WEEPING ON CUE: THE SOCIO-LEGAL CONSTRUCTION OF MOTHERHOOD IN THE CHAMBERLAIN CASE

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ABSTRACT

This thesis considers the influence and effect of the dominant Australian ideology of motherhood on the Chamberlain case. Lindy Chamberlain was convicted on 29 October 1982 of murdering her baby daughter, Azaria. Her conviction was overturned in 1988 after a Royal Commission into her trial. Two main explanations have been proposed for Chamberlain's wrongful conviction. The first explanation is that the scientific evidence adduced in support of the prosecution was seriously flawed. The second is that Chamberlain's right to a fair trial was prejudiced by the enormous media attention focused on the case. I argue that each of these factors influenced the jury's decision to convict Chamberlain but that each factor and the outcome of the case were also affected by the jury's assessment of Chamberlain as a mother. The failure of the scientific evidence was also at least partly attributable to the fact that certain scientists, convinced on the basis of behavioural evidence that Chamberlain was guilty of murdering Azaria, conducted their scientific investigation with tunnel vision and therefore overlooked anomalies that invalidated their results. The scientific and media discourses were also influenced by the dominant ideology of motherhood.

I have identified at least three discursive constructions of motherhood in the Chamberlain case. The Crown presented Chamberlain as a murdering mother, whose strange behaviour after Azaria's disappearance could be attributed to her guilt. The defence sought to construct Chamberlain as a good mother – sentimental and loving – who related normally to her daughter and who deeply grieved Azaria's death. Chamberlain presented her own view of herself as innocent yet angry at the misappropriation of her daughter's memory and at the damage that the legal process and media attention had inflicted on her family. The disjuncture between Chamberlain's persona and the mother constructed by the defence likely served to entrench juror suspicions about Chamberlain's honesty and the bona fides of the defence as a whole. I have drawn on a unique source of information – the notes taken by juror Yvonne Cain throughout the trial and jury deliberations – to demonstrate the relative influences of media, science and common sense notions of motherhood. These notes suggest that the jurors' assessment of Chamberlain as a mother was crucial to the decision to find her guilty of murder. They also provide some insight into the method by which juries construct a case story and seek to assimilate evidence into that story.
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Thank you also to my family – my mother, father and my sisters Clare and Sophie – and to my best friend, Emily Merrett. Each cheerfully submitted at various times to weekend trips to the library, late night phone calls, and demands to send Twisties, Cherry Ripes and Milo. I could not imagine a more loving and supportive Melbourne base.

This thesis is dedicated to my mother, for teaching me that just about anything is possible with a little bit of courage and a lot of persistence.
In Australia, a lone woman is being crucified by the Press at any given moment.

With no unedited right of reply, she is cast out into Aboriginal space.

It’s always for a defect in weeping she hasn’t wept on cue or she won’t weep correctly.

...

She is rogue property. She must be taught her weeping. It is done for the millions.

“A Deployment of Fashion”
Les Murray

From Conscious and Verbal (Manchester: Carcanet, 1999)
CHAPTER ONE: A BABY WAS KILLED ...

1. The Chamberlain case

A baby was killed at Ayers Rock on 17 August 1980 during the evening, between 8 and 9 o'clock; it was a Sunday. ...

Shortly after the event, the mother asserted, and thereafter continued to assert, that the dead child had been taken from the tent by a dingo.

The Crown says that the dingo story was a fanciful lie, calculated to conceal the truth, which is that the child Azaria, died by her mother's hand.\(^1\)

With these words, Ian Barker Q.C. opened the case for the Crown against Alice Lynne (Lindy) Chamberlain. Chamberlain stood accused of murdering her nine-week old baby daughter, Azaria. Chamberlain's husband, Michael, was charged with being an accessory after the fact. By the time the case came to the Northern Territory Supreme Court, it was a media sensation – when Azaria Chamberlain was on the front cover of the media dailies, circulation rose by an estimated 40,000 copies per newspaper, per day.\(^2\)

Lindy Chamberlain was convicted of murdering Azaria on 29 October 1982. Michael Chamberlain was convicted as an accessory. Appeals to the Full Federal Court\(^3\) and the High

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\(^1\) Transcript of proceedings *R v. Alice Lynne Chamberlain and Michael Leigh Chamberlain* (trial conducted in the Northern Territory Supreme Court between 13 September 1982 and 29 October 1982) (*Trial Transcript at 13/14*). Opening address, Ian Barker Q.C for the Crown. A copy of the Trial Transcript is held by the National Library of Australia as part of Manuscript collection 8292 – papers of Norman H. Young. Dr Young is a doctor of science who became involved with the Chamberlain Innocence Committee and who later published a book (see note 7, below) about the campaign to free Chamberlain. He obtained the Trial Transcript together with notes taken by juror Yvonne Cain (see below, note 42) in the course of his involvement with the Chamberlain Innocence Committee.


\(^3\) The decision of the Full Federal Court is reported at *Re: Alice Lynne Chamberlain and Michael Leigh Chamberlain And: the Queen* (1983) 72 F.C.R. (Australia) 1 (*Chamberlain FFC*). An interim decision granting Chamberlain bail pending determination of the appeal is reported at *Chamberlain v. the Queen* (1982) 69 F.L.R. 445 (*Chamberlain FCA Bail Application*).
Court of Australia\(^4\) were unsuccessful. Chamberlain remained in prison until 7 February 1986, when the Northern Territory government released her pending a Royal Commission into her conviction. In May 1987, Royal Commissioner Morling reported that “I do not think that any jury could properly convict [the Chamberlains] on the evidence as it now appears.”\(^5\) On 15 September 1988, the Northern Territory Supreme Court quashed the Chamberlains’ convictions, finding that “the law of the land holds the Chamberlains to be innocent.”\(^6\)

Those who have studied the Chamberlain case have proposed two main explanations for Chamberlain’s conviction. The first explanation, which has gained broad acceptance within the academic legal community, is that the scientific evidence tendered by the Crown led the jury into error.\(^7\) This was the primary basis on which Royal Commissioner Morling found that the Chamberlains’ conviction could not be sustained.\(^8\) However, those commentators who prefer this explanation have failed to account for the fact that at trial there was strong eyewitness evidence supporting Chamberlain’s innocence and contested scientific evidence as to her guilt. The

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\(^4\) The decision of the High Court of Australia is reported at *Chamberlain v. the Queen (No. 2)* (1984) 153 C.L.R. 521 (*Chamberlain HCA Decision*). An interim decision refusing Chamberlain bail is reported at *Chamberlain v. the Queen (No. 1)* (1983) 153 C.L.R. 514 (*Chamberlain HCA Bail Decision*).


\(^8\) Morling Report, *supra* note 5 at 340 – 342.
second explanation, preferred by some criminologists and social theorists, is that Chamberlain’s “trial by media” precluded the possibility of a fair trial. These competing explanations are by no means mutually exclusive, but commentators tend to emphasise one or the other.

In this thesis, I will argue that the prevailing interpretations of the Chamberlain case do not adequately account for the role of social conceptions of motherhood in Chamberlain’s conviction. I do not think that Chamberlain was guilty – on the contrary, I believe that a dingo was almost certainly responsible for Azaria’s disappearance. However, I argue that Chamberlain’s behaviour in the hours after Azaria disappeared and her demeanour during the trial were central to the jury’s decision to enter a guilty verdict. Michael Chamberlain’s behaviour after Azaria’s disappearance was taken as a further sign of Chamberlain’s guilt. Whilst I agree with other commentators that scientific evidence and media commentary each played a role in Chamberlain’s conviction, the scientific and media perspectives were influenced by perceptions of Chamberlain as a mother and as a woman. In this thesis, I argue that it is necessary to consider how Chamberlain was constructed as a mother in order to understand why she was convicted. Chamberlain challenged expectations of how a bereaved mother “should” behave, and this created suspicion about her role in Azaria’s disappearance. Social expectations of motherhood influenced the conduct and outcome of the legal process. The Chamberlain case illustrates that the law is shaped by discourses of motherhood, particularly the dominant ideology of motherhood. However, in the

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Chapter one

Chamberlain case, these discourses were not homogenous – Chamberlain’s motherhood was constructed in various ways, both in the courtroom and in the media.

In this introduction, I provide a brief history of the Chamberlain case before explaining how my thesis departs from existing accounts of the case. Chapter two places conceptions of motherhood within the context of law’s claims to autonomy and suggests that competing conceptions of motherhood are interpreted through the prism of the dominant ideology of motherhood. This is true both socially and in legal fora. For this reason, legal outcomes often favour discourses that conform to the dominant ideology over those that challenge that ideology.

In chapter three, I discuss the construction of Chamberlain’s motherhood in the media and at trial. I argue that, while the defence constructed Chamberlain as a good mother, the Crown sought to characterise her as a bad (murdering) mother. Chamberlain herself accepted neither stereotype – she explained herself as a mother who was innocent of murdering her daughter and angry at her family’s treatment by the law and by the media. However, the defence narrative provided no explanation for Chamberlain’s anger. This disjuncture between the defence narrative and Chamberlain’s account of herself provided grounds for the jury to be suspicious of Chamberlain.

Chapter four provides an introduction to the scientific case against Chamberlain. The scientific investigation was coloured by the belief that Chamberlain had murdered Azaria, which belief was in turn influenced by Chamberlain’s behaviour as a mother. It was partly this dogmatism that led to grave errors in the scientific case presented by the Crown. The scientists employed by the defence to challenge the Crown’s scientific case identified some of these errors at trial, but a number of their fundamental assumptions were also incorrect. These errors certainly contributed
to the jury’s decision to convict Chamberlain, but the importance of the scientific case to the jury’s decision has been overstated in some accounts of the case.

Chapter five focuses on the decision-making process at trial in the Chamberlain case. Justice Muirhead’s summing up at trial focused on the autonomy of law from the social context of the case, but juror Cain’s notes demonstrate that the jury had regard to a wide range of information other than the evidence. This “extraneous” information included media constructions of Chamberlain. However, the media constructions of Chamberlain were not determinative of the jury’s decision – the jurors interpreted media information in the light of what they saw and heard in the courtroom.\(^\text{10}\) The notes also show that, while both the scientific evidence and media coverage were important, the jury’s perception of the case (including its assessment of the scientific evidence and of the media constructions) was affected by the jurors’ judgment of Chamberlain as a mother.

The Chamberlain case has been called “the story that had everything”.\(^\text{11}\) Azaria, a baby girl dressed entirely in white, disappeared after twilight one evening from a campsite at Uluru\(^\text{12}\) – one of the most recognisable, and most exotic, locations in Australia. The juxtaposition between the mundane family events that preceded Azaria’s disappearance – a meal consisting of baked beans, children being bathed and sent to bed – and the savage intrusion of the Australian wilderness, in


\(^{12}\) In 1980, Uluru was usually known as Ayers Rock. Uluru is the name given to Ayers Rock by its traditional owners.
the form of a dingo, resonated with the white Australian cultural fascination with the gossamer between the “alien land” and the transplanted European culture.  

There was more than a hint of the occult in many accounts of the case and this mysticism was bound together with Aboriginal dreaming and stories of dingo spirits. The figure at the centre of all of this was Chamberlain, the deeply religious “strong-faced” mother who “oddly irritated many people.” These elements combined to create a cultural saga that continues to intrigue Australians. For many years, the story was enlivened and perpetuated by the legal process of inquiry into whether Chamberlain had murdered her daughter. The inquests and Chamberlain’s trial, which were ostensibly concerned with transforming the saga into a logical evidentiary account of “what really happened”, only served to feed the legend.

2. **A legal history of the Chamberlain case**

Lindy and Michael Chamberlain arrived with their three children (Aidan, then six years old; Reagan, then four; and Azaria, aged nine weeks) at Uluru on the night of 16 August 1980. The Chamberlains camped close to several other families. They spent the day of 17 August

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14 See Howe, supra note 9 at 5 for a description of some of the reporting about the Chamberlains. Certain newspapers reported the discovery of bibles with strange passages underlined and of a child’s coffin at the Chamberlain’s house. Another suggestion was that the last photograph taken of Azaria actually showed a “substitute” older child. Aspects of these allegations were also made by the Crown during the second inquest into Azaria’s death – see Bryson, supra note 2 at 244.

15 Howe, supra note 9 at 5.


sightseeing – climbing the rock and walking its perimeter. By around 8 o’clock on the evening of
17 August, the family had eaten dinner and one of the children was asleep in the family tent.
Azaria had been fed and appeared to be asleep in her mother’s arms. Chamberlain led Aidan, the
eldest child, and carried Azaria to the tent. The question of what happened in the next few
minutes was the subject of two inquests, a criminal trial and two appeals, and a Royal
Commission.

Chamberlain maintained that she placed Azaria in a bassinet at the rear of the tent and collected a
can of baked beans and can opener from the car before racing Aidan back to the barbeque area.18
Aidan corroborated her story in subsequent police interviews.19 Another couple, the Lowes, gave
evidence that Chamberlain and Aidan had indeed returned to the barbeque area, and that
Chamberlain was carrying baked beans and a can opener. At trial, Michael Chamberlain and Mrs
Lowe both gave evidence that they heard a sharp infant’s cry soon after Chamberlain returned to
the barbeque area. Michael suggested that Chamberlain return to check on Azaria, and
Chamberlain headed back towards the tent. Chamberlain gave evidence that she saw a dingo
coming out of the tent, shaking its head. The dingo ran off and Chamberlain cried the famous
words “A dingo has got my baby”.

A search of the tent revealed that Azaria was not present and her blankets were in disarray.

According to several eyewitnesses, there was blood in the tent. A search party was immediately

18 The examination in chief of Lindy Chamberlain about the events of 17 August 1980 is reported in the Trial
Transcript, supra note 1 at 2071 – 2077. Cross-examination is reported in the Trial Transcript at 2095 – 2112. The
Morling Report, supra note 5 discusses inconsistencies in the accounts Chamberlain gave at various times (to police,
during the coroner’s inquests, at trial and before the Royal Commission) at 23 – 26 and 288 – 291. Justice Morling
allows that he was troubled by these inconsistencies, but ultimately attributes them to the enormously distressing
circumstances of Azaria’s disappearance at 308 – 309.

