Autopsies, scans and cultural exceptionalism

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Abstract

Must we undergo invasive autopsies, contrary to cultural sensitivities? The recent UK High Court judgment in *Rotsztein v HM Senior Coroner* is important for anyone grappling with claims that autopsies are contrary to Australian law's respect for the beliefs of Indigenous people and particular ethno-religious communities. This article discusses *Rotsztein* as a precedent for use of non-invasive technologies in Australian coronial inquiries.

Article

Does digital technology mean that coroners can respect the concerns of many Australians by avoiding traditional dissection of a deceased person, a dissection contrary to religious beliefs? This article highlights a recent UK High Court judgment that emphasised use of digital scanning rather than invasive interference with a deceased person. The judgment in *Rotsztein v HM Senior Coroner for Inner London* [2015] EWHC (Admin) (28 July) [unreported] embodies a recognition that non-invasive autopsies (in the form of imaging and blood tests rather than dissection and organ removal) are appropriate. It should inform Australian practice regarding autopsies relating to Indigenous people and other ethno-religious communities that include adherents of Judaism, Islam or groups such as the Jehovah's Witnesses and some Pacific Islanders.

Many people in Australia, along with overseas peers, consider that the physical integrity and timely burial of dead adults and minors is both a significant facet of their cultural identity and something that should be legally enforceable. Freedom from arbitrary and disproportionate interference is a value underlying Australian law. With living people it is evident in statutory restrictions on cavity searches, controversy over the recent Operation Fortitude in Victoria and debate about warrantless access to telecommunications metadata. In particular, the right of the individual to freedom from unwanted interference with their physical integrity is well-established in common law and criminal law, including the right to refuse medical treatment (which extends to diagnostic procedures) absent lawful justification provided by statute or necessity. Cardozo J, in a judgment much-cited by Australian and UK courts, thus commented

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.[1]

Is that freedom relevant to the dead, people who are unable to voice their concerns or protect dignitary interests and indeed have no legal standing regarding what would otherwise be regarded as battery or a quite visceral invasion of privacy? Is it resonant among Indigenous people, given the colonial history of collecting and displaying skulls and other human remains?[2]

Respect, Freedom and Forensics

It is axiomatic that there is a public interest in knowing how people died, with rationales such as fact-based criminal investigation and research into disease or injury.[3] That knowledge in some instances can only be authoritatively gained through an examination of the body, something that might involve delays in burial and the removal of organs. Australian statute law accordingly mandates that a coroner can order an autopsy, irrespective of the religious or other beliefs of the dead person and the person's survivors.[4]

Some statutes provide for interested parties to challenge authorisation of an autopsy. That challenge is usually urgent and when successful typically embodies cultural exceptionalism, with recognition that in some circumstances the values of particular communities should override a practice norm.[5]

Digital imaging systems, which are well-established in clinical practice, and other new technologies such as advanced blood tests offer scope for forensic post-mortem examination that is less invasive and potentially quicker than more traditional investigation based on dissection and organ removal. It is important to recognise that scanning and blood testing are not comprehensive solutions and will not supersede existing practice in all circumstances. They do however provide a mechanism that accommodates the state's desire for information and a community's desire to prevent 'desecration' of the deceased person and secure timely burial. The guidance provided by *Rotsztein* is accordingly relevant.

Rotsztein

In *Rotsztein* the court noted differing medical opinions (heart attack or septic shock) regarding the death of 86 year old Sarlotta Rotsztein at the Royal Free Hospital. Rotsztein and her family were adherents of Orthodox Judaism, with an expectation that she would be buried within 24 hours without an invasive autopsy.[6] In the first instance the coroner acknowledged the family's religious objections (and its offer to pay for a scan) but indicated a traditional autopsy was necessary. The Coroner's rationale was that a scan was unlikely to identify death by sepsis. The family gained an interlocutory injunction to prevent an invasive autopsy until the cause of death had been investigated using non-invasive mechanisms. The subsequent scans and blood tests revealed no signs of infection, with the coroner releasing the body on the basis that the uncertainty had been resolved.

In January the family gained permission to bring a test case against the coroner, challenging the lawfulness of her approach in directing an invasive autopsy in the face of the Rotszteins' religious objections and scope for a non-invasive examination. The coroner unsuccessfully argued that the application was inappropriate, as Mrs Rotsztein had been buried for several months. Silber J granted permission to proceed as the issue was likely to recur and need speedy resolution.

In the High Court the family argued that the coroner had disregarded guidance by the Chief Coroner on post-mortem imaging, was contrary to Article 9 of the European Convention on Human Rights (dealing with thought, conscience and religion), and had adopted an incorrect test following *R (Goldstein) v HM Coroner for Inner North London* [2014] EWHC 3889[7] in implementing the *Coroners & Justice Act*.[8] The Court received submissions from Muslim Council of Britain and other community representatives.

The Court considered that there was no utility in quashing the coroner's decision. However, it made a declaration that the coroner had acted unlawfully. She had not asked herself whether the short delay involved in non-invasive imaging and blood tests would have vitiated any invasive subsequent autopsy. In effect, UK coroners were guided in reading the Act to strongly consider non-invasive investigations in instances where there is no compelling need for traditional methods. That emphasis might implicitly address concerns expressed by the coroner in *Rotsztein* regarding workload.

