Decision-making in a death investigation: emotion, families and the coroner.

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Abstract

The role of the coroner in common law countries such as Australia, England, Canada, and New Zealand is to preside over death investigations where there is uncertainty as to the manner of death, a need to identify the deceased, a death of unknown cause or a violent or unnatural death. The vast majority of these deaths are not suspicious and thus require coroners to engage with grieving families who have been thrust into a legal process through the misfortune of a loved one's sudden or unexpected death. In this research, ten experienced coroners discussed how they negotiated the grief and trauma evident in a death investigation. In doing so they articulated two distinct ways in which legal officers engaged with emotions which are also evident in the literature. The first engages the script of judicial dispassion, articulating a hierarchical relationship between reason and emotion, while the second introduces an ethic of care via the principles of therapeutic jurisprudence, and thus offers a challenge to the role of emotion in the personae of the professional judicial officer. By utilising Hochschild's[1] work on the sociology of emotions, this paper discusses the various ways in which coroners manage the emotion of a death investigation through emotion work. While emotional distance may be an understandable response by coroners to the grief and trauma experienced by families and directed at cleaner coronial decision making, we conclude that coroners may be better served by offering emotions such as sympathy, consideration and compassion directly to the family in those situations where families are struggling to accept, or are resistant to, coroners decisions.

Introduction

The role of the coroner is to preside over the investigation of unexpected and unnatural deaths. In Australia, and other common law jurisdictions such as England, Wales and New Zealand, where coroners are legally trained, they are aided in their investigatory work by

[1] Hochschild, A. "Emotion Work, Feeling Rules, and Social Structure" (1979) 85(3) AJS 551.

police, who visit the scene of the death and gather relevant information, pathologists and other medical personnel who perform autopsies and other medical procedures on the deceased, and coronial counsellors who liaise with the family throughout the investigation. Coroners are responsible for a cause of death, the identity of the deceased and the date and place of death being determined and recorded in the Registry of Births Deaths and Marriages.[2]

Around Australia, deaths investigated by coroners make up only a small percentage (between 10 and 20 per cent) of all deaths in a community.[3] For deaths that are not reported (80-85% of all deaths in Australia) the cause is certified by individual doctors without reference to the coroner. The primary focus of coronial investigations is neither criminal charges nor disciplinary action but the benign administrative task of creating accurate death certificates with the vast majority of reportable deaths being due to natural causes that are only reported because at the time of death the precise cause is not known.[4] Only a small percentage of deaths that are reported to coroners are sufficiently contentious to warrant an inquest - a public hearing in which witnesses' accounts are tested in order to enable the coroner to make the necessary findings. Over 95% are dealt with administratively 'on the papers'.

Since 1985 in Australia, all state jurisdictions have undertaken major reviews of their coronial systems.[5] The last to overhaul their Coroners Act was Queensland which replaced *The Coroners Act 1958* with *The Coroners Act 2003*. Following the precedence set by the other States, and with a capacity to reflect on the previous changes, the central features of the Queensland coronial system is to emphasise: the desirability of a more consistent, efficient and transparent coronial system; the right of family members to be involved in coronial investigations; and, the need for coroners to seek to contribute proactively to a safer and more just community.[6] This paper is most interested in exploring this second significant change to

[2] Barnes, M and B. Carpenter. "Reliance on Internal Autopies in Coronial Investigations: a review of the issues" (2011) 19 JLM 88.
[3] Freckelton, I. and D. Ranson. *Death Investigation and the Coroner's Inquest* (Melbourne, Oxford University Press, Melbourne, 2006)
[4] National Coronial Information System. (2015) Retrieved from: http://www.ncis.org.au/.
[5] Freckleton, I. "Anglo-Australian Coronial Law reform: the widening gap" (2010) 17 JLM 471.
[6] Barnes, M. *Queensland State Coroner's Guidelines*. (2012) Retrieved from: http://www.courts.qld.gov.au

the legislation, especially how coroners as judicial officers, determine how best to engage with families seeking more information about a coronial investigation, and possibly raising a concern about the performance of an autopsy.

Prior to the introduction of the *Coroners Act 2003*, family members were largely treated as observers in a death investigation, with no right to participate in decisions about their deceased relatives. The inclusion of families in the *Coroners Act 2003*, gives them the right to have their views considered when issues arise such as the extent of autopsy, and to be informed of the coroner's decision to retain organs/tissues for further investigation.[7] All other states have similar statutory regimes. Previous research has demonstrated that raised family concerns do affect coroner's decision making, with coroners less likely to order an autopsy when a family concern is reported to them.[8] This point in the process is also when coroners can be most confronted with the emotion of a death investigation through the grief and trauma of the family, especially since most coronial cases in Australia are normally decided 'on the papers' rather than face to face with the family through the inquest.