19 Extracts from Aidan Chamberlain’s statement are quoted in the Morling Report, supra note 5 at 265.
raised, and a tracker found dingo tracks leading from the tent along a sand dune. It appeared to trackers that the dingo had in places put down a heavy object, which left a mark resembling a knitted garment. Azaria’s body was never found, but some of her clothing (including a jumpsuit) was located at the base of Uluru a week after her disappearance. At the first inquest into Azaria’s disappearance, Coroner Barritt found that Azaria “met her death when attacked by a wild dingo while asleep in her family’s tent … [her injuries] would have resulted in swift death.”

At the second inquest and at the Chamberlains’ trial, the Crown presented a very different chronology from that which was suggested by Chamberlain’s account and endorsed by the first coroner. The Crown alleged that Chamberlain took Azaria to the car, not to the tent, with the intention of murdering her. It alleged that she murdered Azaria using a penknife or scissors while sitting in the front passenger seat of the car, and probably hid Azaria’s body in Michael Chamberlain’s camera bag. One or both parents later buried Azaria’s body, and returned to the burial site to disinter and rebury her later that night. The Crown adduced scientific evidence in support of these allegations. This evidence included testimony that the Chamberlains’ car contained an infant’s blood and that the imprint of a human hand could be detected in bloodstains on Azaria’s jumpsuit. The Crown also adduced evidence to the effect that a dingo could not

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20 Bryson, supra note 2 at 70.


22 This testimony is more fully described in chapter four, infra.
have taken Azaria or created the damage evident in her jumpsuit. The Crown’s evidence was countered at trial by scientific evidence given by expert witnesses called by the defence.

The Crown’s hypothesis contradicted the evidence of several eyewitnesses and also ran contrary to evidence given at the first inquest by Nipper Winmatti, an aboriginal tracker. John Phillips Q.C. for the defence described Sally Lowe’s evidence that she had heard Azaria cry after Lindy Chamberlain had returned from the car as “an absolute bar to conviction”. The Crown invited the jury to disbelieve Lowe and other eyewitnesses.

On 29 October 1982, the jury found Chamberlain guilty of murdering Azaria and Michael Chamberlain guilty of being an accessory after the fact. Chamberlain was given the mandatory sentence of life imprisonment with hard labour. Michael Chamberlain was given a suspended sentence and released to care for the Chamberlains’ surviving children. Appeals to the Full

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23 A detailed consideration of this evidence has been undertaken by Edmond “Azaria’s Accessories”, supra note 7.

24 For reasons that remain unclear, the aboriginal trackers were not called to give evidence at trial. Adrian Howe has called the sidelining of aboriginal evidence in the Chamberlain case and associated reporting “profoundly racist”. Howe, supra note 9 at 265. The decision not to call the aboriginal trackers seems bizarre given the Australian public’s “almost mystical faith in the Aboriginals’ ability to track.” Young, supra note 7 at 287. It is difficult to find reasons other than racism to explain their exclusion. The evidence given by tracker Nipper Winmatti at the first inquest was available to the jury at trial as part of the transcript of the first inquest, but notes taken by juror Yvonne Cain during the trial, infra note 42, suggest that the jury did not have regard to this evidence.

25 Closing submission of John Phillips Q.C. for the defence, Trial Transcript, supra note 1 at 2839.

26 Closing submission of Ian Barker Q.C. for the Crown, ibid at 3041/42.

27 Sections 158, 162 and 164 of the Criminal Code Act 1983 (N.T.). The Criminal Code Act does not include the crime of infanticide. In any event, it is unlikely that the infanticide defence would have been available to Chamberlain because the defence argued that Lindy Chamberlain was in good mental health (and that it was therefore inexplicable for her to have killed Azaria). See the closing remarks of John Phillips Q.C. for the defence, Trial Transcript, supra note 1 at 2835: “This mother was not the sort of mother than Dr Milne explains might commit a motiveless killing; a mother who has rejected the child. These [witnesses] all tell you the same thing. This lady was a caring mother, a mother who loved the child”.

28 “Michael: The boys need their dad – Trial Judge” Sun Herald 31 October 1982, page 1. When passing sentence on Michael Chamberlain, Justice Muirhead said “You have suffered, and will continue to suffer, intolerably. For a long time, your children will also.”
Federal Court and the High Court of Australia were dismissed, with dissenting judgments being delivered in the High Court by Justices Murphy and Deane.\textsuperscript{29} Chief Justice Gibbs and Justice Mason found that:

Mrs Chamberlain was of good character and according to the evidence was a loving mother. There is no evidence to suggest that her mind was unhinged. If she committed the crime she was extraordinarily self-possessed and a clever actress – normal and composed when she returned with Aiden to the barbeque area after having killed the baby, and apparently shocked, tearful and distressed after she had, according to her, seen the dingo.\textsuperscript{30}

Nevertheless, Gibbs CJ and Mason J found that the case against Chamberlain was sufficient for the jury to enter a guilty verdict.\textsuperscript{31} After Chamberlain’s appeal to the High Court was dismissed, the Chamberlain Innocence Committee\textsuperscript{32} continued to petition the federal and Northern Territory governments to release Chamberlain and to hold a Royal Commission into her conviction. This group obtained evidence that discredited much of the scientific evidence on which the Crown’s case was based.\textsuperscript{33} The efforts of the Chamberlain Innocence Committee were met with implacable opposition on the part of the Northern Territory Government, but were increasingly supported in federal parliament.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{29} \textit{Chamberlain} HCA, supra note 4 per Murphy J. at 572 and per Deane J. at 628.
\item \textsuperscript{30} \textit{Chamberlain} HCA supra note 4 per Gibbs CJ and Mason J (as he then was) at 565.
\item \textsuperscript{31} Ibid, at 567.
\item \textsuperscript{32} Members of the Chamberlain Innocence Committee included senators, retired judges and artists. See Young, supra note 7 at 40 – 41, photograph between pages 138 and 139.
\item \textsuperscript{33} See, for example, the analysis of bite-mark evidence discussed by \textit{Edmond "Azaria’s Accessories"}, supra note 7. See also Young, supra note 7 especially at 63 - 102
\item \textsuperscript{34} Young, supra note 7 at 150 – 171.
\end{itemize}
On 2 February 1986, a baby’s matinee jacket was found at Uluru. This jacket answered the description of a jacket in which Chamberlain attested Azaria had been dressed when she disappeared. Chamberlain identified the jacket as Azaria’s on 5 February 1986. Chamberlain was released from prison by Northern Territory authorities on 7 February 1986, after about three years’ imprisonment. On the same day, a joint federal/Northern Territory Royal Commission into the Chamberlain convictions was announced.

The report of the Royal Commissioner was released in June 1987. The Royal Commissioner, Justice Morling, found that new scientific evidence left the Crown’s case “in considerable disarray”. In particular, Justice Morling found that:

The evidence leads me to conclude that if there were any blood in the car, it was present only in small quantities in the area of the hinge of the passenger’s seat and beneath. It has not been established that any such blood was Azaria’s.... There is compelling evidence that the [alleged arterial] spray [upon which the Crown relied heavily in making its case] was made up of a sound deadening compound and contained no blood at all.

Justice Morling also concluded that there was evidence of the existence of blood in the tent and that this evidence “was as consistent with dingo involvement as it was with the murder of the child in the car.” Justice Morling found that “I do not think that any jury could properly convict [the Chamberlains] on the evidence as it now appears.”

35 Young, supra note 7 at xii.

36 Morling Report, supra note 4 at 332.

37 Ibid.

38 Ibid, at 181.

After the Morling Report was released, the Chamberlains renewed their calls for a formal reversal of the jury’s verdict. The Northern Territory passed a new section (433A) of the *Criminal Code Act*, allowing the Northern Territory Attorney-General to refer a case in which a person has been committed of a crime to the Northern Territory Supreme Court for reconsideration. On 15 September 1988, the full court of the Northern Territory Supreme Court reversed the verdicts entered against the Chamberlains. Justice Nader (with whom Chief Justice Asche and Justice Kearney concurred) held that “[t]he convictions having been wiped away, the law of the land holds the Chamberlains to be innocent.”\(^{40}\) In May 1992, the Northern Territory government paid $900,000 to Lindy Chamberlain and $400,000 to Michael Chamberlain to compensate them for their legal expenses.\(^ {41}\)

3. **Departures: (Re)considering the Chamberlain case**

I have based my reconsideration of the Chamberlain case on the trial transcript and the notes taken during the trial by juror Yvonne Cain\(^ {42}\) together with Lindy Chamberlain’s autobiography,\(^ {43}\) newspaper articles and secondary sources. I have also drawn from the decisions of the Full Federal Court and the High Court of Australia, as well as the Morling Report. The newspapers I have focused my research on are the *Sydney Morning Herald* and the *Northern Territory News*. My research into the *Sydney Morning Herald’s* reportage considered articles


\(^{41}\) Bob Watt “The story that had everything” *Northern Territory News* 17 August 2000 page 19.

\(^{42}\) Yvonne Cain, juror’s notes taken during Chamberlain case, held by the National Library of Australia as part of MS8292, *supra* note 1 (*Cain’s notes*).

appearing between Azaria’s disappearance (17 August 1980) and the release of the Morling Royal Commission Report (June, 1987). Specifically, I searched newspapers within the date ranges specified in Appendix A. My research into the *Northern Territory News* focused on articles appearing during Chamberlain’s trial (September and October, 1982). Focusing on this period allowed me to understand what information juror Cain was receiving from the *Northern Territory News* during the trial.\(^{44}\)

The *Sydney Morning Herald* provides an interesting counterpoint to much of the reporting in the Chamberlain case because its Darwin-based reporter, Malcolm Brown, was very sympathetic to Chamberlain. While many reporters constructed Chamberlain as a “dangerous woman”, Brown portrayed her as a good mother who became enmeshed in forces beyond her control.\(^{45}\)

The *Northern Territory News* more closely fitted the mould of negative reportage about Chamberlain. The *Northern Territory News* is particularly important to the Chamberlain case because at least some of the jurors continued to read it during the trial.\(^{46}\) This collision of media and legal discourses about Chamberlain provides a graphic example of a broader phenomenon with which I am concerned – the interrelationship between social and legal conceptions of motherhood. In chapter five, I discuss the articles that appear in juror Cain’s notes and suggest how they may have influenced the jury’s deliberations.

\(^{44}\) It would provide an interesting insight into social constructions of the case as a whole to compare the *Northern Territory News*’s throughout the period from August 1980 to June 1987 with that of the *Sydney Morning Herald* and other major “Southern” newspapers. In addition, another daily Darwin newspaper, *The Territorian*, was published during this time. My thesis does not provide a comprehensive analysis of reportage about the Chamberlains in Darwin or elsewhere. However, such a project would contribute to themes that I have developed in this thesis – in particular, the relationship between legal and other social representations of motherhood.

\(^{45}\) Howe, *supra* note 9 at 3.

\(^{46}\) Cain’s notes, *supra* note 42.
The most widely cited book about the Chamberlain case is John Bryson’s *Evil Angels*. *Evil Angels* weaves quotes from the trial transcript together with newspaper reports and Bryson’s interviews of key actors to form a coherent “fictional-style” narrative told in the third person. His narrative is sympathetic to Chamberlain and lays the blame for her wrongful conviction at the feet of a cabal formed by scientists, journalists, police and lawyers. *Evil Angels* is impeccably researched. However, Bryson ultimately explains Chamberlain’s conviction as an anomaly – the freak result of a combination of poor science, prejudice and the peculiarities of the particular case. It is tempting, but ultimately unsatisfying, to explain the Chamberlain case in this manner.

The large and growing literature on wrongful convictions in every common law jurisdiction suggests that, while the specific circumstances may vary, certain patterns may be observed in cases where justice miscarries. This literature demonstrates that wrongful convictions should not be dismissed as “mere” anomalies. I draw a great deal on *Evil Angels* but my conclusions differ from Bryson’s. The Chamberlain case presents an extreme example of how legal discourse is deployed to enforce cultural expectations of motherhood and to sanction those who contravene these expectations. To that extent, the Chamberlain case demonstrates that legal discourse both draws on social conceptions of motherhood and offers a site to contest those social conceptions.

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48 See for example, Richard Weisman, “Showing Remorse: Reflections on the Gap between Expression and Attribution in Cases of Wrongful Conviction”, forthcoming article in the Canadian Journal of Criminology and Criminal Justice. Another important study of conviction patterns (in this case, the relationship between the police decision to charge a defendant and the likelihood of conviction) is Richard V. Eriksen and Patricia M. Baranek *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process* (Toronto: University of Toronto Press, 1982).

It is therefore a paradigm example of law’s role in the construction of motherhood, rather than an aberration.

Other commentators suggest that poor scientific evidence was responsible for Chamberlain’s conviction. These commentators point to the errors in the Crown’s scientific evidence and suggest that the jury failed to understand the scientific intricacies of the case. In chapters four and five, I suggest that a distinction may be drawn between Chamberlain’s conviction (in which the jury’s perception of Chamberlain was central) and her release and acquittal. It was only once Chamberlain was imprisoned and thereby removed from the public gaze that this shift occurred.

In “Azaria’s Accessories: Deconstructing the Social (Legal-Scientific) Construction of the Chamberlains’ Guilt and Innocence”, Edmond argues that the scientific evidence presented in the Chamberlain case was necessarily influenced by the social context of the case. His focus is on the scientific discourses rather than elaborating on how the social context influenced these discourses. In chapter four, I have extended his analysis by considering how a particular aspect of this social context (constructions of Chamberlain as a mother) shaped the scientific enquiry and the evidence presented at trial.

Another recurrent explanation for Chamberlain’s conviction is that she was denied a fair trial because of the prejudicial speculation in the media before her trial. This argument is premised

50 Crispin, supra note 7; Young, supra note 7.
51 Crispin, supra note 7 at 347 - 8; Young, supra note 7 at 117 - 8.
52 Crispin, supra note 7 at 350; Young, supra note 7 at 117.
53 Edmond “Azaria’s Accessories”, supra note 7.
54 Ibid, at 557.
55 Howe, supra note 9 at 262; Craik, supra note 9 at 128; Keogh, supra note 9 at 23.
on the argument that the media representations of Chamberlain were prejudicial, and that the legal process did not overcome this prejudice. In chapter five, I argue that the media representations of Chamberlain were not in fact uniformly detrimental. I also suggest that the trial provided the jury with an opportunity to “negotiate control” over the media representations by allowing it to compare media constructions of Chamberlain with personal perceptions formed during the trial.