Australian Exceptionalism?

Australian law regarding coronial investigations embodies instance by instance accommodation of difference rather than a shift towards legal pluralism in which specific communities enjoy discrete legal systems within the same jurisdictions. *Rotsztein* is potentially significant in encouraging uniform practice norms across

Australia. Those norms are important, given concerns expressed by both Indigenous people and members of other ethno-religious communities.

Those concerns are evident in a number of judgments. In *Evans v Northern Territory Coroner* for example the Northern Territory Supreme Court agreed to prevent an autopsy on an Indigenous minor who may have died from SIDS.[9] After a preliminary investigation, reflecting "expert advice", the NT Coroner had made a determination that there would be a conventional autopsy. The infant's father sought an order under section 23(3) of the *Coroners Act* (NT), having been alerted by a doctor that any autopsy might be avoidable. His application referred to the family's traditional life and indicated that an autopsy was "against our way and culture", that "bad things will happen to family members" and that

> If the autopsy takes place my son will not be able to enter the spiritual country and be with his ancestral family because his body would not be whole. He will be alone with nowhere to go and no one to look after him. This would be very distressing to me and my family if my son's spirit had to go on without his ancestors to look after him.[10]

In *Re Unchango* Walsh J was receptive to that argument in overriding the Coroner's decision regarding autopsy of another Indigenous infant, commenting that an autopsy

> would not really advance the matter a great deal in circumstances such as this. One should take into account the very strong cultural beliefs held by the relatives and by the community at Kalumburu and the effect that the post mortem would have on them by way of emotional trauma, particularly in view of the fact that it would prohibit, in their view, the spirit of the deceased remaining in the body and returning to the body and would leave the spirit roaming at large.[11]

In *Evans* the Court referred to its decision in *Wuridjal v The Northern Territory Coroner*.[12] It stated that "ascertaining the precise cause of death is less important than the spiritual and cultural beliefs of the family in the particular circumstances". Further, "findings resulting from an autopsy were unlikely to contribute in any meaningful way to a better understanding of the death of this child or to contribute in any meaningful way to efforts being made to improve health outcomes for other infants".[13]

A similar rationale was evident in *Raymond-Hewitt,* with the Court granting an application to prevent an autopsy of a person killed in a road crash.[14] In endorsing *Green v Johnstone*,[15] it noted the family's interests "in following and maintaining their Aboriginal culture and law", that toxicology results were pending (so that invasive procedures were likely to be unnecessary), and a recognition that

> if there are any suspicious circumstances surrounding the death, or there are other compelling reasons why it is in the public interest that an autopsy be performed, those cultural and spiritual considerations must take second place to the public interest.[16]

It is important to recognise that Australian courts, in deciding applications on cultural grounds to prevent autopsies or order immediate burial, have not given an automatic dispensation to Indigenous or other people and have typically referred to the family's distress rather than to any right of privacy that survives death. Instead, although recognising sensitivities, they have considered balances[17] and decided on an instance by instance basis.

Ethno-religious affinity is not a guarantee of exceptional outcomes. Riley J in *Wuridjal v Hand* [2001] NTSC 99 thus rejected an application by members of the Yolngu community. Coroners' decisions have been overturned, for example in *Green v Johnstone*, *Unchango*, and *Abernethy v Deitz* (1996) 39 NSWLR 701. They have also been upheld, for example in *Magdziarz v Heffey*, where the court endorsed the autopsy on the basis that the cause of death of an adult son was not discernable though external examination of the deceased.[18] McDonald J noted the parents' claim that they were devout Catholics and believed "that an autopsy will simply serve to desecrate our son's body". Counsel for the parents had indicated that

> although it was not being advanced that there was a religious reason in particular against the autopsy in this case, nevertheless the Court should take into account the religious views of the parents of the deceased.[19]

Digby J of the Victorian Supreme Court in *Joe Traynor v Ors* endorsed parental rejection of an autopsy of a seven year old girl who died after getting tangled in a skipping rope tied to a swing.[20] Counsel argued that the child's identity was known, as was the cause of her death. There was no indication of foul play; nothing would be gained by the "intrusive dissection of her body" aside from causing unnecessary distress to her family.

Coronial practice documents highlight the need for sensitivity in dealing with families but recognise that distress provides insufficient grounds for overriding a coronial decision to conduct an autopsy. In considering questions from family members and community representatives about invasive investigations and delays in burial practitioners and policymakers should instead focus on outcomes and proportionality. *Rotsztein* can be usefully read in conjunction with the NSW Supreme Court decision in *Krantz v Hand*, where Wood CJ accepted a family's appeal to prevent the autopsy of an 86 year old woman.[21] Wood noted that the family's religious authority had commented

> Among the foremost of the precepts concerning reverence for the dead is one which is of particular importance in the context of the present Application. Put simply, according to Jewish religion, an autopsy is an action of desecration, and as such is inimical to our deepest principles and feelings.[22]

The family had invited the Coroner to conduct an alternative non-intrusive examination and offered to bear any additional costs.