The rest of this paper explores the ways in which coroners understand their role in the context of two related yet contradictory points. The first is the displacement of emotion in judicial decision making. In most legal jurisprudence, reason and emotion are not simply diametrically opposed to each other, but are hierarchically ordered, with emotion positioned as capable of undermining reasoned judgement.[9] Second, is the fact that coroners are necessarily confronted with raw and pressing emotions in their deliberations. The effect of this has been made clear in comparative research on suicide determination by coroners where the increasing influence of therapeutic jurisprudence – 'the study of the role of law as a therapeutic agent' – in coronial decision making has been identified. Here, concerns over closure and the stigma to families can make coroners reluctant to find suicide as a cause of death.[10] By situating 'emotion work' as a crucial element of coronial practice, this paper

[7] id., Ch. 5.
[8] Carpenter, B., Tait, G., Adkins, G., Barnes, M., Naylor, C, and N. Begum. "Communicating with the Coroner: How religion, culture, and family concerns may influence autopsy decision making" (2011) 35(4) Death Studies 316.
[9] Karstedt S. "Emotions and Criminal Justice" (2002) 6(3) Theoretical Criminology 299.
[10] Carpenter, B., Tait, G., Stobbs, N. and M. Barnes. "When Coroners Care Too Much: Therapeutic jurisprudence and suicide findings" 2015 24(3) JJA 172.

offers an opportunity to explore how coroners manage the emotional context of their work and gives us insight into the 'cultural script of judicial dispassion'.[11]

Judicial decision making and the role and place of emotion in the law.

While the law has always 'taken account of emotion' – through for example, the criminal law of provocation, the measurement of emotional suffering in torts, the management of evidence presented to juries and the facilitation of love and attachment in family law – this relationship has been a 'rocky one'.[12] Legal scholars have tended to dichotomise and hierarchise reason and emotion, construing legal thought as a cognitive rational process undermined and unsettled by affective emotional responses.[13] The historical development of the law has positioned emotions as an intruder to the true preserve of the law – reason – with irrational bursts of feelings 'short circuiting' objective deliberations by judge and jury. This framing of legal decision making as being based solely on the objective assessment of factual evidence has maintained, despite a growing body of evidence to the contrary.[14] In short, the role of emotion within the law has been that to which the law has sought to avoid or counteract. It is positioned as 'subjective, irrational, prejudicial, intangible, partial and impervious to reason'.[15] In such a context, investigating the role of emotion in law is positioned as an 'illegitimate endeavor and one that will have a de-stabilising effect on the rule of law'[16] given the historic view of law as 'a process of deducing, from a framework of legal principles, the rule to be applied to a particular case'.[17] This dichotomous and hierarchical relationship between reason and emotion is most often noted in the 'persistent cultural script of judicial dispassion' where to call a judge 'emotional' is a 'stinging insult', 'signifying a failure of discipline, impartiality and reason'.[18] In contemporary western jurisprudence it is never appropriate for emotion to affect judicial decision making. Judges have often

[11] Maroney, T. "The Persistent Cultural Script of Judicial Dispassion" (2011) 99(2) CLR 629.
[12] Maroney, T. "Law and Emotion: A proposed taxonomy of an emerging field" (2006) 30 Law Hum Behav 119.
[13] Abrams, K. and H. Keren. "Who's Afraid of Law and the Emotions" (2010) 94 Minnesota Law Review 1997.
[14] Guthrie, C. Rachlinski, J. and A. Wistrich. "Blinking on the Bench: How judges decide cases" (2007) 93(1) Cornell Law Review 1.
[15] Bandes, S. and J. Blumenthal "Emotion and the Law" 8 Annual Review of Law and Social Science 161 at 162.
[16] id., p. 162.
[17] Abrams and Keren, op. cit., n. 12, p. 2003.
[18] Maroney, op. cit., n. 10, p. 629.

interpreted this to mean that 'feelings or emotional displays must be repressed' since such affective responses are 'inconsistent with the legitimate exercise of judicial or legal authority'.[19] A detached rationalist stance was also seen to 'insulate judges' from 'political pressure' or from 'undue sympathy' to families or victims.[20]

The positioning of science as better path to the "truth" in inquests was central to the competition for the control of the coronial jurisdiction in England in the nineteenth century when a movement to require coroners to be medically trained was prosecuted on the basis that such a perspective was more in keeping with the rationality so prized by modernity.[21] This push did not succeed in England. However, throughout most of the twentieth century, in Australia, dominance of the jurisdiction was ceded to the medical profession, in particualr forenesic pathology, as full time professional coroners were replaced by clerical court staff.