Arguably, the prejudicial media portrayal of Chamberlain could not have been totally counteracted at trial, particularly if jurors approached the case with pre-formed suspicions about the Chamberlains’ honesty. However, the prejudicial publicity was but one of many sources of information on which the jurors may have formed their view that Chamberlain was guilty. In chapter five, I discuss the deliberative process in greater detail. At present, it is sufficient to note that although the jury members likely approached the trial with preconceptions about Lindy Chamberlain, these conceptions were contested and renegotiated during the course of the trial.

Like those who blame the media for Chamberlain’s conviction, I focus on representations of Chamberlain’s motherhood. Unlike these commentators, I believe that Chamberlain’s motherhood was not merely constructed in the media, but also by both the Crown and the defence at trial. In turn, Chamberlain presented her own view of herself while giving evidence and through her demeanor in the courtroom. Another author who has focussed on Chamberlain’s motherhood is Briar Wood. 56 Wood characterises Chamberlain as a passive, or at best, reactive agent around whom the battle for meaning was fought:

As the good mother and God-fearing wife, Lindy Chamberlain did her very best to fit [the] description of the fantasy woman whose support of the male-led institutions of Church and home guarantees their continuity. But in the sense that this identity is a fantasy, no real woman can fulfill it.\textsuperscript{57} [emphasis in original]

I argue that Chamberlain was a more active agent in the construction of her own identity than Wood, Howe or Craik allow. In fact, Chamberlain was punished more harshly for her presumed murder of Azaria than she might otherwise have been because she defiantly challenged attempts to categorise her as either a good mother or a murderer.\textsuperscript{58} Equally, I believe that Chamberlain’s demeanour explains the jury’s decision to prefer the Crown’s case, including its scientific evidence, over the defence narrative. In the next chapter, I discuss the role of conceptions of motherhood in the legal process.

\textsuperscript{57} Ibid, at 69.

\textsuperscript{58} Craik \textit{supra} note 9 at 131 suggests that Chamberlain was punished harshly because she lied. Certainly her refusal to “confess” is cited by Chamberlain herself as one of the reasons that she was imprisoned for more than three years – Chamberlain, \textit{supra} note 43 at xi. Chamberlain’s refusal to confess may be read two ways – as maintenance of the “lie” of innocence or as a continuation of an agenda of defiance. In the context of the case as a whole, I consider that it was Chamberlain’s defiance as was most powerfully manifest in her “lie” per se that infuriated law enforcement agencies and the jury.
CHAPTER TWO: THROUGH A GLASS, DARKLY: THE ROLE OF SOCIAL CONCEPTIONS OF MOTHERHOOD IN THE CHAMBERLAIN CASE

1. Introduction

Chamberlain was charged with murdering her daughter. The nature of her relationship with her daughter therefore became a fundamental focus of enquiry during her trial – for example, the defence commenced its summing up by appealing to the loving and protective nature of the bond between mothers and daughters.59 The relationship also fascinated reporters and police. The press used headlines such as “Lindy ... The Private World of a ‘Guilty’ Mother”60 and “Mother Weeps at Hearing”61 to sell papers. The police interviewed staff at Mt Isa hospital, where Azaria was born, as a starting point to their investigation of Azaria’s disappearance.62 The assumption that a meaningful distinction exists between “good mothers” and “others” permeated the socio-legal process of constructing Chamberlain as a mother.63

59 Trial Transcript, supra note 1 at 2827/8.
60 Sydney Sun 1 November 1982 cited by Keogh, supra note 9 at 27.
61 Sydney Morning Herald 16 December 1980.
62 Bryson, supra note 2 at 98.
63 Kline, “Complicating Motherhood” supra note 49 refers to “good mothers” and “bad mothers” and argues that “the expectations of good mothering are presented as natural, necessary and universal” at 121. See also “Mothers, Other Mothers and Others: the Legal Challenges and Contradictions of Lesbian Parents” (Gavigan, “Mothers and Others”) in Dorothy Chunn and Dany Lacombe, Law as a Gendering Practice (Ontario: Oxford University Press, 2000) 2 – 18. The characterization of a particular mother as “good” or “bad” is not immutable and social discourse about mothers recognizes degrees of “badness”. For example, Kathleen Folbigg has repeatedly been described as “Australia’s worst female serial killer”. She was convicted of murdering three of her children and of manslaughter of one child (three of these deaths were originally attributed to SIDS). See for example Lorna Knowles “Folbigg: Most hated woman alive” 9 July 2003 – downloaded from www.news.com.au on 2 September 2003 (this article originally appeared in the Sydney Daily Telegraph). This article quotes a letter written by Folbigg to her foster sister. Folbigg maintains her innocence but was convicted of murder on 21 May 2003. At the time of writing, she
Despite the overwhelming focus on Chamberlain’s motherhood during the course of her trial, existing accounts of the case pay little attention to how Chamberlain was constructed during the trial as a mother. Commentators focus on science, on media representations of Chamberlain, on police procedure: but rarely do they refer to Chamberlain’s own words or actions. Where Chamberlain does appear in these accounts, it is as the object of forces over which she has no control, and to which she has no “right of reply”. This absence may partly be motivated by compassion – Chamberlain faced more than enough scrutiny during her trial and the events that preceded it. Yet it seems wrong to expel the defendant (particularly a defendant as voluble as Chamberlain) from a history of her trial. One journalist suggested that Lindy was “the woman who talked her way into jail”. Equally, it is wrong to assume that Chamberlain entirely lacked agency throughout the legal process. Rather, she was presented with certain choices such as the decision whether to testify at her trial. However, these “choices” were made between unappealing alternatives in a situation that was not of her making. I am concerned with how Chamberlain was constructed as a mother, how she responded to these constructions and why it mattered.

My analysis of the Chamberlain case begins from a feminist legal perspective. Feminist legal theory, in common with all thoughtful assessments of the legal system, challenges the positivist conception of law as an “autonomous, self-contained system” that is aloof from the creation and had not yet been sentenced. The parallels and differences between the Folbigg and Chamberlain cases warrant further consideration.

64 With the exceptions of Wood, supra note 56 and Bryson, supra note 2. However, Wood constructs Chamberlain as lacking agency and Bryson portrays Chamberlain’s wrongful conviction as a tragic, but anomalous, miscarriage of justice. I find neither of these explanations satisfying.


66 Sydney Morning Herald 12 October 1985 cited by Young, supra note 7 at 12.
perpetuation of social inequities. According to the positivist characterisation, law is an autonomous institution that operates to identify the “truth” about past events and to ascribe responsibility for those events. The positivist conception reifies law by claiming that it is rational and objective. Law’s objectivity is safeguarded by legal process, which purportedly separates the reasoning process from the personal caprices of judges themselves. Legal process is therefore central to law’s claims to self-containment. It mediates between cultural knowledge and legal knowledge by allowing some forms of knowledge to enter the legal arena, and excluding other forms of knowledge.

The feminist challenge to legal positivism is premised on an alternative conception of law as a social institution that is necessarily affected by broader social conceptions of gender. Part of the legal feminist project is to demonstrate that apparently “neutral” rules affect individuals differently because of pre-existing gender inequities. I adopt the conception of law as ideological in two senses:

1) Law emerges from an existing ideological field in which the norms and values associated with social values are continuously asserted, proselytised, debated, abandoned, revised and generally struggled over.

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69 Stubbs, supra note 67 at 72 – 73.
The law is a major bearer or carrier of ideological messages which, because of the general legitimacy accorded to law, serve to reinforce and legitimate the ideology which the law carries. That is, law is itself ideological but it also serves to entrench ideologies. It is important to note that judges “do not always unquestioningly accept and reproduce the expectations of dominant ideologies” and that the oppressive aspects of dominant ideologies can to some extent be shifted or displaced. To this extent law constitutes a “site of contest” where alternative discourses about gender can be voiced and may at times succeed. However, challenging the ideological assumptions informing the content of law leaves undisturbed and may even serve to reinforce the power accorded to institutions of the state such as the law. This is because changes to the content of law do not ordinarily shift fundamental social relations of gender, class, race or sexual orientation.

The characterisation of law as ideological has been criticised by poststructuralist legal feminists such as Carol Smart and Zillah Eisenstein. These feminists argue instead that law is a discourse

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71 Kline, “Complicating Motherhood”, supra note 49 at 137.


that "can make claims to scientificity and hence truth." Smart draws on Foucault's discourse theory to argue that law "sets itself apart" from the social milieu of discourses by claiming to occupy "a space inside rationality and objectivity." The basis on which law makes this claim is that law is practiced according to legal method, which provides legal practitioners with direct access to the truth of legal texts. Like the ideological conceptualisation of law, the poststructuralist vision posits a mutually generative relationship between "legal knowledge" and "social knowledge" rather than reifying law as separate from and superior to cultural knowledge. However, the concepts of discourse and ideology also differ in important ways. In particular, poststructuralists regard discourse to be constitutive of subjectivity. In contrast, ideology mediates between reality and social consciousness and is accordingly predicated on an assumption that an external reality can be (incompletely) understood. The importance of the poststructuralist critique of Marxian legal feminism is that it reminds us that law "constructs and reconstructs maleness and femaleness, and contributes routinely to a common-sense perception of difference which sustains the social and sexual practices which feminism is attempting to

75 Smart, Law's Power, supra note 72 at 197. Smart's theory constitutes a departure from Foucault because Foucault conceived of law as pre-dating the modern episteme in which truth became the dominant mode of knowledge. This is arguably a less significant departure than it may seem, because a feature of Foucault's work is that it "involves the deliberate avoidance of any pretence to provide a systematic and integrated body of knowledge or theory." Episteme are "historically enduring discursive regularities" which provide the "unconscious ordering that gives rise to forms of thought that underlie intellectual disciplines." Alan Hunt and Gary Wickham Foucault and Law: Towards a Sociology of Governance (London and Colorado: Pluto, 1994) at 9.

76 Smart, "Law's Power", supra note 72 at 197.


79 Smart, "Woman of Legal Discourse", supra note 74 at 33.

Relevantly, legal and social conceptions of motherhood are not static, but are instead subject to contestation and change. Discourse analysis allows feminist legal theorists the space to notice that different constructions of gender may occur simultaneously within the legal process.

In chapter three, I identify at least three distinct discourses about motherhood that emerged during the course of Chamberlain’s trial. Most significantly, Chamberlain challenged powerful discourses about motherhood during her testimony. However, I will suggest that she was ultimately penalised for challenging dominant conceptions of motherhood. Understanding the ways in which Chamberlain was penalised for challenging these conceptions requires the use of theories of both ideology and discourse. Poststructuralist legal feminism “does not give a clear sense of how discourses are constituted and reproduced, nor how some discourses come to be more powerful and privileged than others.” Smart identifies law as a powerful discourse because of its “scientificity”, but she does not explain why legal outcomes tend to favour dominant social discourses or “ideologies”. For that reason, poststructuralist legal feminism alone does not sufficiently explain why Chamberlain’s account of herself was eventually subordinated to other discourses about her motherhood.

Neo-Marxian feminists argue that it is necessary to have regard to how “power flows from material (economic and social) circumstances in order to understand the hierarchy of discourses

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81 Smart, “Law’s Power”, supra note 72 at 201.
82 Smart, “Woman of Legal Discourse”, supra note 74 at 33. However, Shelley Gavigan finds Smart’s “Woman of Legal Discourse” to be “discursively unidimensional (and relentlessly exploited as a heterosexual woman)”, Gavigan, “Mothers and Others” at 13. Unlike Smart, Eisenstein regards law as relentlessly phallocentric – see Eisenstein, supra note 74 at 54 – 57.
outside law, which law then selectively values.\textsuperscript{84} That is, law intersects with other ideologies as well as other discourses and it tends to prefer outcomes that conform to dominant ideologies. This raises questions about the ability of law to make significant social change. The material social and economic circumstances relevant to the Chamberlain case included Chamberlain’s status as the primary caregiver to her children and the Chamberlains’ middle-class economic status, but also the resources enjoyed by the Crown in investigating and prosecuting Chamberlain. Whilst the Chamberlains were able (with the assistance of their church) to retain lawyers and scientists, I argue in chapter four that the Crown’s superior access to specialists was an important factor in the outcome of Chamberlain’s trial.

Because of this focus on material social and economic circumstances, the neo-Marxian characterisation of the relationship between law and material relations offers a more complete understanding of the perpetuation of social inequalities through law. One ideology that is of particular importance to an analysis of the Chamberlain case is the dominant ideology of motherhood. In the next section of this chapter, I will discuss the ideology of motherhood before suggesting how law tends to adopt and perpetuate the dominant ideology of motherhood.

2. The dominant ideology of motherhood

Marlee Kline defined the dominant ideology of motherhood as:

\textsuperscript{84} Ibid at 98, citations omitted. See also Shelley Gavigan, “Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law” (1993) 31 Osgoode Hall Law Journal 589 at 605; and Rosemary Hennessy and Chris Ingraham “Introduction: Reclaiming Anticapitalist Feminism” in Hennessy and Ingraham (eds.), Materialist Feminism: A Reader in Class, Difference and Women’s Lives (New York and London: Routledge, 1999) at 4 – 6. However, Sundhya Pahuja suggests that the neo-Marxian use of ideology is as close to a Foucauldian analysis as it is to a Marxian one – Sundhya Pahuja, “Power and the Rule of Law in the Global Context” Keynote Address, UBC Law Graduate Students’ Conference, May 2003. On one view, the distinction isn’t crucial – the point is simply that, while room exists for dominant conceptions of gender to be contested, outcomes tend to favour the economic and social status quo.
the constellations of ideas and images in Western capitalist societies that constitute the dominant ideals of motherhood against which women’s lives are judged. The expectations established by these ideals limit and shape the choices women make in their lives, and construct the dominant criteria of “good” and “bad” mothering. They exist within a framework of dominant ideologies of womanhood, which, in turn, intersect with dominant ideologies of family.\(^85\)

Eileen Fegan suggests that ideology takes the biological fact that women are responsible for bearing children and combines it with values to which all members of society have a certain commitment – including the idea of children being loved and reared within a nurturing and secure environment. The ideal becomes a dominant ideology when it is entrenched as a social duty and a private commitment, thereby rendering certain understandings about motherhood axiomatic.\(^86\)

The reification of essentially personal ideals has oppressive effects – for example, in the late nineteenth century, “women’s child-bearing capacity was treated as evidence of their special child-rearing capacity, which was considered to be implanted at the level of instinct.”\(^87\) The effect of ideology is to trap mothers within certain norms of behaviour.\(^88\) Boyd,\(^89\) Kline\(^90\) and Gavigan\(^91\) have demonstrated that whilst the ideology of motherhood propagates a naturalised and “universal” vision of motherhood, it does not treat all mothers equally – race, class and

\(^85\) Kline, \textit{supra} note 49 at 119.


