. While it is convenient to point to the rising Islamophobia in western nations post 9/11 (Spalek 2008; Poynting and Mason 2006), it is also clear that Muslim immigrants have been seen as a problem community since Lebanese Muslims started arriving in Australia in significant numbers from the 1970s (Humphrey 2007:12; Poynting and Mason 2007). There may be a number of reasons for this. First is the intertwining of religion and politics in Islam and its portrayal as in opposition to secular modernity, which correlates with political disloyalty to Australian national identity. Concerns over ‘Muslim first and Australian second’, speak to the ‘underlying expectation that all immigrants are on the journey to becoming Australian, at least across generations’ (Humphrey 2007:12). Second, is the focus on the cultural incompatibility of Islam to the West which is positioned as a cultural backwardness rather than just a cultural difference, and particularly in terms of their control and treatment of women. Such an understanding constructs Muslims as ‘trapped by tradition’ in contrast to the West which is ‘liberated from cultural constraints and individually autonomous’ (Humphrey 2007:21). Finally, is the more recent moral panic around terrorism which has led to a situation ‘where any expression of Islamic religious identity is suspicious’, possibly indicative of an underlying and dangerous fundamentalism

(Humphrey 2006:13). This has led to the creation of 'suspect communities' who should be 'monitored by state agencies, casting new questions about citizenship, identity and loyalty' (Spalek 2008: 211). Such an understanding is now widespread in Australian society with the 'Arab other' constructed through a 'complex process involving recurrent negative media portrayals, prejudiced political pronouncements and racist populist rhetoric' (White 2009:366).

Judaism

There is a liaison for the Jewish community. I think there is also for the Samoans and so on, through the Church. But they're less proactive than the Jewish community. I think there's a liaison fellow from the Jewish community, and he'll get involved pretty quickly. It's really just to ensure that the burial takes place as soon as possible. That's not necessarily an objection to autopsy. I don't think they mind autopsy so much, but it's got to be done quickly (Coroner)

He's very much an advocate for the Jewish community in New South Wales and by default, now all of Australia, who was very, very active in issues of objections to autopsies, objections to retention of tissues, and was very active in changing initially, the way that the New South Wales Government operated and ultimately, the law (Pathologist)

In Judaism, it is considered a desecration to interfere with the body of the dead (Segal 2006:102). This is because, according to Mittleman et al (1992:826), the Jewish faith never views a deceased person as a corpse. 'Having housed G-d's soul, the body, even after death, is considered a holy vessel. Furthermore, the soul remains in close proximity to the body immediately after cessation of physical life, thereby suffering a sense of separation anxiety. The dissection of the body can therefore be considered painful to the soul which should be treated with the highest level of dignity'. Despite the similarities between Judaism and Islam in terms of their location within the coronial death investigation, and the religious legitimacy of their objection, the differences between the situation of Jewish advocacy and that of Muslim suspicion is stark and speaks to the different space that the Jewish community occupy in Australian society. Part of the reason for this, according to Stratton (2000) is that the 'Jew' is a socially constructed 'gentile, Western Other', homogenised and othered in much the same way as the 'Asian', but not to the same extent because the Jew is also white, European and Western. It is also consistently noted that prominent members of the Jewish community were part of the founding government of Australia, and continued to use their influence in policy and legislation regarding Jewish immigration after WWII (Rutland 2005). Research also demonstrates that anti-Semitism is on the decrease in Australia, unlike many other countries (Stobbs 2008; Rutland 2008) and that the Jewish community are neither over-policed nor over-criminalised in Australia (Stobbs 2008). Finally, the recasting of Judaism after the Holocaust as integral to the history of the West would appear to place Jewish objections against autopsy in a different location to either Muslim or Indigenous concerns (Mamdani 2004).

Indigenous

But interestingly we rarely have many issues concerning autopsies within the Aboriginal community and we should do, there should be more and I don't know why. Now it could be that it's more of an urban population and therefore it's not a particular issue for them or it could be that no-one's asking the questions (Coroner)

There's a fair few Aboriginal autopsies that we do as well and there's never any sort of problems getting permission because they don't have a problem with having an autopsy. There's never been any protestation. So I don't really know what all the ho ha is about (Pathologist)