However, for more than thirty years legal scholars have been challenging the 'narrow definition of rationality that has informed traditional legal thought'.[22] Prompted by the work of sociology as much as legal jurisprudence, it has been argued that the law rests on a series of unexplored assumptions about emotion and how it influences behavior and decision making. By rejecting the fiction of 'pure, emotionless rationality' such scholarship explores how emotion and rationality actually interact, posing a 'challenge' to standard accounts of legal reasoning and judicial decision making.[23] The implausibility of a model of human behavior where emotion and reason are separated is not only challenged as inappropriate with regard to human nature it is also argued to not be as monolithic as it first appears. Judicial emotion is 'inevitable' and 'perhaps to be welcomed'[24] as an unavoidable part of the 'adjudicative process'.[25] Nevertheless, and despite such a recognition, an 'outward countenance' of 'neutrality, detachment and disinterestedness' are positioned as the desirable

[19] Roach-Anleu, S. and K. Mack. "Judicial Authority and Emotion Work" (2013) 11 TJR 229 at 330.
[20] Abrams and Keren, op. cit., n. 12, p. 2004.
[21] Burney, I. *Bodies of Evidence: Medicine and the Politics of the English Inquest 1830–1926* (Johns Hopkins University Press, Baltimore, MD, 2000).
[22] Abrams and Keren, op. cit., n. 12, p. 1999.
[23] Bandes and Blumenthal, op. cit., n. 14, p. 162.
[24] Maroney, op. cit., n. 10, p. 629.
[25] Roach-Anleu and Mack, op. cit., n. 18, p. 332.

characteristics of an effective judicial demeanour by decision making bodies such as judicial appointment boards.[26]

The idea that judges and magistrates might need to manage their emotional states by doing 'emotion work' has been identified by Roach-Anleu and Mack.[27] Following Hochschild,[28] they recognise that judicial officers might be required to 'evoke or suppress feeling in order to sustain an outward countenance that produces the proper state of mind in others'. According to Hochschild, such 'emotion work' requires a moment of 'pinch' or discrepancy between what one feels and what one wants to feel in certain situations. Eliminating the 'pinch' requires working on such feelings because emotions and actions need to be aligned with the norms and expectations of specific social or professional settings. These are the 'feeling rules' which guide 'emotion work' - the social norms that tell us what to feel, when to feel, how long to feel and how strong our emotions should be. While feeling rules vary in content between occupations, all workers apply a sense of 'should' to the situated feelings that emerge in the course of their working week. For coroners, this requires aligning the cultural script of judicial dispassion in the court room, with the grief and trauma of a unexpected death, in a legislative context where families have a role to play in decision making. In this way, Hochschild offers us a way of seeing and understanding emotions as part of the presentation of self. The sort of emotion work that is enacted tends to signal something about the kind of self the individual is claiming, informed by expectations of behaviour in certain situations. How coroners work to specifically manage these situations is yet to be detailed, despite other areas of legal work coming under scrutiny.[29] The rest of this paper examines the various ways in which coroners make decisions in an environment where emotions are clearly evident but where a script of dispassion prevails.

Coroners and natural justice

In addition to the personal impact the emotional content of coronial inquiries may have on coroners, a cluster of legal rules referred to as procedural fairness or natural justice, may also limit the capacity for coroners to interact with bereaved family members in a meaningful

[26] id, p. 332.
[27] Roach-Anleu and Mack, op. cit., n. 18, p. 334.
[28] Hochschild, op. cit., No. 1.
[29] Roach-Anleu, S. and K. Mack. "Magistrate's Everyday Work and Emotional Labour" (2005) 32(4) J Law Soc 590.

way. These rules are activated when a court or tribunal exercises power that may prejudice a person's rights or interests. The High Court has held they apply to a coroner presiding over an inquest.[30] Of particular relevance to the issues discussed in this article is the requirement that a decision maker disqualify themself from continuing to preside in proceedings if a fair minded observer might reasonably apprehend that they might not bring an impartial and unprejudiced mind to the resolution of questions in issue.[31] One of the ways this concern is recognised as arising in relation to trial courts is if the judge has communicatesion or meets with a party or witness in the absence or without the consent of other parties.[32]

The role of a coroner is very different from that of a trial judge: a coroner inevitably acquires extensive knowledge about a case as they direct the investigation in a manner quite foreign to the detached role played by a judge in adversarial proceedings. The notional observer whose views are the benchmark is presumed to be aware of the decision maker's role and the context in which it occurs.[33] This has led to eminent commentators observing that strict adherence to the rule would not be consistent with the inquisitorial nature of a coroner's role. However, they also concede that the extent to which the appearance of bias rule applies to coroners is an unresolved question.[34] Further, the very experienced lead author of a recently published coroners' handbook cautions that "it is genrally wise for coroners to resisit the temptation to have meetings with grieving relatives, especially if a case is going to inquest." Dillon goes on to suggest that coroners should not even write directly to the family of the deceased, instead, relying on court staff to undertake all communication.[35]

The research project and methodology

This discussion is situated within a ten year history of funded research from both government departments and the Australian Research Council. In 2005, research began on a large quantitative project to explore the decision making of coroners in the context of the newly enacted *Coroners Act 2003* in Queensland. All closed paper coronial files for the first 12-months of the operation of the *Coroners Act 2003* were examined over a four-month period

