Why being called before the coroner is worse than being sued!

The coroner's court is different to other dispute resolution processes. They coroner is to investigate an event and try to identify what happened and what lessons can be learned from the event. The Victorian coroner for example is to investigate certain deaths and if necessary hold an inquest (that is a formal, court like hearing) to determine:

(a) the identity of the deceased; and

(b) how death occurred; and

(c) the cause of death; and

(d) the particulars needed to register the death under the *Births, Deaths and Marriages Registration Act 1996.*[1]

In the case of a fire the coroner is to investigate

(a) the cause and origin of the fire; and

(b) the circumstances in which the fire occurred; and

(c) the identity of any person who contributed to the cause of the fire.[2]

In making his or her findings, the coroner "may comment on any matter connected with the death [or fire] including public health or safety or the administration of justice."[3] It is this last provision that allows coroners to expand their inquest to consider matters such as the response to a particular incident.

The idea behind the coroner's inquest is that it is not adversarial; it is not there to resolve issues between the parties rather it is there to determine what happened and why to try and make recommendations to avoid future deaths and fires. An English judge, Lord Lane said:

> … an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is not trial, simply an attempt to establish facts.[4]

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1 *Coroners Act 1985* (Vic) s 19.

2 *Coroners Act 1985* (Vic) s 37.

3 *Coroners Act 1985* (Vic) ss 19(2) and 37(2).

4 *Reg v South London Coroner; ex parte Thompson* (1982) 126 SJ 625 cited in Maria Doogan *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003, Volume 1* (2006, ACT Coroners Court) 7.

The ACT coroner put it this way

> … the aim of the inquiry is to seek out the truth of what happened in order to learn from the established facts and endeavour to ensure that, where mistakes have been made or things could have been done in a better way, lessons are absorbed and the prospect of similar mistakes occurring in the future is eliminated or, if this is not possible, reduced.[5]

Why then are coroner's inquests feared, and looked upon, like more traditional litigation that does seek to apportion fault or blame and establish liability? It is because:

> Once the truth is established, however, it is often impossible to learn from mistakes made without finding fault on the part of individuals …[6]

Counsel who are engaged by people or organisations that appear before a coroner, and who are used to representing clients in traditional litigation, may well feel, and be, duty bound to protect their client's interest. It is easy to understand why they may '… turn the inquiry into adversarial litigation rather than seeking the truth about what happened…'[7]

Although a coroner's inquest is not a hearing between parties, and the coroner's finding are "not determining rights or offering any binding opinion",[8] for people called before the coroner the process, and the outcome, can be harrowing and very personal. Appearing before the coroner or Royal Commissioner may be worse that being sued. Where litigation is commenced it is unlikely to be against the individual, rather the action will be against the organisation or, in this context, the State. Insurance will cover the liability[9] and if the case is settled, there will be no public hearing and no public naming or shaming of any individual. In litigation a defendant has a number of pre-trial processes to reduce the issues, the burden of proof is on the plaintiff to establish the legal elements of his or her cause of action and the named defendant will be represented by counsel, paid for by their insurer.

A case example is the 2003 Canberra fires. In the litigation[10] the action against the then Commissioner of the NSW Rural Fire Service was dropped as the State assured the Court that it would accept liability (if any) for the actions of its Commissioner. The action is now proceeding against the State of New South Wales.[11] Whether West's case is successful or not, there will be no judgment against an individual firefighter or manager and the responsibility for the response

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5 Maria Doogan *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003, Volume 1* (2006, ACT Coroners Court) 7.

6 Ibid.

7 Ibid, 51.

8 *Lucas-Smith v Coroner's Court of the ACT* [2009] ACTSC 40 (8 April 2009) [77].

9 And for State instrumentalities that is usually self-insurance – see, for example, the *Crown Proceedings Act 1988* (NSW) s 7 and the *Victorian Managed Insurance Authority Act 1996* (Vic).

10 *West v NSW* [2007] ACTSC 43 (6 July 2007) [3]

11 *Crown Proceedings Act 1988* (NSW) s 5; A similar approach was adopted by the Northern Territory see *Gardner v Northern Territory of Australia* [2004] NTCA 14 (10 December 2004) [5].

is correctly placed with the State and its institutions rather than individuals. Compare that with the outcome from the coroner's inquest into the same fires. There the focus was clearly on the managers of the Emergency Service Bureau (ESB). It is those managers that have been the subject of adverse comment and whose names appear in the litigation papers. This is the case even though the coroner cannot find them guilty of an offence or to have been negligent. It can be expected that if anyone sues the ESB or other agencies, the action will be against the Australian Capital Territory not the ESB managers personally. For this reason responders, and in particular volunteers, may fear being called before the coroner in much the same way (or more) than they fear being sued.

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