\(^87\) Ibid, at 179. See also Boyd, “Ideology and Discourse”, \textit{supra} note 49 at 90.

\(^88\) Boyd, “Ideology and Discourse”, \textit{supra} note 49 at 100.


\(^90\) Kline, “Complicating Motherhood”, \textit{supra} note 49 passim, but especially at 120 – 121.

\(^91\) Gavigan, “Paradise Lost”, \textit{supra} note 84 at 597; Gavigan, “Other Mothers”, \textit{supra} 63 at 108.
sexuality all influence how an individual mother will be judged. By presenting a “universal” vision, the dominant ideology of motherhood obscures significant differences among women. For instance, Kline demonstrated that the dominant ideology of motherhood affects Canadian First Nations women differently from the ways in which it affects most white, heterosexual mothers.92

The dominant ideology of motherhood leads to certain “common sense” assumptions being made about mothers. In particular, the ideology of motherhood reproduced in law “relies on a notion that mothers will assume responsibility for children, that they will put aside their own interests, and often their participation in the so-called “public sphere”, in order to do so, and that they can expect to be paid nothing for this labour of love.”93 In general terms, women are expected to assume primary day-to-day responsibility for their children, including the responsibility to protect them from harm. This allocation of caregiving responsibility privatises the onus of raising children and individuates the burden of caregiving so “when there is a problem with a child, the individual mother’s practices are subjected to critical scrutiny.”94

The content of the dominant ideology of motherhood changes over time.95 For example, Boyd has mapped changes in the content of the ideology of motherhood since the 1950’s and 1960’s


93 Boyd, Child Custody, ibid at 218.

94 Kline, “Complicating Motherhood”, supra note 49 at 124. See also, Lori Ann Lothian Mapping Contesting Terrain: The Doctrine of Failure to Protect in Canadian Criminal Law (L.L.M. Thesis, University of British Columbia, 2002). Lothian considers the rising trend towards rendering mothers criminally responsible for harm caused to their children by abusive partners.

95 Contra Smart, “Woman of Legal Discourse”, supra note 74 at 30. Smart characterises Marxist feminism as “a recipe for despair, given that theorising everything as an effect of a monolithic patriarchy rendered feminism itself little more than false consciousness at best, or a device for retaining patriarchy at worst.” Smart’s criticism draws on
“in focusing somewhat less on female moral/sexual conduct, and in beginning to countenance some degree of employment by mothers.” These changes represent the success achieved by certain sectors of the women’s movement in challenging the expectation that mothers should not work outside the home. However, that success was arguably achievable partly because working mothers did not present a grave threat to social order (given that they by and large continued to perform social reproductive work as well as taking on economically productive employment). When attempts to change conceptions of motherhood present more fundamental challenges to material relations, they may be less successful.

Law’s relationship to the dominant ideology of motherhood is complex. Law may reinforce expectations imposed on mothers by supplying a legal sanction when those expectations are not met. Legal sanctions may result from a particular event – such as where a child is hurt by a third party (often the mother’s male partner) and the mother is held criminally responsible for failing to protect the child. Or law may remove children from a mother who demonstrates attributes that derogate from ideological expectations of motherhood – for instance, legal

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Foucault’s rejection of ideology, which was based on a perception that ideology “always stands in a secondary relation to some prior determining material realm”. Lois McNay *Foucault and Feminism: Power, Gender and the Self* (Cambridge, U.K.: Polity Press, 1992) at 25 citing Michel Foucault *Power/Knowledge: Selected Interviews and Other Writings 1972 - 1977* (edited by C. Gordon) at 118. But see Hunt, “Marxism and Law”, *supra* note 70 at 104 - 115 for a detailed discussion of different Marxist conceptions of law. Hunt argues that the “Base-Superstructure Theory” of law is only one conception of law, and not the most refined of Marxist theories.

96 Boyd, “Ideology and Discourse”, *supra* note 49 at 93.

97 This phenomenon has been extensively documented in Canada and elsewhere. See, for example, Pat Armstrong “Restructuring Public and Private: Women’s Paid and Unpaid Work” in Susan B. Boyd (ed.), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy,* (Toronto: University of Toronto Press, 1997) 37 – 61 at 49 - 50.

98 Fegan, *supra* note 86 at 178.

99 Lothian, *supra* note 94 discusses the growing trend towards holding mothers criminally liable in these circumstances.
decision-makers may be more likely to refuse to award custody of children to a mother who is perceived as deviating from the “idealised norm of middle-class, white, heterosexual motherhood”.\(^{100}\) Even where a mother is not overtly penalised for transgressing the dominant ideology (eg. where she is awarded custody of her children), she may nevertheless be disciplined by the terms on which she succeeds.\(^{101}\) However, these outcomes do not always ensue\(^{102}\) and the dominant ideology of motherhood may interact with other ideologies in such a way that it manifests differently in different cases.\(^{103}\)

The Chamberlain case does not neatly fit with any of the types of legal enforcement of the dominant ideology of motherhood that I have identified. On the one hand, Chamberlain was accused of murdering her child – of actively harming Azaria, rather than failing to intervene to protect her.\(^{104}\) On the other, Chamberlain’s trial was not a contest to establish whether Chamberlain was a better parent than Azaria’s father or a third party.\(^{105}\) Yet there was no body and the Crown faced considerable difficulties proving that Chamberlain could have murdered Azaria in the ten minutes during which she was away from the barbeque area. In order to prove that Azaria was murdered, the Crown used scientific evidence to suggest that human hands had

\(^{100}\) Boyd, *Child Custody*, supra note 92 at 8 – 9; Kline, “Complicating Motherhood”, *supra* note 49.

\(^{101}\) For example, a mother may be awarded custody of her children but restrained from relocating to pursue employment or a new relationship. Boyd, *Child Custody*, supra note 91 at 152 – 156.

\(^{102}\) See for example, Kline, “Complicating Motherhood”, *supra* note 49 at 137.

\(^{103}\) For example, expectations of black mothers are demonstrably different from those imposed on white mothers. Boyd, *Child Custody* *supra* note 92 at 13.

\(^{104}\) Compare with the circumstance in which a mother is held criminally liable for failing to act – see Lothian, *supra* note 94.

\(^{105}\) Unlike child custody and child protection disputes – see Boyd, *Child Custody*, supra note 92; Kline, “Complicating Motherhood”, *supra* note 49.
killed the child. In order to prove that Chamberlain murdered Azaria, the Crown needed to persuade the jury that she was capable of murder. The Crown drew on “common sense” notions of motherhood in order to create suspicion about Chamberlain as a mother. However, the defence counsel used similar notions in an effort to inspire the jury’s sympathy for Chamberlain. Both Crown and defence employed the ideology of motherhood, but their discursive constructions of Chamberlain could not have been more different. The differences between these constructions of Chamberlain show that, within the framework of the dominant ideology of motherhood, there exist contradictions that may form a site of contest in a particular case.106

3. Conclusion

The dominant ideology of motherhood interacts with other ideologies at different times to form “a grid of competing frames of reference through which people think and act.”107 I argue below that the dominant ideology of motherhood permeated the scientific enquiry into the cause of Azaria’s death as well as the media constructions of Chamberlain. In the course of the Chamberlain case, the dominant ideology of motherhood intersected with the ideology of science and with (media-influenced) conceptions about the criminal justice system. Like law, science is a discourse that makes powerful truth claims. These claims are partly empowered by the institutional authority given to scientists in modern Western society. But scientific knowledge and media narratives are also shaped by ideology. In chapters four and five, I discuss the ways in which the scientific evidence was influenced by each party’s conceptions of Chamberlain’s

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106 Gramsci proposed the notion of contradictions within common sense. Gramsci argued that individuals tend to have a number of ‘conceptions of the world’ which ‘tend to be in contradiction with one another and therefore form an incoherent whole’. David Forgacs (ed.) The Antonio Gramsci Reader (New York: New York University Press, 2000) at 421.

107 Hunt, “Marxism and Law”, supra note 70 at 120. See also Fegan, supra note 86 at 182.
motherhood, and investigate the institutional power of the Crown's forensic scientists. I also consider the various media representations of Chamberlain and the ways in which these representations influenced and were coloured by the trial process. First, I identify the ways in which Chamberlain's motherhood was conceptualised during the case.
CHAPTER THREE: THE LOVE OF A MOTHER FOR HER CHILD: CONSTRUCTIONS OF CHAMBERLAIN’S MOTHERHOOD

1. Introduction

In this chapter, I argue that both the prosecution and defence counsel adopted the dominant ideology of motherhood in framing the Chamberlain case. As between prosecution and defence, the site of contest moved from the construction of “mother” to the question of whether Chamberlain should be categorised as a “good” mother or as a “bad” mother. However, Chamberlain herself did not accept the lawyers’ conception of mothers as either “good” – warm and loving or “bad” – mad, sick or evil. Chamberlain used the witness stand to assert her own view of herself as a mother – a wronged mother, who was angry at the treatment that she and her family had received. Chamberlain’s opportunity to express her anger was constrained by the legal form and by the defence construction of Chamberlain and this constraint meant that she was unable adequately to explain her anger.

In chapter two, I explained the ideological construction of motherhood as the “natural, desired and ultimate goal of all ‘normal’ women”. The corollary of this universalisation of the goal of motherhood is that a mother who loses her child risks losing her social status as a fulfilled woman. In her study of the ideology of motherhood, Wearing quoted a mother who told Wearing

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108 This dichotomous characterization is a common feature of social representations of mothers who are thought to have murdered their children. For example, in an article about Kathleen Folbigg (who was convicted in 2003 of murdering four of her children), the authors ask “Was she mad or bad?” Julie Szego and Stephen Caurcho “Killing them softly”, The Age 30 August 2003, Insight pages 1 and 4.

109 Kline, supra note 49 at 119 quoting Michelle Stanworth Reproductive Technologies: Gender, Motherhood, and Medicine (Minneapolis: University of Minnesota Press, 1987) at 14. The reference to “normal” women is crucial – Kline identified that the dominant ideology of motherhood excludes some women from the category of good mother if they do not fit the dominant (white, heterosexual, middle class) conception of motherhood. See also Boyd, “Ideology and Discourse”, supra note 49 at 91.
that "after you've lost a baby you have this terrible feeling of inferiority - that you can't be a
proper woman."\textsuperscript{110} Chester Porter, counsel to the Royal Commission into the Chamberlain
convictions, expressed a very similar sentiment when he said that in the Chamberlain case there
were:

two extreme positions and there is no intermediate ground. Either this lady when she
gave all those statements [to police and in courtrooms about Azaria's disappearance] was
a murderess, or she was a mother, who had suffered frightfully and was being accused of
murder.\textsuperscript{111}

Porter's "two extreme positions" could not have been more clearly differentiated. Either
Chamberlain was a murderer, in which case she was not entitled to the title "mother" (despite her
continued care for three children) or she was a mother who had "suffered frightfully" and was
entitled to the deepest sympathy. If she was a murderer, presumably she had not suffered. In
Porter's eyes Chamberlain could not be both murderer and Mother. Porter's comments
demonstrate the pervasiveness of the dominant ideology - motherhood has a social content, and
in order to fit the dominant paradigm, a mother must do more than simply bear children.

2. The origins of disbelief

It is difficult, if not impossible, to pinpoint the moment at which sympathy for Chamberlain
turned into suspicion on the part of police officers. Certain aspects of Chamberlain's report of
her daughter's disappearance may have warranted further investigation - in particular,

\textsuperscript{110}Betsy Wearing The Ideology of Motherhood: A Study of Sydney Suburban Mothers (North Sydney: George Allen
and Unwin, 1984) at 44. This study was based on interviews conducted with mothers in suburban Sydney during the
late 1970's. Wearing asked the subjects about their perceptions of motherhood and its role in their lives.

\textsuperscript{111}Transcript of Royal Commission, cited by Crispin, supra note 7 at 242. My attention was drawn to this statement
because it is cited by Wood in a slightly different context, supra note 56 at 88.
Chamberlain was the last to see Azaria, and was the only person to have seen the dingo which she claimed had taken Azaria. However, these potentially suspicious aspects of Chamberlain’s account were outweighed or negated by other factors. In particular: the trackers found evidence of a dingo carrying something away from the tent;\textsuperscript{112} the chief ranger willingly accepted that a dingo would be capable of entering a tent and taking a child;\textsuperscript{113} and eyewitnesses corroborated significant portions of Chamberlain’s account of events. These factors suggest that the origins of disbelief of Chamberlain’s story did not lie in the objective facts that no one else had seen the dingo and that Chamberlain was the last to see Azaria. In order to explain police suspicion, it is necessary to have regard to the operation of the dominant ideology of motherhood.

The dominant ideology of motherhood presumes a unity of interest between a natural mother and her child. This manifests itself in an expectation that the natural mother loves her child and will sacrifice her own interests to those of her child.\textsuperscript{114} The dominant ideology of motherhood assumes that mothers will have primary responsibility for their children and that a mother’s life will focus to a great extent on the care and protection of those children. Chamberlain herself fit some of these assumptions – she was the primary caregiver to her children, and she did not work outside the home. Because of the presumed unity between mother and child, when a child dies or is injured, attention is focused on the child’s mother. This focus may be sympathetic –

\textsuperscript{112} See Bryson, supra note 2 at 57.