[30] Annetts v McCann (1970)170 596, 598–603.
[31] Johnson v Johnson (2000) 201 CLR 488 [11].
[32] Re JRL; ex partre CJL [1986] HCA 39.
[33] Ebner v Offical Trustee in Bankruptcy (2000) 205 CLR 337.
[34] Freckelton, I and D. Ranson, *Death Investigation and the Coroner's Inquest* **(**Oxford University Press, Melbourne, 2006) at 587 and 591.
[35] Dillon, H. and M. Hadley. The Australasian Coroner's Manual" (Federation Press, Sydney, 2015) at 38.

by a team of non-medical researchers. A range of documents were used to create a picture of the decision making process: initial police reports; autopsy orders from the coroner to the pathologist; autopsy findings and follow-up reports; and cause of death certificates issued by the coroner to the Registrar of Births Deaths and Marriages. Information on file also deemed relevant included any written correspondence between coroners, pathologists, police, and coronial counsellors. Cases were excluded from the research when no decision about an autopsy was required (e.g., incomplete skeletal remains).

Two issues were identified in the research which speak directly to the current paper and also served to inform subsequent research. First, the decision making of coroners appeared inconsistent and contradictory. Second, how families were engaged with depended on a range of issues including: the area where the death occurred, their religion and culture; whether they raised a concern about the coronial investigation; and the reason for that concern.[36]

Subsequent research sought to explore these issues in more depth through interviews with a range of coronial personnel, including coroners, pathologists, counsellors, nurses and police. Questions focused upon how each professional group engaged with families during a death investigation, particularly those that presented as culturally or religiously different based on practices around death, dying and the disposal of bodies. Based on the purposive sampling of the most experienced personnel in one Australian jurisdiction, x coronial professionals were interviewed (10 full time coroners, 7 forensic pathologists, 3 coronial nurses, 6 specialist police officers, 6 senior police liaison officers and 6 coronial counsellors). Semi-structured interviews over a nine month period in 2012, explored a series of relevant issues which included: understanding of the role of families in a death investigation; impediments to a family's involvement; the appropriateness of familial involvement in coronial decision making; and views on their colleagues' interactions with families. It is to these last two issues that the discussion in this paper will concentrate.

Interviews with coroners form the basis of this paper and were conducted at their place of work, taking between 1 and 2 hours each to complete. All interviews were conducted by one researcher for consistency of approach, and transcribed by a professional service before being

[36] Carpenter et al., op. cit., n. 7; Carpenter, B. and G. Tait. "Health, Death, and Indigenous Australians in the Coronial System" 1 (2009) Australian Aboriginal Studies 29.

sent back to each interviewee for confirmation. Thematic analysis was the key process utilised in this research and an inductive approach to the data was favoured. Thematic analysis of the transcripts began with a process of schematic coding, which required all transcripts to be read in their entirety by the research team. Themes were identified through a series of discussions between the research team where both dominant and emergent themes were identified and then reviewed. For the purposes of this paper, the role of emotion in coronial decision making was the dominant theme identified and explored in the interviews with coroners. At this point it is important to note that thematic analysis is a recursive rather than a linear process. Rather than simply moving from one stage to the next, analysis moves back and forth between the phases as required[37]. Once the theme of emotion was identified as dominant within the coroner's transcripts, a process of schematic coding began where four sub themes were identified: judicial impartiality, support for the rights of families, reliance on counselling services and the importance of family engagement. These were then further organised into two dominant themes: emotional distance and emotional engagement. Judicial impartiality and a reliance on counselling services were seen as indicative of emotional distance while support for the rights of families and the importance of family engagement indicative of emotional engagement.

In all of this we were guided by an exploration of the ways in which a coronial death investigation can either exacerbate or mitigate the grief and trauma of a sudden death. The little research there is on families dealings with a coronial death suggest that coronial processes can cause further trauma to family members already suffering significant grief[38]. This has been noted in particular during the inquest,[39] in the scandals relating to the retention of organs[40] and experimentation on bodies,[41] and in the commonplace (and legislative

[37] Braun, V. and Clarke, V. (2006) "Using Thematic Analysis in Psychology" (2006) 3(2) Qualitative Research in Psychology 77 at 86.

[38] Harwood, D., K Hawton, T Hope and R Jacoby (2002) "The Grief Experiences and Needs of Bereaved Relatives and Friends of Older People Dying through Suicide: A descriptive and Case Controlled Study" (2002) 72(2) *Journal of Affective Disorders* 185.

[39] Biddle, L. "Public Hazards or Private Tragedies? An exploratory study of the effects of coroner's procedures on those bereaved by suicide" (2003) 56(5) Social Science and Medicine. 1033; Green, J. "The Medico-Legal Production of Fatal Accidents" (1992) 14 Sociology of Health and Illness 373.