Indigenous cultural proscriptions against autopsy are in place to protect the spirit of the deceased, which it is argued would be harmed by a mutilation of the body and thus prevented from entering the dreamtime (Lynch 1999:72). As Vines (2007:17) identifies 'the relationship between Aboriginal people and their dead is one of custodianship. The body should remain whole so that the spirit will have somewhere to go. Autopsy is often seen as desecration and destructive of the spirit'. Unlike the space in which Muslim objections may find themselves – as inherently suspicious - it appears that Indigenous objections are all but invisible in the Queensland coronial system. There may be a number of reasons for this. First, a long and well documented history of poor relations between police and Indigenous people, including 'volatile conflict' and 'police abuse and harassment', 'excessive force' and 'institutional racism' (Cuneen 2006), may mean that Indigenous people do not wish to have their cultural identity known to police. Second, given the over-representation of Indigenous people in the criminal justice system – also well documented – it may be that if their cultural identity is known, this is through adverse dealings with police and magistrates. In such a context, Indigenous people may feel powerless to have their objections heard. Unfortunately, and as we have noted elsewhere, such silence and invisibility is in the context of Indigenous over-representation in the coronial system due in part to such factors as endemic violence, poor access to health care, low life expectancies and high rates of chronic disease. Moreover, over-representation is not an issue experienced by either the Muslim or the Jewish community (Carpenter and Tait 2009; Carpenter et al 2011). Ironically, the silence and invisibility of the Indigenous community occurs against a backdrop of 'the endemic losses of colonialism and the heightened mortality of ongoing alienation', and which in other contexts, such as Maori in New Zealand, have been argued to increase rather than decrease the relevance of cultural practices in relation to loss and death (Clarke and McCreanor 2006:27).

Grief work

So the short answer is that you can't be assured that they [the family] understand, you can't actually have any confidence that people know what they're even agreeing to. And this is an ethical dilemma we struggle with (Counsellor)

Most people don't object. I don't know ... I suspect part of its due to the blankness of their minds and they just go along with whatever ... Some of them I suspect probably think they're a bit powerless, you know, they're unfamiliar with death, they've had the police rock up and say this is what's going to happen (Pathologist)

... and dealing with people who are suddenly thrust into a grieving process is totally different from dealing with somebody who's had their house broken into or somebody who was drunk and belligerent (Police Officer)

I get the feeling that it [the death investigation] is allocated to quite junior officers with little or no training. So I would say no; I would say that I wouldn't be confident that it was really very carefully investigated (Coroner)

These statements raise a number of relevant issues in the grief work required of Coronial personnel, which is replicated in the little research there is on families dealings with a coronial death, with most suggesting that coronial processes can cause further trauma to family members already suffering significant grief (Green 1992; Harwood et al 2002; Biddle 2003; Robb and Sullivan 2004; Clarke and McCreanor 2006; Drayton 2011). While this has been noted in particular during the inquest (Biddle 2003; Green 1992), and in the scandals relating to the retention of organs (Robb and Sullivan 2004; Drayton 2011) and experimentation on bodies (Walker 2001), it is most keenly felt in the commonplace (and legislative necessity) of autopsy, where terms such as 'mutilation', 'desecration', and 'barbaric acts' have been used by families to describe images of the autopsy of their loved one (Robb and Sullivan 2004:41). It has been argued that this demonstrates 'a profound connection to the body of the deceased' by those suffering from grief and loss (Drayton 2011:231) in part because the dead body maintains a 'social existence as a powerful representation of the self' (Hockey 1996:56) which is not immediately removed at death.

It is also the case that this connection between the bereaved and the body of the deceased is intensified during a coronial death investigation due to the added trauma of the unexpected and often violent nature of the death (Neria and Litz 2004). This is partly because decisions about autopsy occur when families are still in the grip of the shock and disbelief of the death notification, 'when their ability to process and retain complex information may be severely compromised' (Drayton 2011:238). In such conversations, two competing representations of the dead body are evident: the medico-legal body which is 'mechanistic', 'devoid of personality', 'tissue'; and the body as 'beloved and lamented' (Drayton 2011:240).

Research has also shown that when cultural difference is added to the medico-legal inquiry, harm and trauma can be exacerbated by the ways in which coronial procedures interrupt culturally specific grieving practices, many of which focus on the presence of a body (Tatz 2005; Byard and Chivell 2005; Clarke and McCreanor 2006). Moreover, while the appearance of police at a death investigation may cause alarm in many families, with the innuendos of guilt and suspicion that they bring, this is particularly pronounced for those communities already over policed and over criminalised, like Aboriginal people in

Australia, or Maori in New Zealand (Carpenter and Tait 2010; Clarke and McCreanor 2006; Tatz 2005). In stark contrast, the disruption of religious grieving practices is less researched in the context of a coronial death investigation. Despite this, such practices appear to be more familiar within the coronial community generally, with religious objections influencing Coroners to make less invasive autopsy decisions (Carpenter et al 2011). It is also the case, however, that such knowledge does not necessarily decrease feelings of suspicion and heightened trauma of grieving families, especially in Muslim communities, who are more likely to feel positioned as 'outsiders' (Yasmeen 2008).

