

Policing Expert Testimony in a Death Investigation: Medical Opinion as Legal Fact

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Abstract

Within coronial investigations, pathologists are called upon to give evidence as to cause of death. This evidence is given great weight by the coroners; after all, scientific 'truth' is widely deemed to be far more reliable than legal 'opinion'. The purpose of this paper is to examine the ontological and epistemological status of that evidence, from the perspectives of both the pathologists and the coroners. As part of an Australian Research Council Linkage Grant, interviews were conducted with seven pathologists and 10 coroners from within the Queensland coronial system. Contrary to expectations, and the work of philosophers of science, such as Feyerabend (1975), pathologists did not present their findings in terms of unequivocal facts or objective truths relating to causes of death. Rather, their evidence was largely presented as 'educated opinion' based upon 'the weight of evidence'. It was actually the coroners who translated that opinion into 'medical fact' within the proceedings of their death investigations, arguably as a consequence of the administrative necessity to reach a clear-cut finding as to cause of death, and on the basis of their own understanding of the ontology of medical knowledge. These findings support Latour's (2010) claim that law requires a fundamentally different epistemology to science, and that science is not entirely to blame for the extravagant truth-claims made on its behalf.

Introduction

The central role of the coroner is to preside over the investigation of unexpected and unnatural deaths. In Australia, where coroners are legally trained, they are aided in their investigatory work by a number of other agencies: police, who visit the scene of the death and gather relevant information; coronial counsellors, who liaise with the family throughout the investigation; and pathologists, who perform autopsies and other medical procedures on the deceased. It is the coroners who are responsible for determining the cause of death, the identity of the deceased and the date and place of death, and for recording this information in the Registry of Births, Deaths and Marriages (Barnes and Carpenter 2011). Around Australia, deaths investigated by coroners make up only a small percentage — between 10 and 20 per cent — of all deaths in a community (Freckelton and Ranson 2006). For deaths that are not reported, the cause is certified by individual doctors without reference to the coroner at all. The primary focus of coronial investigations is neither criminal charges nor disciplinary action, but the benign administrative task of creating accurate death certificates. Over 95 per cent of coronial deaths are dealt with administratively 'on the papers', with only the small remainder deemed sufficiently contentious to warrant an inquest.

While the epistemological and administrative logic of such death investigations appears to be relatively straightforward and unproblematic, in actuality coronial courts have long been a site of contestation. From its inception at the end of the twelfth century in England, the role of coroner has changed on a number of occasions. Beginning principally as a revenue-raising office for the sovereign, the coroner eventually morphed into an investigator of death. Even with this crucial role, the position of the coroner eventually began to decline in importance due to the rise of a parallel legal office — the Justice of the Peace — such that by 1500 the sole remaining function performed by the coroner was the holding of inquests into violent deaths (Knapman 1993). Tension continued to exist between these two positions for

the next 300 years, and it was only completely resolved with the clarification of roles in the nineteenth century.

This has not been the only point of contestation. By the end of the nineteenth century, the investigative work conducted by the coroner to provide evidence for inquests was delegated to the police force who undertook these tasks under the direction of the coroner. As part of these changes, the long-standing tradition of the 'coronial jury' was no longer mandatory. Not only did this discontinue the practice of the coroner summoning juries for inquests, but it also established a lesser reliance on the lay perspectives of the public that constituted these juries (Freckelton and Ranson 2006). Burney (2006) contends that these changes signalled the start of a long struggle over the role of coroner. That is, medicine began a struggle for dominance against much older forms of organisation and sets of truth-claims — largely those of the wider citizenry, manifest in the forms of the elected jury, and the legal review of evidence within the public hearing.

It has been argued elsewhere that this is an example of the contemporary dominance of medical truths over other sets of knowledges (Carpenter and Tait 2010). That is, legally trained coroners now prioritise medical cause over legal circumstance in coronial investigations, most notably through a heavy reliance on orders for full internal autopsy. Medical truths as to the cause of death are used as confirmation of any circumstantial evidence gathered at the scene and, as such, the objective scientific facts presented in the pathologist's report become the final arbiter of the case.

This paper asks the question: are the epistemological issues that simple? Do doctors bring medical facts to the coronial investigation, facts that trump any other knowledges available to the coroner? Is the coroner given no real choice, other than to accede to power of medical truth? Arguably, this study presents a significantly more complex picture.

Medicine and the production of truth

Truth has always been a complex philosophical issue. While few philosophers would consider the matter in any way resolved, most would accept that the rise of modernity at the end of the seventeenth century signalled a new way of approaching the issue. With its mantra of truth, progress and objectivity, modernity sought to step out of what it saw as the intellectual dark ages, characterised by truth claims based upon religious authority and tradition, and replace them instead with a new set of possibilities surrounding the production of knowledge. And central to this new way of thinking was the discipline of science.