[40] Drayton, D. "Organ Retention and Bereavement: family counselling and the ethics of consultation" (2011) 5(3) Ethics and Social Welfare 227.

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.[42] Coroners are acutely aware of these issues, as this research will now explore.

Emotional Distance and Impartiality

Death investigations are understood by all coronial professionals to be confronting emotional experiences which have the capacity to distress and disturb. It is also the case that coronial professionals must deal with many such deaths often on a daily basis and so it is understood that a certain emotional distance is required as much for mental and emotional health as for efficient and appropriate decision making. It is important to clarify at this stage, that Australian coroners are legally trained and rarely attend death scenes. They are thus able to remain distanced from the family if they so desire by determining the vast majority of matters 'on the papers'. Some of the coroners interviewed for this research noted the importance of maintaining a social distance from families as a crucial element of fair and impartial decision making.

> *Not personal. No I don't have, I mean if I spoke to people personally, I wouldn't get anything done, and I think it's good to have that distance between the decision maker and the people that they have contact with (Coroner 9)*
>
> *I can't – I won't get involved directly with the family any more. Because I'm a judicial officer and it can – that can somehow conflict – come into conflict with my legal duties. So I get the counsellors and the other people to do that work, yes. (Coroner 5)*
>
> *I tend to keep a distance … there's still an emotional involvement that you have to manage and you have to manage your own capacity to rationally make decisions in accordance with legislation while balancing emotional involvement. And to some extent you have to be protective of yourself to be able to do that properly (Coroner 3)*
>
> *Very rare [do I speak to the family] because initially I took the view that if I was going to have to make a decision as a judicial officer … I mean I just kept my distance. In hindsight I'm still not sure about the wisdom of having contact with the next of kin. Because when I did have contact it was either a good experience or an absolutely disastrous one. There didn't seem to be any middle ground. (Coroner 8)*

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[41] Walker, B. *Inquiry into Matters arising from the postmortem and anatomical examination practices of the institute of forensic medicine* (New South Wales Department of Health, North Sydney, 2001).

[42] Robb, B. and J Sullivan. 'The Past and the Present: Listening to parental experiences of autopsy practice" (2004) Winter Grief Matters 39.

In the way of thinking articulated here, emotion is said to pose a challenge to rational deliberation and to influence decision making beyond the evidence, in a biased or unfair manner. Emotions are positioned as outside forces that compel an individual to act inconsistently. The ideal of blind justice is appropriate to note, as is her iconic representation at the front of many law courts in Australia. Her hand on the scales of justice and her eyes blindfolded, indicates how judges must rise above influence to dispense justice without favour. These quotes from coroners are clearly motivated by these ideas about judicial impartiality and the script of judicial dispassion, tempered with the recognition that grieving families can have an impact on your own mental health. This effect of families emotional responses to death have been recognized in criminal jurisdictions, where for example, attention has been given to ways in which victim impact statements in murder investigations have been used to sway judgements with their 'powerful emotional impact' rendering them 'especially prejudicial'.[43] As these coroners demonstrate, similar understandings about the need to keep the emotion of grieving families at a manageable distance were evident in our interviews.

However, coroners did not always utilize explanations from the script of judicial dispassion. Given that families are now explicitly invited into the coronial jurisdiction through the autopsy decision making process - now a legislative requirement - coroners are required to engage directly with the consequences of this familial participation. The employment of coronial counsellors has been the central way in which this jurisdiction manages the raw emotion which families necessarily bring to the decision making process. Informed by the recognition that coronial death investigations are difficult for families and that coronial processes can both minimise and exacerbate their pain and suffering, most coroners quickly delegate this grief work to counsellors to navigate for them. In this way coroners rely upon counsellors to act as a conduit within and between the discursive space of law, medicine and loss.

> *If we think there's a problem, we'll get the coronial counsellors to ring - to assist us. We generally don't talk to the - I don't talk to the family, anyway. I have on occasion, but generally, I don't. That's not a conscious decision on my part. It's just that the [counselling] staff are pretty good. (Coroner 4)*

[43] Bandes, S. "Victims, 'Closure', and the Sociology of Emotion" (2009) 72 Law and Contemporary Problems 1.

With the suspicious deaths, if I can't get a death certificate and it's just not coming, then I'll get the coronial counsellors to contact the family and explain to them that if they don't have an autopsy they'll never know how their loved one died and that might have impacts. Counsellors are really good at doing this. (Coroner 9).

That counselling service with people who are trained just took an awful load off. Even bodies not being released on time because an autopsy hasn't been done or anything we get onto the counselling service and they fix it up. (Coroner 6).