Wood CJ concluded

> I am quite unpersuaded by the argument that the wrong message would be sent to the public in a case such as this, if the matter was allowed to proceed without a post mortem examination. For the reasons identified by Walsh J, in *Unchango*, this case and similar cases can never be taken as a general precedent. In every case a discretion has to be exercised having regard to the particular facts of the matter.[23]

Further

> I am satisfied in a case such as the present that the public would readily understand the lack of any need for a post mortem in respect of a frail 86 year old woman whose health was observed by independent observers to have been progressively declining, who had a supportive family, who died in her own home, where there was genuine evidence of strong religious beliefs shared both by her and by her family concerning the undesirable interference with a body at post mortem.[24]

Protection from interference?

None of the above judgments preclude invasive examination of a body in instances where there is reasonable belief that the death is attributable to foul play or that the autopsy will provide society with otherwise unobtainable data regarding illness, irrespective of ethno-religious affinity and the distress experienced by families through the death of a loved one. An argument against blood testing is unlikely to succeed, given that extraction of a blood sample is proportionately far less invasive than opening of body cavities and removal of organs in a traditional autopsy?

Neither the Australian High Court nor the Supreme Courts has granted an application to prevent an invasive autopsy specifically on the basis that such interference with the deceased person is contrary to that person's dignity or any privacy rights under statute (for example Victoria's *Charter*) or common law.

Rotsztein embodies an acceptance of non-invasive technologies as a default position for identification of the cause of death in circumstances where there is no compelling reason for a more visceral interference with the deceased person. It is a judgment that might be acknowledged by practitioners and courts seeking guidance about balances between community, institutional and private needs.

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[1] *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914)
[2] Tiffany Jenkins, *Contesting Human Remains in Museum Collections: The Crisis of Cultural Authority* (Routledge, 2010); and Helen MacDonald, Possessing the Dead: The Artful Science of Anatomy (Melbourne University Press, 2010).
[3] Belinda Carpenter and Gordon Tait, 'The Autopsy Imperative: Medicine, Law, and the Coronial Investigation' (2010) 31(3) *Journal of Medical Humanities* 205. See also Prue Vines, 'The Sacred and the Profane: Property Concepts in Post-mortem Examinations' (2007) 29(2) *Sydney Law Review* 235, 252; and Hugh Dillon and Marie Hadley, *The Australasian Coroner's Manual* (Federation Press, 2015).
[4] *Coroners Act 1997* (ACT) s 21; *Coroners Act 2009* (NSW) s 89; *Coroners Act* (NT) s 20; *Coroners Act 2003* (Qld) s 13; *Coroners Act 2003* (SA) s 22; *Coroners Act 1995* (Tas) s 36; *Coroners Act 2008* (Vic) s 25; *Coroners Act 1996* (WA) s 34.
[5] *Coroners Act 1997* (ACT) ss 20, 28; *Coroners Act 2009* (NSW) ss 89, 96; *Coroners Act* (NT) s 23; *Coroners Act 2003* (Qld) s 19; *Coroners Act 1995* (Tas) s 38; *Coroners Act 2008* (Vic) ss 8, 79; *Coroners Act 1996* (WA) s 37.
[6] Fred Rosner, 'Autopsy in Iewish Law and the Israeli Autopsy Controversy' (1971) 11(4) *Tradition* 43.
[7] See also *R v Westminster City Coroner, ex Parte Rainer* (1968) QBD 112; SJ 882 and *Callanan v Geraghty* [2007] IEHC 419.
[8] *Coroners & Justice Act 2009* (UK) s 1(2).
[9] *Evans v Northern Territory Coroner* [2011] NTSC 100.
[10] *Evans v Northern Territory Coroner* [2011] NTSC 100, [5]
[11] *Re Death of Simon Unchango (Jnr); ex parte Simon Unchango (Snr)* (1997) 95 A Crim R 65.
[12] *Wuridjal v Northern Territory Coroner* [2001] NTSC 99.
[13] *Evans v Northern Territory Coroner* [2011] NTSC 100, [26].
[14] *Raymond-Hewitt v Northern Territory Coroner* [2011] NTSC 94.
[15] *Alan James Green v Graeme Douglas Johnstone* [1995] VSC 34; [1995] 2 VR 176.
[16] *Raymond-Hewitt v Northern Territory Coroner* [2011] NTSC 94.
[17] See for example *Morris v Hand* (Unreported, NSWSC, 1997).

[18] *Magdziarz v Heffey* [1995] VSC 201. See also: *Pope & Pope v State Coroner* [1998] SASC 6526.
[19] *Magdziarz v Heffey* [1995] VSC 201, [18].
[20] *Joe Traynor v Ors* (Unreported, Supreme Court of Victoria, 2012).
[21] *Krantz v Hand* [1999] NSWSC 432.
[22] *Krantz v Hand* [1999] NSWSC 432, [4].
[23] *Krantz v Hand* [1999] NSWSC 432, [49].
[24] *Krantz v Hand* [1999] NSWSC 432, [50].