For the last 250 years, the central operating logic of science is that truth is not something that we produce, but rather something that we objectively and dispassionately uncover. Indeed, part of the foundational rationality of science — and, in particular, the scientific method — is that science is the *only* way of reliably accessing truth. This depiction should be familiar to all of us, at first glance, science has always been its own best publicist, cordoning off the rights to the production of truth, and disparaging other types of truth claims (Tait 2005). This has particularly been the claim within modern Western medicine, which has constantly sought to marginalise other systems of healing (Foucault 1973).

A number of philosophers have taken significant issue with what they saw as science's depiction of itself — most notably Feyerabend (1978). He suggests that a number of qualifications should be placed upon the claims made by science, two of which are worthy of mention here. First, Feyerabend argues that the relatively uncritical acceptance of scientific truths is based upon a belief in its infallibility, in that it can be separated from all other ideologies — religion, myth, superstition, tradition — by the notion that it can prove its claims. Science is not seen as requiring any form of faith for its operation, it is simply regarded as the most efficient means available for 'uncovering' truth, based in the 'fair, rigorous and controlled' scientific method. However, Feyerabend (1981) famously argues that there is no realistic evidence to

demonstrate that the scientific method has any more validity than do the standards that underlie the practice of magic — given that the ‘rigorous’ scientific method is, in practical terms, a generally nebulous collection of rules and procedures, applied unevenly and pragmatically, and ‘supplemented by unscientific methods and unscientific results’ (Feyerabend 1978: 105).

Second, Feyerabend (1978, 1981) argues that science is merely an ideology — more pervasive and successful than other existing ideologies, but an ideology nevertheless. Analogous to the right that once belonged to religion, science now exists in a conceptual framework that bestows upon it the sole legitimate right to contemporary truth-formation. Furthermore, the ideology of science is compulsory (all children must be taught science), exclusory (other truth-building systems are debarred/ridiculed) and undemocratic (when a scientist says it is true, it must be true).

When this understanding of scientific knowledge is applied to the information provided by the pathologists to the coroners as part of death investigations, Feyerabend would likely make the following observations: first, there is nothing ontologically absolute about the truths produced via the autopsy. The medical methodologies that organise their assembly are shaped and executed within social contexts; there are no guarantees as to the consistency of their application; and, during the autopsy itself, they are likely to be supplemented by any number of other ‘unscientific’ knowledges and practices.

Third, Feyerabend would also likely argue that the pathologist’s report often operates within a context that is compulsory, exclusory, and undemocratic: it is compulsory, in that coroners often feel epistemologically obliged to order autopsies, even where the cause of death does not appear to be in dispute; it is exclusory, in that medical knowledges are deemed to supersede other truth claims during coronial inquiries, such as police evidence collected at the scene, when there is any disagreement between the two; and it is undemocratic, in that if a pathologist posits a particular cause of death, then that is precisely how they died, all evidence to the contrary notwithstanding.

This paper will test Feyerabend’s assessment of scientific knowledge, via the specific medium of expert testimony within coronial inquiries. That is, the paper will explore aspects of the relation between medical assessments of cause of death within the coronial system, and the findings reached by that system. Do pathologists present ‘facts’ to coroners, or is something else going on?

The research project and methodology

This paper is situated within a ten-year history of funded research from both government departments and the Australian Research Council. In 2005, the research began with an exploration of 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 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.

An issue was identified in the research which speaks directly to the current paper and also served to inform subsequent research: the decision making of coroners often appeared to be inconsistent and contradictory. Subsequent research sought to explore this issue (among a range of others) in more depth through interviews with a range of coronial personnel, including coroners, pathologists, counsellors, nurses, and police. In this instance, questions focused upon how each professional group organise their professional responsibilities, and reach their conclusions. Based on the purposive sampling of the most experienced personnel in one Australian jurisdiction, 10 full time coroners and seven forensic pathologists were interviewed. The interviews were semi-structured, and were conducted over a nine-

month period in 2012, taking between one and two hours each to complete. All interviews were conducted by one researcher for consistency of approach, and transcribed by a professional service before being 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.

At this point it is important to note that thematic analysis is a recursive rather than a linear process (Braun and Clarke 2006). Rather than simply moving from one stage to the next, analysis moves back and forth between the phases as required. Once 'expert testimony' was identified as a pertinent issue within the transcripts, a process of schematic coding began where sub-themes were then identified. The sub-themes were identified as: the coronial status of pathologists, the ontological status of medical statements, and the evidentiary requirements of the coronial system.