I have never had any bad experience from talking to the family but I have found in discussions about autopsy issues that on a couple of occasions discussions haven't resulted in the best outcomes, so I've decided to keep out of it because I think the counsellors are experienced and professional and so I leave it to them now. (Coroner 1)

Relying on coronial counselors to deal with families that might require more information, or challenge the decision of the coroners, enables coroners to keep their distance from the emotional consequences of a death investigation. It might be argued that coroners thus use counselors in the same way that judges use legal representatives – to 'excise raw human emotion.' In these 'superior courts' judges interact with legal counsel rather than with ordinary citizens and thus remain removed from their demands and desires.[44] Such disclosures from coroners, while not relying on the ideal of judicial dispassion, still indicate that coroners remain wary of the emotion of death and this tends to play a part in their decision to detach themselves from families. It also reveals how potentially challenging suffering, bereavement and loss can be to legal practice.

Of recent times it's been very easy to dispose of [objections to the autopsy] because of the coroners counselling service. So if we know that there's an objection to a post mortem the first thing we'll do is I'll get my clerk to contact the counselling service. The counselling service then contacts them and talks about what their problems are and it's all been sorted out without any problems. (Coroner 6)

I was always aware of the coronial counselling service being there and I pretty much relied on them to deal with that [objections to autopsy]. (Coroner 7).

So if I have an objection I'll just email the counselling service and say whoever is allocated to the case could they contact the family about this particular issue. (Coroner 1)

This concern with the potential harm that might be caused to coronial practices by engagement with families is clearly informed by the perceived relationship between emotion and impartiality. However, it may also be at least partly motivated by a well-founded belief that such engagement with families are not only beyond what can be expected of a legal officer but also well outside their own professional training and capacities. In the context of a death investigation, families are often asked to make important decisions when still in the

[44] Roach-Anleu and Mack, op. cit., n. 28, p. 591.

grip of the shock and disbelief of the death notification. It is well recognised that this impacts on their decision making capacity, given their severely compromised ability to process and retain complex information at that time.[45] Similarly, in a death investigation there is a general consensus that the trauma of a violent or unexpected death 'poses specific and daunting challenges which do not necessarily follow a non-traumatic death'.[46] It may not be unrealistic therefore, for Coroners to want to make use of trained and experienced personnel.

> *I felt that I didn't know enough - as much as I'd looked at – read stuff myself. I wasn't trained as a counsellor and I think you needed some of the skills necessary for – not just intellectual skills, having read papers about grieving people. But practices skills like a counsellor might have to understand what the underlying issues were and so forth. So I mean if I wasn't properly equipped with the skills to do that, I wasn't going to learn on the job and potentially burn a few people in the process. (Coroner 8)*

> *My staff, they're not trained to deal with that kind of thing and we can't get into counselling people, so we just straight away, or well say please phone this number, but then we'll phone the counsellors and tell them and they'll actually initiate contact with those people as well. (Coroner 9)*

These disclosures indicate how a recognition of the emotion of death plays a part in a coronial decision to detach themselves from families, and how potentially challenging coroners believe suffering, bereavement and loss can be to their legal practice and their professional persona. As Kramer notes,[47] coroners are presented as offering 'disinterested' facts about a death 'advanced purely for [their] inherent value in assisting the truth seeking element of the process.' The emotion work required for coroners to maintain this persona may be considerable. There is a pinch to be acknowledged between disinterested and detached decision making and the recognition that families are suffering and need support and guidance through this process. Eliminating the 'pinch' requires working on feelings that may be positioned as inappropriate in the minds of coroners. In research in Australian magistrates courts, these feelings have been found to include sympathy, revulsion, disgust, and sadness, and the emotion work required to align their legal personae with the norms and

[45] Drayton, op. cit., n. 39.
[46] Drayton, op. cit., n. 39, p. 238.
[47] Kramar, Kirsten. "Coroners' Interested Advocacy: Understanding Wrongful Accusations and Convictions." (2006) 48(5) Canadian Journal of Criminology and Criminal Justice/La Revue canadienne de criminologie et de justice pénale 803.

expectations of the court resulted in 'stress' and was identified as 'emotionally wearing' for magistrates.[48]

It has been argued in the context of magistrates courts that 'feeling rules are not set by management' but rather are 'contained in ethical principles and professional norms' and that 'failure to conform to feeling rules' 'risks criticism'.[49] We would tend to agree that this is also the case for coroners, however, unlike magistrates, some coroners may be challenging professional norms of judicial dispassion by invoking therapeutic jurisprudence as a more appropriate ethical principle when dealing with families thrust into a judicial process because of the sudden death of a loved one. This may ameliorate emotion work for some coroners when the pinch between what coroners feel and the personae they should project becomes less discernible. As Hochschild[50] has identified, feeling rules only come into play when discrepancy is noted. If coroners embrace an engagement with legal processes that promote the emotional and psychological wellbeing of families and prioritise elements such as closure and sensitive decision making, it may be that feelings like sadness and sympathy do not have to challenge professional norms.

Examples of coroners departing from judicial dispassion are: the increasingly common practice of allowing family members to make statements to the court that do not contain evidence relevant to the findings the coroner has to make; and to allow the display photographs of the deceased in the courtroom. These practices advance no forensic purpose but are adopted in recognition of the solace they can afford the family.