\textsuperscript{113} The ranger had been concerned about the behaviour of dingoes at the top camping ground for several months. He had written a memorandum to his superiors warning of the danger posed by the dingoes and stating that “children and babies can be considered possible prey” once dingoes lost their fear of humans. Ibid, at 26.

\textsuperscript{114} Kline, supra note 49 at 119; M.M. Slaughter “The Legal Construction of “Mother” at 85 in Martha Albertson Fineman and Isabel Karpin (eds.) Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood (New York: Columbia University Press, 1995), 73 - 100. See the closing remarks of Phillips Q.C., Trial Transcript, supra note 1 at 2827/2828: “A mother will make all manner of sacrifices for her baby. A mother will die for her baby.” I discuss these remarks below.

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Chamberlain describes the compassion of individuals in the hours and days after Azaria’s disappearance. However, a mother may also be scrutinised for her failure to meet the all-loving, all-protecting norm. Lori Ann Lothian has argued that critical scrutiny of a mother whose child dies by misadventure is partly the product of an assumption that a mother’s love can be measured in terms of outcomes: “A mother who loves her child can protect the child”. Chamberlain was criticised for taking a nine-week-old child camping in the Australian outback and for forgetting to zip the fly of the tent when she returned to the barbeque area. At least in the media, these criticisms were often solely directed at Chamberlain – “Why did she take a baby into inhospitable country at the tender age of nine weeks?” [emphasis in original]. The use of the feminine pronoun is interesting, especially given that this article reported an interview with both Lindy and Michael Chamberlain. The article appeared after Azaria’s matinee jacket was found and Chamberlain had been released from prison. Even at this time, when there were serious doubts as to her guilt, some part of the public focus continued to be on Chamberlain’s failure to prevent Azaria’s death. These and similar criticisms seem to draw directly on the belief that a mother should protect her child and that it reflects poorly on her mothering skills if she fails to do so.

115 Chamberlain, supra note 43 at 46 – 53 and at 63. Compassion was especially strong among mothers, such as Sally Lowe and Judy West who later gave evidence in support of Chamberlain at her trial (this evidence is discussed further below). Another example of compassionate focus is that of Norma Cozens, the wife of a Seventh-Day Adventist pastor who was sent to comfort the Chamberlains on the day after Azaria’s disappearance. She told Chamberlain “I have got a little one to bring up in heaven, too. It’s not easy, lovey. You never quite forget, but at least we know we will see them again.” Ibid, at 63. I discuss the role of religious belief in Chamberlain’s response to Azaria’s death below.

116 This argument is made in the context of the trend towards criminalising women who fail to protect their children from abuse or deprive their children of medical care. Lothian, supra note 94 at 164.

Chamberlain seemed to possess many of the attributes of the good mother. She was married, white and middle class. She did not work outside the home, she was house proud and active in her community. She was the primary carer for her children. However, soon after Azaria disappeared, police became concerned at the Chamberlains’ “strange” behaviour. On 26 August 1980 (9 days after Azaria’s disappearance), the chief ranger at Ayers Rock told police: “I must admit to feeling that the parents in this case were so overcalm and that really confused my thinking altogether. Obviously, the ways shock takes people are different, but, this is the thing, the conduct of the parents in this case was quite amazing.” Conduct that caused particular concern included the Chamberlains’ early acceptance of the likelihood that Azaria was dead, their return to the campsite on 18 August to take photographs for the media, and Mrs Chamberlain’s decision to write in a visitors’ book in a local store “a dingo took my baby”.

Chamberlain’s “strange” behaviour and the misgivings voiced by the chief ranger and others led police to investigate the circumstances of Azaria’s birth, in order to determine whether Chamberlain had any motive to murder her daughter. An initial focus of their investigation was Chamberlain’s behaviour after Azaria’s birth. An early police report included the following comments:

   The mother was reported to have repeatedly complained about the child [Azaria] being sick, stated that she was suffering from pyloric stenosis, an ailment which closes the sphinctum and causes vomiting. She would not heed hospital staff when they told her the baby was completely normal.

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[118] Bryson, supra note 2 at 162.

[119] Chamberlain provided explanations for each of these actions, including her hope that publicizing Azaria’s fate would prevent the possibility that other children might be harmed. However, another likely explanation is that Chamberlain was deeply in shock. See Justice Muirhead summing up, Trial Transcript, supra note 1 at 3221; Morling Report, supra note 5 at 33 – 34; Chamberlain Through My Eyes, supra note 43 at 47 – 67.
She allegedly told the staff that her other children suffered from the same complaint and that she had cured it herself when she had fallen down a hole carrying them as young babies.

It is reported that she appeared not to have cared for the baby, and at one stage did not feed it for over eight hours. Registration for the baby was never completed.

When bringing the baby in for a check-up she astounded the Sisters by having the baby dressed completely in black. A doctor who treated the baby said *she did not react like a normal mother.*\(^{120}\) [emphasis added]

The characterisation of Chamberlain as a murdering mother had begun. Some police officers expressed concern about relying upon this report, especially given that it was based on anonymous information.\(^{121}\) The contents of this report were discredited – by Chamberlain herself and by others. For example, Chamberlain’s gynaecologist gave evidence at trial that disproved many of the allegations.\(^{122}\) While Chamberlain had dressed Azaria in a black dress at times, counsel assisting the Royal Commission commented that the dress “which seemed quite sinister when spoken about, was quite harmless when produced in the witness box.”\(^{123}\) However, some investigators continued to maintain that Chamberlain was not a “normal mother”. One senior police officer described Chamberlain as a “religious nut”.\(^{124}\) This reference to Chamberlain’s religious affiliation struck at a major difference between Chamberlain and the prototypical natural Australian mother.

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\(^{120}\) Report of Inspector Gilroy, quoted by Bryson, *supra* note 2 at 98.

\(^{121}\) Ibid, at 100.

\(^{122}\) See Cain’s notes, *supra* note 42.

\(^{123}\) Young, *supra* note 7 at 17.

\(^{124}\) Young, *supra* note 7 at 12.
Chamberlain’s adherence to an unusual religion constituted grounds for suspicion in Australia, where religious zeal is neither particularly common nor well understood. Australian culture distinguishes between “mainstream” religions such as Anglicanism and Catholicism, and “alternative” religions. A Commonwealth government report into freedom of religion and belief in Australia (published in 2000) found that Australians “are suspicious of unfamiliar religions and their practices, because they seem to be foreign and different. This attitude remains prevalent in Australian society.” In the months after Azaria’s disappearance, Seventh-Day Adventists’ beliefs were the subject of a great deal of press and police speculation, including rumours that Adventism countenanced child sacrifice. Arguably, this speculation hinted at a (perhaps peculiarly Australian) dimension of the ideology of motherhood – the notion that while it is proper for a mother to hold some religious beliefs, these beliefs should not be unusual or unusually fervent. An alternative means of conceptualising the debate about Chamberlain’s

125 Robert Hughes wrote the following assessment of Australian attitudes to religion in a portrait of Australia that was published for the Sydney 2000 Olympics: “we have no Fundamentalist Christian tradition, and the level of born-again tub thumping is mercifully low—though there are signs that as a result of American cultural influence, it is creeping up among the young. Any political candidate who declared that God was on his side would be laughed off the podium as an idiot or a wowser (prude, intrusive bluenose).” Robert Hughes, “The Real Australia” Time Atlantic 25 September 2000 (volume 152, issue 13) accessed via Academic Search Premier at http://search.epnet.com/direct.asp?an=3629765&db=aph His statement is hyperbolic but symptomatic of the Australian mistrust of non-mainstream religion. For a more balanced assessment of why Australia lacks “a strong religious culture”, see Patrick O’Farrell “Spurious Divorce? Religion and Australian Culture” (1989) 15 Journal of Religious History 519 – 524.


127 Young, supra note 7 at 12 discusses the media and police perception of the Chamberlains’ religious beliefs. See also Bryson, supra note 2 at 215- 216; Crispin, supra note 7 at 63.

128 Some additional support for this proposition comes from the readiness of child protection agencies to remove children from mothers who are involved in non-mainstream religions. For example, in 1992, 142 children who were associated with the Children of God were seized by child welfare agencies in Sydney and Melbourne. The agencies based in Sydney were later found to have acted unlawfully: see http://religiousmovements.lib.virginia.edu.au/nrms/Family.html The seizure occurred because an ex-member of the Children of God accused his estranged wife of abusing their children by involving them in the Children of God. All
religion is that the case partly concerned the intersection between the dominant Australian ideology of religious belief and the dominant ideology of motherhood.

The first coroner sought to put paid to speculation about whether Chamberlain was a good mother in his findings, stating:

To you, Pastor and Mrs Chamberlain, and through you to Aidan and Reagan, may I extend my deepest sympathy. You have not only suffered the loss of your beloved child in the most tragic circumstances, but you have all been subjected to months of innuendoes, suspicion, and probably the most malicious gossip ever witnessed in this country.

... 

[I] find that neither parent of the child, nor either of their children, were in any degree whatsoever responsible for this death.

... 

I find that the name Azaria does not mean, and never has meant 'sacrifice in the wilderness.'

Despite the Coroner’s best intentions, his findings did not end the speculation about the nature and practice of the Chamberlains’ religious belief. The Crown case at the second inquest was that Azaria was murdered in the course of a sacrificial rite. However, at Chamberlain’s trial, the Crown made no definite reference to her religious beliefs or the role that these beliefs may have played in Azaria’s death. The Crown did not explain the reasons for this shift but they of the children who were removed were later returned to the religious community. http://www.thefamily.org/dossier/legal/australia.html. The Children of God lives communally and therefore also violates the ideological expectation that children should be reared in nuclear family units.

129 Bryson, supra note 2 at 244.

130 Ibid, at 349.
likely include the fact that the Crown became aware that Seventh-Day Adventists held no beliefs that could be construed to countenance child sacrifice. The evidence on which the Crown intended to rely also pointed to Azaria being murdered in the car when Chamberlain was absent from the campsite for around ten minutes – which also militated against the possibility of a sacrificial killing.

As the rumours about Seventh-Day Adventism were disproved, the investigative narrative about Chamberlain was increasingly founded on an assumption that “as a mother [Chamberlain] must know and must be made to speak the truth” about Azaria’s disappearance. The “lies” that the Crown believed Chamberlain told fuelled the desire to force Chamberlain to recant. The conviction that Chamberlain knew more than she was telling intensified over the course of the investigation and became central to her prosecution. Even at the eventual Royal Commission into the Chamberlain convictions, Barker Q.C. maintained that “all the facts are not known and never will be known because the sole repository of all facts is Mrs Chamberlain and she will not disclose what happened.”

The idea that Chamberlain could be made to tell “the truth” about Azaria’s disappearance surfaced early in the investigation. During the course of an interview on 1 October 1980, a police officer asked Chamberlain “what she thought” of hypnotism. She explained that Adventism prohibits hypnotism. The police officer later testified at the first inquest that Chamberlain had

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131 Wood, supra note 56 at 85 – 86. Emphasis in original.
132 Crispin, supra note 7 at 310. See also ibid.
133 Chamberlain, Through My Eyes, supra note 43 at 104.
refused to be hypnotised, implying that her refusal was suggestive of a guilty conscience.\textsuperscript{134} The police tried to surreptitiously record Chamberlain and offered “off the record” interviews in attempts to gain a confession.\textsuperscript{135} Arguably, the decision to resort to scientific investigation of Azaria’s jumpsuit and the Chamberlains’ car after the first inquest was also part of this campaign to force Chamberlain to “tell the truth” that she had murdered Azaria. By the time that Chamberlain came to trial, the construction of her as the murderous, deceitful mother was central to the Crown’s narrative.

3. “Azaria died by her mother’s hand”: the Crown construction of Chamberlain’s motherhood

At trial, the Crown case against Chamberlain did not include any overt suggestion that Azaria’s murder was ritualistic or related to her religious belief. Barker Q.C. stated at the outset that:

\begin{quote}
[t]he Crown does not venture to suggest any reason or motive for the killing. It is not part of our case that [Chamberlain] previously showed any ill will towards the child, nor is it part of our case that [Azaria] was anything other than a normal baby.

We do not put a motive, nor do we invite speculation of motive.\textsuperscript{136}
\end{quote}

Chamberlain’s religious belief was therefore not immediately central to the Crown’s construction of Chamberlain at trial. However, Barker Q.C.’s opening statement was cleverly constructed. Because he did not refer specifically to the Chamberlains’ religion, Barker Q.C. did not refute the rumours that had appeared in the press about Seventh-Day Adventism. The passage quoted

\begin{flushright}
\textsuperscript{134} Ibid at 127.
\textsuperscript{135} Ibid, at 181.
\textsuperscript{136} Opening statement of Ian Barker Q.C., Trial Transcript, supra note 1 at 13/14.
\end{flushright}
above appears to distance Barker Q.C. from those rumours, but Barker Q.C. did not actually inform the jury that the rumours they had probably heard were false. Barker Q.C.’s refusal to put a motive also sidestepped one of the most problematic aspects of the case by emphasising the extent to which the alleged crime ran contrary to reason or nature.

A central part of the Crown’s case was that Chamberlain’s behaviour was inconsistent with the conduct to be expected of a grieving ‘good’ mother:

you are entitled to look at the whole conduct of the accused after the event, and then say to yourselves, ‘Was it consistent with the account of the tragedy given by the mother? Was it consistent with events as you would expect to follow such a tragedy, if it happened, or was it rather consistent with [murder]?137

... The Crown asserts that the whole story of the dingo taking the baby was a fanciful fabrication, calculated to conceal a murder.138

... [Y]ou are entitled to consider the lies told by the accused, Alice Lynne Chamberlain, if you find them to be lies, as evidence of her guilt. You are therefore entitled to use the evidence against her as part of the Crown case upon the simple premise that if she were not guilty, she would not have told the lies.139

Chamberlain’s status as Azaria’s mother was constantly reinforced by references to Chamberlain as “the mother”. Barker Q.C. asked the jury to judge Chamberlain according to how a mother could be expected to behave had her child been abducted. From the outset, Barker Q.C. invited

137 Ibid, at 55/56.
138 Ibid, at 65/66.
the jurors to apply their own experience and expectations of motherhood to their judgment of Chamberlain's conduct. Barker Q.C.'s statement that Chamberlain's conduct was inconsistent with the alleged tragedy implied that there is a "normal" way for a mother to express grief when she loses her child. He invited the jury to find that departure from this "normal" expression of grief renders a mother suspect. Arguably, this invitation simply validated a reasoning process that the jury would have employed in any event. As will be seen below, the "common sense" expectations of motherhood employed by the jury contributed to the decision to enter a guilty verdict.