Results

The ontological status of medical statements

The key finding of this study is that the evidence given by pathologists is understood in very different ways by the two central players — the pathologists themselves, and the coroners. This research suggests that the evidence given by pathologists at coronial inquiries is always presented as 'medical opinion'. That is, causes of death are described in terms of likelihood and probability, rather than as categorical and indisputable truths.

Sometimes the duty pathologist and me may have a different opinion, so the duty pathologist may have said, yeah, that's fine, I'm happy with an external and may then come to me and I might have a different opinion. Pathologist 5

When everything's in, we'll collate it all together and provide a report to the coroner and provide him with our findings and present him with our opinion as to the cause of death. Pathologist 4

So you present your expert opinion and then the coroner makes a decision on that. Pathologist 3

This is not to say that pathologists do not often have very high degrees of confidence in their opinions, or that those opinions are not founded upon a wealth of medical data; however, this still does not elevate their own opinions to the status of 'objective truth':

When I walk into a court room or an inquest I will be asked to maintain the highest rigorous scientific standards as to what I found and I will be expected to come up with an argument to establish why I believe this is the cause of death, and to support my opinion with facts. Now, at the end of the day what I come up with is an opinion, but I have to demonstrate that I've got a sub-strata of facts that can support quite solidly that opinion. Pathologist 4

However, this is not generally how that evidence is received by the coroners. Within the context of the coronial court, this research suggests that 'medical opinion' is translated by the coroners as 'medical fact'.

Pathologists are able to say what the cause of death is; we usually sign it off. Coroner 2

According to this understanding of medical statements, autopsies do not simply provide additional evidence for the coronial inquiry, they provide an unequivocal cause of death — an objective truth, around which to frame a matrix of explanation.

So they'll decide (the police) there's no suspicious circumstances, that it was probably a natural death; but then the autopsy will confirm that. Coroner 3

Well, you've got to rely on the medicine of it. Coroner 9

Indeed, the medical 'facts' of the autopsy are often understood as the only truly indispensable element of the investigation. Other truth-claims — whether made by witnesses, or from police at the scene of the death — are deemed to require the 'real' truth of the medical autopsy to provide a solid foundation to the entire process.

So, any violent or unnatural deaths, or deaths arising out of a medical context, we still most often have to have autopsies. Otherwise, if there's going to be an investigation, the investigation tends not to get anywhere. Coroner 7

The evidentiary requirements of the coronial system

The second central finding of this research is that the evidence (the medical opinion) provided by the pathologist is not only principally *understood* by the coroner as 'objective truth', it is also administratively deployed by the coroner as an objective truth. The detail of the pathologist's evidence is widely regarded as irrelevant by the coroner, with the sole relevant issue being an unequivocal statement as to cause of death.

We come from completely different standpoints; we simply want to know the cause of death, so why do we need the nth degree about the weight of each organ etc. And so there's that tension between coroners and pathologists. Coroner 8.

The requirement for a definitive cause of death is one of the principal factors organising the coroner's relationship to both the pathologist and to their evidence. Coroners are often presented with a cause of death as 'undetermined' by the pathologists, and this sits uneasily with both the coroners' visceral expectations regarding the ontology of medical truth and the statutory requirements of the role.

Some of the pathologists are producing more undetermined causes of death on the autopsy ... but still describe in the report the various possibilities of what could've caused the death — what's more likely — and as a result I have to make a decision, well, it's more likely that this, in fact, is the cause of death, and that's what I'll say in my finding. Coroner 2

Often the pathologists will come back with an undetermined cause of death but, with a bit of history in there which tells a little more about possible causes, I can then make a finding as to what the cause of death is. Coroner 2

The coroners often sought to steer the pathologists into committing themselves to a particular definitive cause of death, even where the evidence was partial, ambiguous or incomplete.

She was umming and ahing about whether it was a myocardial infarction or whether it was a PE [pulmonary embolism], and I just basically just talked her through, and got her to reach a decision. Coroner 8

At the moment, if there's multiple possible medications, toxicology testing takes some time, months and months. You can't have the body waiting around so you just have to make a decision. Coroner 2

On those occasions where the pathologist was unwilling to allow their medical opinion to be translated into medical fact — at least not without further autopsy evidence — the coroner's irritation was often clear.

Electrocution's a classic one, because I've had cases where there were witnesses, the person's going Bzzzzzzzzzz, there's burn marks on the hands from the object where the current's passing through ... he collapsed, and was dead instantly. Now some pathologists will say we still need to do an autopsy because they can't exclude heart attack — what's the chances of that? And then what happens is that they refuse to certify that it was an electrocution!
Coroner 4

In summary, within the context of the coronial court, there exists a complex historical relationship between the coroner and the pathologist, with tensions largely centering upon the related issues of expertise, status and authority. Importantly, while medical information from autopsies is presented in terms of 'opinion and probability' by the pathologists, this evidence is translated by the coroners themselves into 'scientific fact'. This translation occurs for both epistemological and administrative reasons.