Therapeutic jurisprudence

And I just think that's so important and I see the fallout of what happens if people aren't heard and you know if someone has a really strong objection because of religion and I can come back and explain why it has to happen regardless of that, they can accept that whereas if they're not heard it's like an assault on their belief. And that's an added trauma to them (Counsellor)

In other words the coroners are really, really, really reluctant to go against a family objection no matter what the basis for it is, no matter what unsupported evidence that they provide (Pathologist)

I really dislike it when coroners lean too much towards taking the religious objections on board, you know, I don't think religious objections should have any part to do with it (Police Officer)

There has to be a bloody good reason to over-ride an objection to autopsy. A really good reason. Usually the only reason is if there's criminal behaviour involved (Coroner)

There is clearly a tension, evident in the statements above, between the medico-legal death investigation and the emotion and humanity of the family. It is perhaps not surprising that pathologists stand in opposition to what they perceive as this recent impost on the process of a death investigation – wedded as they are to science as the point of access for the truth of the death (Carpenter and Tait 2010) - and perhaps equally unsurprising that counsellors are able to accommodate and advocate for the family's place in the investigation of the death of their loved one – positioned as they are 'in an ethical framework which asserts the centrality of client self-determination' (Drayton 2011:238). What may be more curious is the diametrically opposed position of police and Coroners to the introduction of familial beliefs – who are both legal officers of the court and yet who offer either resentment or respect to the idea. While the valorisation of science in modernity may be able to accommodate the police officers views (Carpenter and Tait 2010), the views of the Coroner are of a different nature, recognising 'the broader social implications of death' (Scott Bray 2010:568).

Since all coronial legislation now stresses 'the rights of the family member to be involved in decisions concerning the deceased' (Barnes 2003:1.1), it is increasingly being suggested that a Coroner's work is intimately connected with 'well being' and thus fits squarely within the ambit of therapeutic jurisprudence (King 2009). While commentators are quick to point out that therapeutic values should not outweigh procedural fairness requirements (Wexler and

Winick 1996; 2003) it is also acknowledged that sensitivity, clear communication, access to counselling and support and opportunities for families to express their distress and grief are crucial to an acknowledgement of their loss and the humanity of their loved one (Freckleton 2007). While we have argued elsewhere (Carpenter and Tait 2010) that the central debate within the coronial jurisdiction is between the pillars of law and medicine, it also seems likely that the bereaved views in relation to autopsy introduce a third discourse into the debate – ‘knowledge born of emotional attachment’ or ‘suffering’ (Drayton 2011:236). Moreover this discourse of loss and bereavement has been shown to be particularly potent, motivating governments to instigate public inquiries, and support changes in policy, practice and legislation (Drayton 2011: 236, see for example Walker 2001; Redfern 2001). It also appears to be influencing Coronial practice.

Conclusion

The introduction of bereaved family’s views into the medico-legal death investigation has added three central tensions to the process. The first is the different spaces occupied by the families, depending on their cultural or religious location in larger social and historical processes. It is clear that wider fears over Islamic fundamentalism post 9/11 has influenced suspicion in the minds of some coronial personnel, while Jewish political and social influence has been used to advocate more successfully for bereaved families. The silence and invisibility of Indigenous beliefs and concerns speaks to their ambiguous position in a coronial investigation often overseen by personnel who also act in the criminal justice space.

Second, these conflicting and contradictory engagements with bereaved families who have legitimate reasons for objecting to an autopsy is compounded by the nature of a reportable death - unexpected and often violent - and the ways in which coronial procedures disrupt traditional grieving practices. Specifically, it is the differing ways in which the dead body is perceived – corpse or beloved – and its forced removal for the purpose of the medico-legal process of death investigation that is most often cited as the cause of suffering and pain for the family. This is compounded by the role of police in the investigation of coronial deaths, which has been highlighted as particularly traumatic for those families who are part of communities already over-policed and over-criminalised.

Finally, the differences between coronial personnel’s attitudes to the role and place of families suffering through a medico-legal investigation, has indicated the importance placed by Coroners on the relation between their role in the prevention of avoidable deaths and the therapeutic potential of a death investigation for families. As the primary decision makers in a coronial death investigation, this convergence has the potential to undermine more traditional knowledges like science and medicine as the final arbiters in a death

investigation. CSI notwithstanding it appears that a discourse of emotion and suffering may be on the verge of entering the medico-legal space of a coronial investigation.

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