Emotional Engagement and rights of families

The therapeutic jurisprudence movement was, as originally conceived, an attempt to apply research findings from the social sciences to legal processes in order to make those legal processes less damaging to the well-being of those involved with and affected by them.[51] The normative rationale of the therapeutic jurisprudence movement is that there exists an

[48] Roach-Anleu and Mack, op. cit., n. 28.
[49] id, p. 614.
[50] Hochschild, op. cit., n. 1.
[51] Wexler, D. "Putting Mental Health into Mental Health Law" (1992) 16(2) Law and Human Behaviour 27.

obligation on the part of the legal system to promote therapeutic outcomes and reforms and to identify, limit and, where possible, ameliorate anti-therapeutic roles and processes. The influence of the movement in achieving these goals, especially through the operation of the problem-solving courts (drug courts, gambling courts, mental health treatment courts, veteran's courts, Indigenous sentencing courts and others), has been widespread and significant.[52]

Now the therapeutic jurisprudence movement, in what is sometimes referred to as its 'maturation phase'[53] has set itself a somewhat broader and more ambitious agenda in order to build on these successes. This agenda includes influencing the work and functions of judges and lawyers outside the specialist criminal courts and among those who have not had significant experience or training in the principles of therapeutic jurisprudence.[54] Here, therapeutic principles associated with 'solution-focused' judging are argued to have broad application to judging more generally, including coroner's courts**.** Michael King[55] has been quite explicit in his call for an increasingly therapeutic approach to coronial practice:

> Coroner's courts are intimately concerned with matters affecting the wellbeing of deceased person's families; with those who may be the subject of adverse comment; and with public health and safety issues. Therapeutic judging principles such as more collaborative decision making processes, judicial case management, more support for families and ADR processes may promote coronial functions.[56]

[52] King, M. "Therapeutic Jurisprudence's Challenge to the Judiciary" (2011) 1 Alaska Journal of Dispute Resolution 1.
[53] Freckleton, I. "Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence" (2008) 30(2) Thomas Jefferson Law Review 575.
[54] Wexler, D. "New Wine in New Bottles: The need to sketch a therapeutic jurisprudence 'code' of proposed criminal processes and practices" (2012) Arizona Legal Studies Discussion Paper No. 12-16
[55] King, M. "Non-adversarial Justice and the Coroner's Court: A proposed therapeutic, restorative, problem-solving model" (2008) 16(3) Journal of Law and Medicine 442; King, M. *Solution focused Judging Bench book* (Australian Institute for Judicial Administration, Melbourne, 2009); King, op. cit., No. 51.
[56] King, Op. Cit., No 54 (2009), p. 187.

There is certainly evidence of the harmful or anti-therapeutic potential of coronial processes. Biddle[57] and Chapple, Ziebland and Hawton[58] both explored the ways in which coronial inquests adversely affected the emotional and psychological well-being of families suffering the loss of a loved one through suicide while Tait and Carpenter[59] demonstrated that this knowledge can influence coroners decision making in the context of suicide determination. Motivated by coronial legislation that stresses 'the rights of the family member to be involved in decisions concerning the deceased',[60] 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[61]. Increasingly, there is evidence that some coroners are exploring this role re-definition.

> *There was a case where a parent was advised that the coroner was about to deliver findings in relation to the death of her son and this woman wrote a beautiful and quite long letter to me. She said I don't know how you can make your findings unless you know more about my son, and she wrote the most wonderful tribute to her son. I was so touched that I rang her and we had one or two very moving conversation where she was grateful and said that she appreciated the way that the matter had been handled and I conveyed to her that I felt it was an honour to be dealing with the matter. So it was more an emotional rather than a legal thing. I think that it's important that when we are dealing with coronial matters that we don't forget that there are people behind all of this, there are living people who are wanting to honour their dead (Coroner 7).*

> *So the only next of kin I ever contacted was when there was a complaint but I did that on a personal basis with the next of kin and it's amazing how you can work things out … so that's what the personal touch does. It's amazing how much they appreciate the personal telephone call. That someone does care you know, and I'd make time to do that sort of thing. I'm a sort of person's person (Coroner 6).*

> *So I had to communicate with the next of kin. I had to try and explain to the son that this was the system. He eventually calmed down and we got everything done that we had to. But at the end of the day there's no substitute for getting involved yourself if you have to. (Coroner 2).*

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[57] Biddle, L. (2003) 'Public Hazards or Private Tragedies? An exploratory study of the effects of coroner's procedures on those bereaved by suicide'. *Social Science and Medicine*. 56(5):1033-1045

[58] Chapple, A., Ziebland, S. and Hawton, K. "A Proper Fitting Explanation? Suicide bereavement and perceptions of the coroner's verdicts" (2012) 33(4) Crisis 230.