Barker Q.C. focused on two matters that, according to the Crown, were indicative of Chamberlain having fabricated "the dingo story". The first was the existence of apparent inconsistencies between various accounts given by Chamberlain of the dingo she saw emerging from the tent. The second was Mr and Mrs Chamberlain's conduct after Azaria's disappearance. The Chamberlains' conduct, and the inconsistencies in Mrs Chamberlain's account of Azaria's death were supplemented by a third aspect of the evidence which, in the Crown's submission, militated against acceptance of Chamberlain's story: this third aspect was the scientific evidence. The behavioural evidence against Chamberlain provided a link between Chamberlain's account of Azaria's disappearance and the scientific evidence.

3.1 The Chamberlains' reaction to Azaria's disappearance

When I first considered the behavioural evidence against Chamberlain, I tried to separate evidence relating to Mrs Chamberlain's conduct after Azaria's disappearance from evidence about Mr Chamberlain's actions. I was unable to do so, because this aspect of the Crown's case against Mrs Chamberlain relied heavily on Mr Chamberlain's conduct. Evidence about Mrs
Chamberlain’s “strange” conduct was in actuality more concerned with Mr Chamberlain’s actions. In this respect, the Crown ascribed guilt to Chamberlain on the basis of her husband’s actions more than on her own conduct.

The scenario put forward by the Crown was as follows: Chamberlain murdered Azaria in the car and then returned to the campsite with Aidan. Fortuitously for Chamberlain, Sally Lowe heard a sound which she mistook for Azaria’s cry and Chamberlain took advantage of that mistake to fabricate “the dingo story”. At some stage after the alarm was raised, Chamberlain confessed to Mr Chamberlain that she had killed Azaria. Later that night, one or both parents took Azaria’s body and buried it in a nearby dune. Later still, the body was disinterred and her clothes were removed and cut to resemble dingo damage. Her body was hidden somewhere and the clothes were left to be found.140

In his closing remarks, Barker Q.C. invited the jury to find that the Chamberlains had accepted Azaria’s death too readily and that they had “lacked urgency” in the search for Azaria.141 He put considerable weight on the fact that Mr Chamberlain had made the following statement to the chief ranger without demur from Mrs Chamberlain:

Our baby girl has been taken by a dingo and we are fully reconciled to the fact we will never see our baby alive again. … The dingo would’ve killed the child immediately, would it not?142

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140 See Trial Transcript, supra note 1 at 3300 – 3302.
141 Ibid at 3116/3117
142 Trial Transcript, quoted by Brennan J (as he then was), Chamberlain HCA, supra note 4 at 592.
This statement was allegedly made about twenty minutes after the alarm was raised. The Crown also suggested that it was inexplicable for Mr Chamberlain to have left the campground to sleep at a motel that night with Mrs Chamberlain and the two boys. Barker Q.C. pointed to Mr Chamberlain’s willingness to take photographs for a newspaper on the day after the disappearance and to both parents’ decision to give interviews to the press as inconsistent with their manifestations of shock and grief after Azaria disappeared. The most significant matter that related directly to Mrs Chamberlain’s conduct was her evidence that she had considered taking Aidan and Reagan to the Olgas (a nearby geological formation) on 18 August in order to distract the boys from Azaria’s absence and that she had not protested when Michael Chamberlain suggested that Azaria was probably already dead.

The Crown’s conflation of Mr and Mrs Chamberlain’s conduct reveals an assumption that husband and wife were of one mind in the hours and days after Azaria’s disappearance. The presumed unity between mother and child is here extended to a presumption that the Chamberlain family unit formed a coherent whole and that Michael Chamberlain’s views and actions could be attributed to Lindy Chamberlain. Barker Q.C. also seems to ascribe to the Chamberlain family the characteristics of a patriarchal family unit. On the Crown’s case, having learned that Mrs Chamberlain had murdered Azaria, Mr Chamberlain assumed control of the family and sought to minimise the possibility that her crime would be revealed. This version of events never made a great deal of sense, as both Deane J. in the High Court of Australia and Commissioner Morling

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143 Trial Transcript, supra note 1 at 3116/3117

144 Brennan J (as he then was), Chamberlain HCA, supra note 4 at 592; Gibbs C.J. and Mason J. (as he then was), Chamberlain HCA, supra note 4 at 546.

145 Trial Transcript, supra note 1 at 2729.
identified. Deane J. found that “There is much about the dingo story that strikes me as far fetched ... the Crown case ... strikes me as being, in its own less spectacular way, almost as unlikely as the story of the dingo.” Commissioner Morling commented that “mention should also be made of Mr Chamberlain’s willingness to leave Aidan and Reagan alone with his wife after the tragedy. Had his wife told him the horrific news that she had killed their daughter, one would think that he would have concluded either that she was a murderess or that she had suddenly been overtaken by some form of severe mental illness.”

The Crown’s challenge to inconsistencies in the “dingo story” constituted a much more direct attack on Mrs Chamberlain’s credibility. Barker Q.C. used the dingo account to portray Chamberlain as a bad mother and a calculating killer.

3.2 Inconsistencies in Chamberlain’s account of the dingo

A large part of Barker Q.C.’s cross-examination of Chamberlain was directed towards establishing inconsistencies in her account of having seen a dingo emerging from the family tent. In particular, the Crown alleged that she initially told Constable Morris that she had seen something in the dingo’s mouth but that she had later changed her account to say that she had not seen anything:

[Barker Q.C.] Is it the position that you did not see the baby in [the dingo’s] mouth?

[Chamberlain] That’s correct.

[Barker Q.C.] Did you see anything in its mouth?

146 Chamberlain HCA, supra note 4 at 628.

147 Morling Report, supra note 5 at 303.
[Chamberlain] No.

... 

[Barker Q.C.] You say, do you, seriously, that you did not see the baby in the dog’s mouth?

[Chamberlain] That’s right.¹⁴⁸

This cross-examination served two purposes: to emphasise the Crown’s contention that Chamberlain was lying and to provoke Chamberlain to anger. Chamberlain’s lawyers warned her that she should not get angry and that she should not “appear too bright” when Barker Q.C. cross-examined her because, if she became angry or smart, the jury would find it easier to accept that she was capable of murder.¹⁴⁹ At the first inquest, Chamberlain had shown her frustration by lashing out at counsel.¹⁵⁰ Eventually, despite her lawyers’ warnings, Barker Q.C. succeeded in making Chamberlain angry:

[Barker Q.C.] You say that the blood on the parka must have come from the baby?

[Chamberlain] Yes.

[Barker Q.C.] When it was in the dog’s mouth?

[Chamberlain] Somewhere around that time.

[Barker Q.C.] What other time could it have come from the baby?

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¹⁴⁸ Trial Transcript, supra note 1 at 2113.

¹⁴⁹ Chamberlain, Through My Eyes supra note 43 at 261.

¹⁵⁰ See Bryson, supra note 2 at 209 – 210.
[Chamberlain] Look, Mr Barker Q.C., I wasn’t there. I can only go on the evidence of my own eyes. We’re talking about my baby daughter, not some object.\textsuperscript{151}

It is easy to empathise with Chamberlain’s anger, especially given that Barker Q.C. repeatedly referred to Azaria as “it” or “the baby” when challenging Chamberlain’s account of Azaria’s disappearance. After considerable provocation, Chamberlain expressed her anger towards Barker Q.C.. However, the defence narrative did not allow for the possibility of a loving, but angry mother and her anger may have been construed as unbecoming to the loving mother constructed by the defence.

Justice Muirhead adjourned the court immediately after Chamberlain lost her temper and Chamberlain was again cautioned by her counsel to remain calm. Bryson quotes the following conversation between Chamberlain and her lawyer:

'I know it’s difficult for you,’ [junior defence counsel] Kirkham said, ‘but you must hold your temper. You sound too harsh, too angry.’

‘I am angry,’ she said. ‘What do you expect?’

‘It’s not going to go over well with the jury. Try to be more’ he cast around, ‘demure.’

She was angry all over again. ‘I am the way I am,’ she said. ‘The jury will have to get used to it.’

‘Understand this,’ he said, in a glacial voice, ‘when this case is over, I am going to climb on a plane and get the hell out of the place. You could be staying here for a fucking long time.’\textsuperscript{152}

\textsuperscript{151} Trial Transcript, supra note 1 at 2141/2142.
Chapter three

Chamberlain’s cross-examination provided the flash point between Chamberlain and her counsel. I discuss the disjuncture between the defence construction of Chamberlain and Chamberlain’s view of herself in greater detail below.

Barker Q.C. characterised the “dingo story” in such a way that he invited the jury to regard Chamberlain’s account as both false and manipulative. Barker Q.C.’s cutting humour is often nominated as one of the most devastating aspects of the Crown’s case. Mirroring the press coverage of the Chamberlain case, much of Barker Q.C.’s humour at trial was directed at the dingo. For example, he described photographs of dingoes tendered in evidence as “the dingo blown up.” The Crown invited the jury to compare the ridiculous dingo story with the far more serious allegation of murder. The tactic of mocking the dingo account as a means of undermining Chamberlain’s credibility continued throughout the trial. Barker Q.C.’s closing submission included the following passages:

The accused Alice Lynne Chamberlain is the only one who saw this creature ... she was able to describe this dog down to the hairs on it’s [sic] ears – she missed the baby in its mouth. ... What is this dingo supposed to have done? It managed, if her story is true, to kill the child in the bassinette154 ... it managed to [carry the child approximately five kilometers] without tearing or pulling the fabric of the jumpsuit, collecting almost nothing in the nature of seeds or sticks or other vegetation along the way. So, all in all, ladies and gentlemen, it was not only a dexterous dingo, it was a very tidy dingo ... It managed to cut the collar and the sleeve with a pair of scissors.

152 Bryson, supra note 2 at 463. See also Chamberlain, supra note 43 at 265. Bryson’s source is not cited, but Chamberlain refers to the incident in her autobiography in terms that suggest his account is accurate.

153 Malcolm Brown, “Azaria: A laughing jury, a riveting thigh, a tattooed lawyer” Sun Herald Sunday 19 September 1982 page 1

154 This is untrue. The defence case did not depend on an assertion that Azaria was dead by the time the dingo had removed her from the tent. This sequence of events was designed to draw attention to the ostensible lack of blood found in the tent.
Suppose the dingo were on trial here. How could you possibly convict it on this evidence? Where is the evidence? Where is there one substantial clue, apart from the account given by the child’s mother, pointing to the killing of this child by dingo? There isn’t one. The case against the dingo would be laughed out of court because it is a transparent lie.\(^\text{155}\)

In this passage, Barker Q.C. ridiculed the dingo story but also carefully constructed Chamberlain’s role in her daughter’s death. The reference to the “dexterous” and “tidy” dingo invited the jury to consider the parallels between the “house proud” Chamberlain and the “intelligent” dingo on which Chamberlain’s story was premised.

Barker Q.C.’s reference to “a pair of scissors” evoked Chamberlain’s own dressmaking ability. Chamberlain had given evidence at some length about her practice of cutting the legs off jumpsuits as her children grew or when they had worn out the knees of suits when crawling.\(^\text{156}\) Malcolm Brown of the Sydney Morning Herald commented that: “Every woman in the gallery hearing Mrs Chamberlain discuss her baby’s jumpsuits was talking about what SHE does with HER jumpsuits as the crowd left the court at the adjournment.”\(^\text{157}\) Chamberlain’s evidence was given in response to evidence led by a Crown scientist that “loops” consistent with those that would fall from a cut jumpsuit had been found in the Chamberlain’s car. The satirical reference to “maternal” activities such as housework and sewing and the blurring of mothers and dingos was calculated to allow the jury to discern that the skills of a houseproud mother could also prove useful when planning and executing a murder.

\(^{155}\) Trial Transcript, \textit{supra} note 1 at 3041/3042 – 3046.


4. “This mother’s love and affection for her baby”: the defence construction of Chamberlain

The behavioural case crafted by the defence counsel was predicated on an assumption that, if Chamberlain could be shown to be a “good mother” who had deeply grieved her child’s death, the jury would be unable to find that she had murdered her daughter. Chamberlain’s desire for a daughter and her love for Azaria were central to the defence construction of Chamberlain as a warm and loving mother.

Phillips Q.C. began his closing remarks for the defence with the following words:

One of the most fundamental facts in nature is the love of a mother for her child. A mother will make all manner of sacrifices for her baby. A mother will die for her baby. We all know that, it happens again and again.¹⁵⁹

Wood suggests that Phillips Q.C.’s reasoning amounts to an assertion that mother love is the most natural thing in the world and that only a mad or sick mother could fail to love her child.¹⁶⁰ The defence drew upon aspects of the dominant ideology of motherhood in order to show Chamberlain to be a warm and loving mother, a person whom the jury could trust, feel sorry for, or even like: a “good mother”. The defence counsel accepted the prosecution’s construction of motherhood and the dominant ideology of motherhood on which that construction was based. According to both the defence and the prosecution, a mother could be characterised either as “good” – warm and loving – or as “bad” – mad, sick or evil. The defence suggested further that a

¹⁵⁸ Phillips Q.C., closing submission, Trial Transcript, supra note 1 at 2831.
¹⁵⁹ Trial Transcript, supra note 1 at 2827/2828.
¹⁶⁰ Wood, supra note 56 at 69.
good mother would convey her love for her child in readily recognizable ways. As between the prosecution and defence, the contest moved from the definition of motherhood to the categorisation of Chamberlain as a mother.