Discussion

The results of this study suggest two areas of further discussion.

1) Feyerabend's critique of science

To what extent is Feyerabend correct about the nature of scientific truth-claims? At this point, it would be fairly easy to assert that he is both correct, and incorrect. That is, Feyerabend is correct in that the scientific evidence tendered by the pathologists in the coronial court is compulsory, exclusory and undemocratic — risk-averse coroners request autopsies as a matter of reflex, and this information is prioritised over other sets of truth-claims, which are often marginalised in the process, such as eye-witness accounts, family histories, and collations of other evidence from the scene of death.

However, it is equally possible to suggest that he would be incorrect — in this instance — in assigning responsibility for these social/ideological elements of the scientific method to the scientists themselves. This research suggests that while pathologists remain circumspect about the information they provide to the coronial process, it is the coroners who translate that evidence into the compulsory, the exclusory and the undemocratic. Pathologists may base their opinions upon 'a sub-strata of facts'. However, it is the coroners who interpret that opinion as unequivocal truth: that is, 'Pathologists are able to say what cause of death is'.

However, Feyerabend would quite rightly argue that even though pathologists may not make frequent claims to either complete scientific objectivity or direct access to the noumenal realm of facts-in-themselves, they still certainly benefit from widely held assumptions that these two elements are part and parcel of the scientific method, and hence part of the bedrock of the knowledge it produces. To put it another way, while there may be no expectation that scientists should continually attenuate each statement they make — lest it is taken as claim to objective truth — over the last 300 years, 'science' (as a reified entity) has traditionally been its own best self-publicist in the modernist struggle for the high ground of knowledge production (Tait 2010). Significantly, coroners are as exposed to this rosy depiction of science as the rest of us.

2) *Medicine and the legal process*

A trial is presumed to be a search for truth, but, technically, it is a search for a decision.
(Felman 1997: 738)

In addition to both the historic, modernity-related reasons for coroners to valorise and reify scientific 'facts', as well as the more contemporary cultural forces that have accentuated this perception, it is arguably the legal system itself that requires its expert evidence to be conceptualised in terms of objective truth. Kramar (2006) argues that pathologists are not simply reading biological information when assessing cause of death; they are filtering that information through personal and professional moral lens to reach their conclusions. These subjective judgements are distilled into medical knowledge:

which is taken up in law as expert opinion evidence to become legal fact. Once this evidence has become legal fact, it becomes unassailable, having both passed medical-scientific scrutiny and been accepted as independent, disinterested medical knowledge ...
(Kramar 2006: 818)

The foundational logic of this argument is supported by Latour (2010: 229) who states that both scientists and lawyers (pathologists and coroners) speak 'the truth', but each according to quite different criteria: 'two distinct conceptions of exactitude and talent, of faithfulness and professionalism, of scruple and objectivity'. Crucially, scientists struggle to understand how judges can employ the term 'incontrovertible fact' to evidence that has not been subject to rigorous critique and counter-submission. Latour (2010) asserts that in cases where scientific evidence is required — as in coronial investigations — it is law, rather than science, that seeks the objective authoritative fact. It is seen to be the task of the coroner to constitute a domain of unassailable truth as soon as possible, so that this truth can be deployed within the administrative and judicial framework of the rule of law. Importantly, the most important element of the rule of law is 'the judgement' — in this case, the finding as to cause of death.

Conclusion

This research has reached a number of conclusions, some predictable within the context of the coronial inquiry, others less so. First, coroners and pathologists have a complex and often difficult relationship within death investigations, and while coroners have the final word in determining cause of death, the evidence of the pathologist carries considerable weight, more weight indeed than any other contributor to the proceedings. Second, while the pathologists present their evidence in terms of opinion and probability, this is interpreted by the coroner as objective fact; that is, within the context of the coronial inquiry, the coroner translates the ontology of the pathologist's evidence into detached, independent truth. Third, these newly-minted 'medical facts' are not only *understood* by the coroner as truths, they are administratively *deployed* as such to reach a legal decision as to cause of death. Finally, and by way of summary, this research suggests that the chief conveyers of the ideology of scientific and medical certainty are not the pathologists themselves, but rather the coroners. This is in part because of a broad acceptance of the 'infallibility' ideology by coroners, but also because of the administrative and judicial requirements of the coronial system itself.

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