[59] Tait, G. and B. Carpenter. "Suicide and the Therapeutic Coroner: Inquests, governance and the grieving family" (2013) 3(2) International Journal for Crime, Justice and Social Democracy 92.

[60] Barnes, M. *Queensland State Coroner's Guidelines*. (2003) Retrieved from http://www.courts.qld.gov.au

[61] King, Op. Cit., No 54 (2009), p. 39.

Done it a couple of times actually … ring the family up and talk to them, yes. Particularly talk to the family in relation to the need to go further, because there are siblings alive, who could benefit from this forensic investigation (Coroner 5).

These admissions from coroners, that personal contact with families, accompanied by sympathy, identification, compassion, and concern can be held up as models of coronial professionalism demonstrates that such a shift may have commenced, specifically in the context of autopsy decision making. As previously noted, autopsies are a legislative requirement of a coronial investigation into a death, and they do not require the consent of the family to proceed. Legislation however allows the coroner to determine the level of invasiveness of an autopsy, with many coroners confirming the importance of a raised family objection on their decision making. For the family, a continuing connection to the body has been argued to be a normal part of suffering, grief and loss,[62] but intensified during a coronial death investigation due to the shock of a coronial death.[63] The dead body maintains a 'social existence as a powerful representation of the self' which is not immediately removed at death.[64] Such connections are based on memories of the deceased in life which are necessarily associated with their body in death. While it is recognised that the body is empty, 'a corpse', it is also the case that the body maintains a social identity as manifestation of their loved one. In this research some coroners demonstrated clear sympathy, consideration and identification with the position of families, irrespective of and at times in contradiction to, their professional training.

The rights and interests of families are really crucial in the Queensland coronial system. Coroners are required under the guidelines issued by the state coroner to consider the interests of the family at all stages of the coronial process, and to keep them informed about the investigation as it proceeds. (Coroner 10)

The family's wishes must be observed. You don't just chop people up for the pleasure of satisfying some forensic curiosity that may exist in the pathologist or somebody else's mind. You have to really satisfy the needs of the family in relation to the deceased – they're paramount. (Coroner 5)

[62] Drayton, op. cit., n. 39, p. 231.
[63] Neria,Y. and B. Litz. "Bereavement by Traumatic Means: The complex synergy of trauma and grief" (2004) 9 Journal of Loss and Trauma 73.
[64] Hockey, J. "Encountering the 'reality of death' through professional discourses: The matter of materiality." (1996) 1(1) Mortality 45.

All I can say is that every coroner here is acutely aware of the sensitivities of the relatives. There has to be a bloody good reason to override an objection to autopsy. A really good reason. Usually the only one is if there's criminal behaviour. (Coroner 4).

In the context of the coronial jurisdiction, families may be best served by a form of therapeutic jurisprudence, where the law is not simply a set of codes to be followed without reflection, but rather one which is seen to have consequences for all those caught up in the proceedings[65] (King 2011; Freckleton 2008, Carpenter et al 2015). Rather than emotion being antithetical to good legal decision making, some of the coroners interviewed appear to challenge the hierarchical relation between reason and emotion by positioning wellbeing of families as a key consideration in their decision making. In this context emotion work takes a different turn. Rather than noticing a pinch or discrepancy between their feelings and professional requirements, these coroners utilize the techniques and practices of therapeutic jurisprudence to import an 'ethic of care' into the judicial personae of the coroner. As the social norms that guide emotion work, feeling rules may differ between occupations but are never absent. Coroners who utilise the principles of an 'ethic of care' rather than one of judicial dispassion to inform their decision making will thus not find themselves beyond a need for emotion work. By acknowledging the emotion evident in a death investigation, and communicating with families in a compassionate and sensitive manner when the need arises, coroners may however, avoid the strain identified in other legal contexts.

Conclusion

The intensely emotional nature of a coroner's role can precipitate coroners erecting barriers to protect themselves from psychological trauma when they don't feel appropriately equipped to engage effectively with bereaved family members. They seek distance by relying on other professionals to act as buffers. This tendency is reinforced by legal rules designed to ensure trial judges are impartial and untainted by the receipt of extra curial information when deciding cases that prohibit meeting and communication between the decision maker and a party to the proceedings – even though most coroners' cases don't go to court and inquests are very different from trials. A tradition of judicial dispassion that is thought to maximise objectivity and reliability, exacerbates the problem. All of these factors militate against a

[65] King, Op. Cit., No 54 (2009); King, Freckleton, Op. Cit., No 52; Carpenter et al., Op. Cit., No 7.

constructive, emotinal alliance between the coroner and the party most in need of compassionate understanding – the family of the deceased.

By their practice, coroners have demonstrated an increasing commitment to therapeutic jurisprudence. In our view, if the impediments described above could be minimized, an ethic of care could be incorporated into the normative theory of the coroner's court. That would require coroners to be better trained in this aspect of their role and recognition by the higher courts and perhaps in legislation of the importance of this factor.