Phillips Q.C. spent a great deal of time establishing that Chamberlain fit within the category of good mothers. His examination of eyewitnesses elicited statements that Chamberlain was a loving mother who “sort of had a new mum glow about her”161 and that she was “a very proud mum”.162 Another witness said that Chamberlain had told her that the name Azaria “meant blessed of God … they’d always wanted a girl and that she was very much the baby that they wanted.”163 Chamberlain became very distressed while listening to this evidence and the court was adjourned to allow her to recover. Witnesses told the court at Phillips Q.C.’s prompting that Chamberlain appeared to be in shock on the evening of 17 August and that she and her husband had walked away from the campsite several times to cry.

This evidence was clearly intended to counter the Crown’s construction of Chamberlain as an uncaring mother and to defeat the assertion that Chamberlain’s conduct was inconsistent with the manifestations of grief to be expected of a mourning mother. In particular, Phillips Q.C. sought to show the jury that the Chamberlains mourned in private, but demonstrated their faith in public. Phillips Q.C. apparently accepted that it was possible to identify the “normal” expressions of grief by a mother, and sought to fit Chamberlain’s reaction to Azaria’s death within these expected parameters.

161 Cross-examination of Sally Coral Lowe, Trial Transcript, supra note 1 at 148.
162 Cain’s Notes, supra note 42 re. evidence of Jennifer Ransom.
163 Cross-examination of Judith Ellen West, Trial Transcript, supra note 1 197.
The defence also explained that Chamberlain’s religious belief might have given her strength to cope with Azaria’s death. For example, Amy Whittacker, who comforted Chamberlain on the night of Azaria’s disappearance, testified that she had conducted the following conversation with Chamberlain:

[Whittacker] I put my arms around her and pulled her toward me, and I said: “God is good.”

[Barker Q.C.] Did she say anything?

[Whittacker] Yes. She said “Whatever happens, it is God’s will.” And then she pulled her body back from and looked at me directly and said: “It says, doesn’t it, that at the second coming babes will be restored to their mothers arms.”

It is difficult to assess what impact the evidence about Chamberlain’s religious belief may have had on the jury’s perception of Chamberlain. Damaging rumours had been published about Seventh-Day Adventism before the trial; including rumours that Adventists countenanced child sacrifice and that their beliefs prohibited medical treatment. Since the Crown did not make explicit reference to the Chamberlain’s religion, the defence was faced with a difficult choice. It could either ignore Chamberlain’s religious belief altogether, or it could seek to demonstrate that her faith did not impair her love and care for Azaria. Given that a refusal to acknowledge Chamberlain’s religion could have raised questions in the jury’s mind about what the defence had to hide, it was arguably the better decision to bring Chamberlain’s religion into the defence narrative. However, the appeal to her religious belief probably came at some cost because of the

164 Evidence in Chief of Alice Amy Whittacker, Trial Transcript, supra note 1 at 230.

165 See Bryson, supra note 2 at 133. These rumors betrayed a startling lack of knowledge in Australia about Seventh-Day Adventism in general and Adventist hospitals in particular.
likelihood that some jurors may have been suspicious of Seventh-Day Adventism and may have believed some of the patently false rumours that had been published about the religion.

Justice Muirhead certainly appears to have regarded Chamberlain’s religious belief as being significant to the jury’s assessment of Mrs Chamberlain. He included the following warning in his summing up:

Ladies and gentlemen, many people in our society are cynical of those who profess belief in their God or Christ.

Many so-called Christians are derogatory of those who practice their belief in a form other than their own. Many people who profess a faith may, when the chips are down, have no faith or find no help in it. Others who profess their faith in God may in times of sadness strive to find help in prayer, or the prayers of others, and no doubt may find that it helps. All I’m saying, ladies and gentlemen, is that it would be a great injustice for a jury in a trial such as this to allow a religious or an anti-religious bias to intrude upon quiet objective evaluation of the evidence, and I’m sure I need say no more on that.166

The construction of a loving, deeply religious mother who was devastated by her daughter’s loss was central to the defence. The defence adopted a syllogism that Chamberlain loved Azaria and that a mother who loved her child could have no reason to murder that child. This founded the defence’s appeal to “proof after proof after proof of this mother’s love and affection for her baby.”167 It was therefore crucial to the success of the defence that Chamberlain be manifestly loving and heartbroken by the disappearance of her child. This strategy foundered on Chamberlain’s own behaviour.

166 Justice Muirhead, summing up, Trial Transcript, supra note 1 at 3209 – 3210.

167 Phillips Q.C., closing remarks, Trial Transcript, supra note 1 at 2831.
5. “My baby daughter”: Chamberlain’s narrative construction of herself

The defence construction of Chamberlain as the “good mother” left very little scope for Chamberlain to assert herself as a person. By the time she came to trial, she had endured the death of her daughter and two years of suspicion about her role in that death. She had given evidence twice before – once at each inquest. Chamberlain had proven to be an uncompromising witness, quick to anger and ready to challenge those who would portray her as a murderer. The following exchange with Crown counsel occurred during the first inquest:

‘Was the Woman’s Day article [of 1 October 1980] an accurate one?’

‘No. It was an extremely inaccurate one. In fact, it was the most inaccurate article of reporting perhaps that there has been. Or, at least, that I have read so far.’

‘Were the parts marked in quotation-marks accurate?’

‘No. There were actually only two or three paragraphs that were accurate out of the whole article. …’

‘I just want to read part of page twelve of that interview, which is contained in quotation-marks apparently quoting you. And firstly, can you tell me whether this is what you told them, or not: ‘I was cuddling Azaria [AZ-air-ia] all the time, kissing her toes — …

‘Excuse me, would you mind calling my daughter Azaria [az-AR-ia], … it does annoy me when you call her the wrong name.’

‘I’m sorry,’ Macknay said, and began the passage again. ‘I was cuddling Azaria all the time, kissing her toes and thinking what an incredible baby she was. I think Michael said “You must put her down sometime, you’re spoiling her”. Did you tell that to the reporter?’

‘Pure invention. If you stop to think about it … cuddling a baby and kissing bare toes in those temperatures is absolutely ridiculous. But it does sound good for the audience that
the paper is specifically written for, and I think that Liz, whatever her name was, who wrote that particular piece, wrote in a way that she thought would be as kind as possible and get the message over to her readers, without necessarily being correct.\textsuperscript{168}

Chamberlain used the witness stand as a forum for asserting her own identity – that of a wronged mother, and a mother who was angry at the treatment she and her family had received. Her view of motherhood was of a different order to that perpetuated by Phillips Q.C. – she was more concerned with cold children than with kisses. This did not contradict social notions of good mothering per se, but neither did it fit perfectly with the construction of Chamberlain as the loving and sentimental mother with the “new mum glow”. Chamberlain had been misquoted time and again by the press and she used the opportunity to give evidence as a means of “setting the record straight”. Because her evidence was transcribed, it could not be misquoted. However, it could be manipulated.

The defence lawyers were concerned that Chamberlain could appear too clever and too unfeeling when she gave evidence.\textsuperscript{169} Before she began her evidence, they:

reiterated that I was not to appear too bright when Barker Q.C. cross-examined me. Even if I did realise what he was going to say next, I should let him finish. I must not be cross or too quick, as that would not go over well with the jury, who would think I was trying to be smart, they said. If I showed my intelligence too much, Barker Q.C. would only use it as evidence that I was smart enough to do exactly what they had accused me of.\textsuperscript{170}

The logic here seems to be that, a loving mother must not be too smart or she would risk losing credibility as a mother. This direction is reminiscent of the Cartesian mind/body duality – the

\textsuperscript{168} Bryson, supra note 2 at 209 – 210.

\textsuperscript{169} Chamberlain, supra note 43 at 261.

\textsuperscript{170} Chamberlain, \textit{ibid} at 261.
notion that intellect is masculine, whereas emotion is feminine.\textsuperscript{171} The defence construction of Chamberlain allowed for her to have certain emotions, but not to be too analytical.

Both Chamberlain’s lawyers and Justice Muirhead intervened at times when Chamberlain was giving evidence. This intervention was seemingly intended to assist Chamberlain with the difficult task of relating her account, but rather it served to interrupt her. This difficulty was enhanced by Barker Q.C.’s frequent requests that Chamberlain speak more loudly. These difficulties are exhibited in the following lengthy passage from Chamberlain’s evidence in chief:

\textbf{[Phillips Q.C.]} Just take it slowly please and describe what happened thereafter. You were going towards the tent?

\textbf{[Chamberlain]} Aiden [sic]\textsuperscript{172} was walking with me. I went to the tent and unzipped it, I crawled in. Aiden took his parka …

\textbf{[Barker Q.C.]} Sorry, a bit louder please?

\textbf{[His Honour]} Went to the tent and unzipped it, and Aiden took his parka …

\textbf{[Chamberlain]} We both crawled in and Aiden took his parka off and hopped into his sleeping bag …

\textbf{[Phillips Q.C.]} He got into bed?

\textbf{[Chamberlain]} Yes, while I was putting Azaria down and tucking her in.

\textbf{[Phillips Q.C.]} Did you put the baby down?

\textbf{[Chamberlain]} Yes.

\textsuperscript{171} For a discussion of how the Cartesian duality manifests itself in law’s treatment of women, see Elizabeth Kingdon, “Body Politics and Rights” in Jo Bridgeman and Susan Milins \textit{Law and the Body Politic: Regulating the Female Body} (Aldershot, Dartmouth, 1995).

\textsuperscript{172} Aiden’s name is misspelled throughout the transcript. I will use the misspelling in this quote.
[Phillips Q.C.] What happened then?

[Chamberlain] Then Aiden said to me he was still hungry and I suggested some baked beans and he agreed with that so I – so I went to the car to get them, and then straight back to the tent, and we had a short discussion on where he should eat them and decided that he should come back to the barbeque with me.


[His Honour] Are you hearing it all right, ladies and gentlemen? Can we turn it up a bit? Very well.

[Chamberlain] And then Aiden and I had a race for about half way back to the barbeque and then we walked the rest of the distance, and I climbed – climbed the railing to the barbeque area and walked to the stove we were using. I put down the can of baked beans and picked up the can opener to open it, and Michael said that he thought he heard Azaria crying or something to that effect.

[Phillips Q.C.] Yes, all right. You heard no cry yourself?

[Chamberlain] No, I was rattling the things and I hadn’t heard anything.

[Phillips Q.C.] As a result of what Michael said, what did you do?

[Chamberlain] I said to him I didn’t hear her, or I thought she was asleep, and I’d go and check on her, and I put down what was in my hands and walked back across the railing and started walking towards the tent, and …

[Phillips Q.C.] Just take it slowly, perhaps just short sentences?

[Chamberlain] I got about half way back to the tent and saw the dingo.

[His Honour] Well, perhaps I can help you. Do you remember where the dingo was when you first saw it, Mrs Chamberlain?
[Chamberlain] No, the dingo just had its shoulders and head area sort of half in and out of the tent, and was shaking very vigorously at something. I thought it had a shoe or something and I yelled at it to get out of the tent. ¹⁷³

This passage was one of the most important passages of evidence given at trial. I have quoted it in full because it demonstrates the constraints imposed by the legal form on Chamberlain’s narrative. Whether or not Chamberlain’s story was to be believed, in this passage she related enormously personal and painful memories. Yet she was constantly exhorted to speak more loudly, and asked to repeat herself. When she came to the most controversial aspect of all – her account of seeing the dingo – the judge interrupted her narrative.

The interruption to Chamberlain’s narrative probably made the experience of giving evidence more difficult for Chamberlain. It likely also negatively affected her credibility. Studies have shown that the content of witnesses’ testimony becomes distorted if witnesses are limited to answering questions rather than freely narrating their evidence because they may omit parts of their story, or important aspects may be obscured. ¹⁷⁴ Narrative accounts are also likely to create an impression of greater credibility than the more fragmented question and answer format in which evidence is taken in the common law. ¹⁷⁵

Trial advocacy texts suggest that there are two means of eliciting evidence-in-chief from a witness:

¹⁷³ Chamberlain, evidence in chief, trial transcript, supra note 1 at 2072.


¹⁷⁵ Ibid.
If the witness is intelligent and honest the best way is to let him [sic] tell his own story, but if he is stupid and inclined to speak of irrelevant matters, it is better to elicit his testimony by questions. 176

Chamberlain was not stupid, but she was inclined to speak her mind regardless of the “relevance” to her defence. Phillips Q.C.’s decision to intervene closely in Chamberlain’s testimony was probably influenced by many factors, including concern for his (plainly distressed) client and the nerves created by the awareness that the testimony I have extracted above was crucial to the case. However, by interrupting Chamberlain, Phillips Q.C. may have betrayed a lack of confidence in Chamberlain, which could have manifested for the jury as a lack of faith in her honesty. The jury later speculated that Chamberlain’s lawyers may have had reason to believe that Chamberlain was guilty. 177 Phillips Q.C.’s intervention prevented Chamberlain from telling her story in her own words. Ultimately, this interrupted narrative probably negatively affected Chamberlain’s credibility.

In defiance of her lawyers’ instructions, 178 Chamberlain sought to use the witness stand to tell her story and to respond to those who would blame her for her daughter’s death. In part, she was able to explain conduct that was impugned by the Crown – for instance, she told the court that she had given media interviews on 18 August 1980 (the day after Azaria’s disappearance) “to warn other mothers of the danger.” 179 She explained apparent inconsistencies in her evidence by describing that on the evening of 17 August she “felt totally numb, and some things came to [m]e


177 See chapter five.


179 Chamberlain, evidence in chief, *Trial Transcript, supra* note 1 at 2076/2077.

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very clearly, and others just a complete blank – like a series of disjointed pictures put
together.”\textsuperscript{180} Where it was possible for her to do so, she corrected the tendency of all legal
counsel to treat Azaria as another piece of evidence, by referring to Azaria as “it” or “the baby”.
She corrected Barker Q.C. when he mispronounced Azaria’s name and when he confused Aidan
with Reagan. She reminded the court that what was at stake was intensely personal: “my baby
daughter”. However, she also tried to follow her lawyer’s advice to “keep as neutral an
expression as I could [during testimony and when in the courtroom] – and my natural expression
comes over, unfortunately, as very hard.”\textsuperscript{181}

Despite the agency Chamberlain exercised by giving evidence, the opportunity to use the witness
stand to obtain a right of reply came at the cost of having to submit to the legal form.

Chamberlain clashed often with Barker Q.C. – over his failure to respect Chamberlain’s love for
Azaria, his assumptions that blood had been found in the car and his attempts to get Chamberlain
to speculate when she could not answer questions. Some of these clashes are detailed further
below. Chamberlain also clashed (privately) with her own lawyers. Her tendency to argue with
Crown counsel seemed to contradict the defence construction of Chamberlain as the loving and
sentimental mother.

The defence narrative about Chamberlain had no place for an angry mother. This was partly a
result of the ways in which defence lawyers constructed Chamberlain’s motherhood in relation to
wider, more diffuse ideologies of motherhood from which they might have drawn their normative
“frame”. Arguably, the dominant ideology of motherhood is sufficiently flexible to accept the

\textsuperscript{180} Ibid, at 2225.

\textsuperscript{181} Rosemary Munday, Susan Duncan and Jan Goldie “The Lindy Chamberlain Story” \textit{Australian Women’s Weekly}
March 1986 page 8.
possibility that a mother will be angry in certain circumstances — for example, if her child is threatened or hurt. It is consistent with the protectiveness expected of a mother that she will defend her child’s memory. However, having constructed Chamberlain as loving and sentimental, the defence lawyers sought to persuade her to conform with their construction; by warning her to remain calm, not to appear too “bright” lest she also be construed as manipulative or calculating. Ultimately, Chamberlain was unable to contain her anger in order to conform with her lawyers’ conception of what a mother should be. However, Chamberlain’s opportunity to express this anger was constrained by her own legal counsel and by Justice Muirhead. Whilst her anger was communicated to the jury, it was not adequately explained. Indeed, it seemed to contradict the story that the defence lawyers asked the jury to accept.

The Crown constructed Chamberlain as a manipulative liar and characterised her reaction to Azaria’s disappearance as unnatural, suggestive that she was capable of murdering Azaria. The characterisation of Chamberlain as a murderer was accompanied by scientific evidence. The role of the Crown’s scientific evidence was twofold — to establish that Azaria was killed by human hands, and to disprove the “dingo story”.
CHAPTER FOUR: REALMS OF SCIENCE, REALMS OF PROOF: THE ROLE OF SCIENTIFIC EVIDENCE IN THE CHAMBERLAIN CASE

1. “The professionals”: science and scientists in the Chamberlain case

In the absence of any confession from Chamberlain, the Crown used scientific evidence to “prove” that Azaria was killed by a human and not by a dingo. In this chapter, I discuss how the scientific narratives in the Chamberlain case were informed by and in turn reinforced each party’s perception of Chamberlain’s motherhood. The Crown’s scientific investigation was premised on the belief that Chamberlain was guilty — a suspicion that was largely driven by her behaviour. The scientific enquiry of both the Crown and defence experts was affected by tunnel vision, leading experts to overlook information that could have cast doubt on their conclusions.

Expert witnesses called by the Crown attested to the presence of blood in the Chamberlain car and reasoned that a dingo could not have caused cuts in Azaria’s clothing. In turn, experts called by the defence challenged the Crown experts’ methodology and conclusions. The Crown presented its scientific evidence as a rational, neutral and objective source of support for its discursive construction of Chamberlain as the murdering mother. The defence used scientific

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182 “[W]e are not in realms of speculation, we are not in realms of science, we are in realms of proof.” Muirhead J, summing up. Trial Transcript, supra note 1 at 3273.

183 Ian Barker Q.C. closing address, “there are scientists who work at teaching and there are scientists that work at testing blood, and they should leave the field to the professionals.” Cited by Crispin, supra note 7 at 178.

184 See, for example, Ian Barker Q.C. opening address for the Crown, Trial Transcript, supra note 1 at 30 – 37. Barker Q.C. referred several times to “scientifically identified” evidence. Barker Q.C. returned to this theme in his closing address: “I can do no more than give you the world’s leading forensic biologist [Mr Culliford] … Mrs Kuhl says it is foetal blood and I suggest to you that she ought to know … as a professional forensic biologist.” Cited by Crispin, supra note 7 at 176 – 177.
testimony both as a shield against the Crown’s story and as a means of strengthening the defence narrative of Chamberlain as the good mother.\textsuperscript{185}

Several commentators have concluded that faulty scientific evidence caused the Chamberlains’ wrongful convictions. Young and Crispin provide a compelling explanation of the ways in which the Crown’s scientific case for conviction miscarried. Ken Crispin’s book \textit{The Dingo Baby Case}\textsuperscript{186} and Norman Young’s \textit{Innocence Regained: The Fight to Free Lindy Chamberlain}\textsuperscript{187} both focus on the role of science in the Chamberlain case. Crispin argues that Chamberlain was convicted because the jury failed to understand the scientific intricacies of the case.\textsuperscript{188} He argues that the increasing complexity of forensic science has left the jury system unable to fulfill its traditional role as the ‘bulwark of liberty’ in the common law because they are unable to critically assess the validity of scientific evidence.\textsuperscript{189} This argument reifies both science and the jury system and overlooks the fact that the jury in the Chamberlain case was asked to choose between competing scientific interpretations. Crispin does not suggest why the jury chose to convict Chamberlain despite confusion about the scientific evidence.

\textsuperscript{185} For example, Phillips Q.C. in his opening address referred to “expert evidence” that would be given to the effect that the conclusions of the Crown’s scientists “are not valid”. Opening address of Phillips Q.C., Trial Transcript, \textit{supra} note 1 at 2049. In his closing address, Phillips Q.C. made similar statements. See in particular the Trial Transcript at 2937 – 2939. Phillips Q.C. also dwelt at length on the discrepancies between the Crown’s scientific case and the eyewitness evidence. See for example the Trial Transcript at 2853.

\textsuperscript{186} \textit{Supra} note 7.

\textsuperscript{187} \textit{Supra} note 7.

\textsuperscript{188} Crispin, \textit{supra} note 7 at 350.

\textsuperscript{189} Ibid, at 351.
Innocence Regained: The Fight to Free Lindy Chamberlain focuses on the story of how the Chamberlain convictions were reversed. It therefore deals only briefly with the trial itself. Like Crispin, Young focuses on the scientific case for and against Chamberlain. This focus is explicable largely because the campaign to free Lindy Chamberlain while she was in Darwin prison centred on efforts to discredit the scientific evidence adduced at trial.

Arguably, a distinction can be drawn between Chamberlain’s conviction (in which behaviour played a central role) and her release and acquittal (in which science was at least as important as Chamberlain’s behaviour). I discuss below the ways in which certain preconceptions about Chamberlain’s behaviour informed the scientific enquiry of both parties, and the ways in which the scientific evidence in turn reinforced those preconceptions. The jurors evaluated the scientific evidence using an interpretive framework that was partly influenced by their judgment of Chamberlain as a mother. It was only once Chamberlain was imprisoned and thereby removed from the public gaze that the scientific evidence was subjected to wide public scrutiny. This is partly a result of the legal form – the scientific evidence provided a seemingly objective means of attacking Chamberlain’s conviction during the appeal process, and appeal courts will not interfere with a jury’s judgment as to the credibility of witnesses. It is also a result of the fact that Chamberlain’s imprisonment curtailed the flow of information about Chamberlain’s behaviour and demeanour.

By the time that Azaria’s matinee jacket was found and Chamberlain was released from prison in 1986, the scientific evidence that had been adduced at trial had been almost entirely

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190 Young, supra note 7 at v.
In his eventual report into the Chamberlains’ conviction, Royal Commissioner Morling relied heavily on new scientific evidence when finding that “there are serious doubts and questions as to the Chamberlains’ guilt”. However he also relied on aspects of the Chamberlains’ behaviour that he regarded as being inconsistent with guilt. These aspects included Chamberlain’s cooperation with police searches for evidence, her willingness to allow strangers in and near the Chamberlains’ car on the night of Azaria’s disappearance and Mr Chamberlain’s willingness to leave Aidan and Reagan in Mrs Chamberlain’s care in the hours and days after Azaria’s disappearance. Accordingly Chamberlain’s behaviour played a dominant role in her conviction and an important role in her exoneration, but science was instrumental to casting doubt on her conviction. By contrast, whilst Young points to prejudice against Lindy Chamberlain’s religious belief, he ultimately attributes her conviction to the failure of the Crown’s scientific method.

In “Azaria’s Accessories: The Social (Legal-Scientific) Construction of the Chamberlains’ Guilt and Innocence”, Edmond uses Foucauldian theory to explore how scientific evidence is

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191 Young, supra note 7 at 176.
192 Morling Report, supra note 5 at 342.
193 Royal Commissioner Morling pointed to the fact that Chamberlain had volunteered information that she had washed blood from her shoes and provided the police with several articles of clothing that she thought may have been bloodstained. Mr Chamberlain had directed police to the camera bag that had been in the car on the night of Azaria’s disappearance when the police initially seized the wrong bag. Morling Report, supra note 5 at 295 – 297; 304 – 305.
194 Ibid, at 296.
195 Ibid, at 304.
196 Young, supra note 7 at 17.
197 Ibid, at 226.
represented in legal settings. Edmond distinguishes between empiricist and contingent (or deconstructive) representations of science. Edmond argues that science is reified by scientific method and by cloaking scientific decisions with objectivity and neutrality. However, this process is rarely uncontested in an adversarial legal setting – experts disagree about the appropriateness of competing methods and about the limits of expertise. Edmond’s insight into the role of social context in shaping science is particularly interesting in the circumstances of the Chamberlain case. However, his article confines its discussion to the contest over the source of damage to Azaria’s jumpsuit. Edmond’s analysis of the dispute over the jumpsuit does not suggest what assumptions informed the opinion evidence or why those assumptions were made.

The notion of science as inherently neutral and objective does not withstand serious scrutiny. Most relevantly, in the context of science in the courtroom, Edmond has written:

> Over the last two decades, it has become common to question what I will call the conventional image of science. It has become increasingly difficult to sustain, at least in the social sciences and humanities, an image of science as ostensibly objective, impartial, and entirely method predicated. From a number of theoretical perspectives, science can no longer be understood as an activity without ideological influence, divorced from politics and interests, in its position as a privileged epistemological means of understanding our world. [citations omitted]

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198 Edmond “Azaria’s Accessories”, supra note 7 at 398.

199 Ibid, at 400 – 405.

200 Ibid. See also Carol Smart “Law’s Power, the Sexed Body and Feminist Discourse” (1991) 17 Journal of Law and Society 194 (Smart, “Law’s Power” at 196). Smart describes the similarities between Foucault’s conception of scientific method and legal method as it is practiced in a common law system.

201 Edmond “Azaria’s Accessories”, supra note 7 at 402 – 403.

Foucault examined the ways in which “scientific” discourses claim to speak the truth. He suggested that, by claiming scientificity, a particular discourse gains power by asserting its truth and relegating competing knowledges to a position of subjugation or partial truth.\footnote{Smart, "Law’s Power", supra note 200 at 196 citing Michel Foucault in C. Gordon (ed.) \textit{Michel Foucault: Power/Knowledge} 1989.} The basis on which this ‘truth claim’ is made is that science is rational and objective. Foucault suggested that the power of scientific discourse could be evidenced by the fact that discourses such as Marxism and psychoanalysis made claims to be scientific.\footnote{Ibid.} The incentive for these claims is the power associated with perceptions of rationality and objectivity.

In response to science’s truth claim, postmodernists suggest that “scientists don't discover facts, they construct them ... science is constructed through the sociopolitical lens and rhetorical practices of scientists.”\footnote{Redding, supra note 202 at 596.} Scientific knowledge is the product of a combination of historically specific social circumstances:

First, scientific facts are not immanent in an objective reality waiting to be discovered by any scientist who looks in the right place. Instead, they are constructed and validated through a social process dominated by those in the scientific community who possess authority to do so. Second, this validation process is itself shaped by the scientific paradigms, the shared assumptions and prejudices of the professional community that

\textit{Technology Law Journal 181 accessed electronically via LegalTrac http://web7.infotrac.galegroup.com/itw/infomark on 17 May 2003.} A reply to Edmond by Richard Redding, “Reconstructing Science through Law” appears at (1999) 23 Southern Illinois Law Journal 585. Redding argues that law uses “common sense” and “real-world experience” as its touchstones whereas science employs empirical testing of events. He suggests that science has been reified to the exclusion of law but that law can and does contribute to scientific knowledge because it is a different form of understanding the world (see particularly Redding at 591). Whilst I agree with Redding’s conclusion that legal and scientific discourse influence one another, I question his faith in law’s “common sense” and his suggestion (at 599–600) that law can supplement (problematic) scientific selectivity with (unproblematic) “real-world experience”. This characterisation of law overlooks its ideological basis.

\footnote{Redding, \textit{supra} note 202 at 596.}
dominate the thought of a particular period. These paradigms hold sway for reasons that may have less to do with their intrinsic merit than with their support of existing social structures, including the scientific establishment. Third, the authority to validate science rests in part on boundary-drawing and other strategic behavior by scientific disputants, behavior that can effectively exclude their less influential competitors.206

Law both reinforces and challenges science's claims to neutrality and objectivity. An important reinforcement comes from the special status accorded to expert witnesses when giving evidence. For example, the Federal Court of Australia's Guidelines for Expert Witnesses in Proceedings of the Federal Court of Australia provide:

General Duty to the Court

- An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- An expert witness is not an advocate for a party.
- An expert witness's paramount duty is to the Court and not to the person retaining the expert.207

These Federal Court guidelines are based on the Uniform Evidence Law but they reflect common law principles which apply in the Northern Territory.208 Notwithstanding the apparent requirement of "neutrality", each of the experts called in the Chamberlain case gave evidence that tended to support the party whose legal counsel called that expert. It is, in fact, unknown for a party to call (and pay) an expert witness who will not support its case. Despite the ubiquitous


208 Odgers, Uniform Evidence Law at 130 – 132.
practice of calling experts in support of a partisan narrative, law retains the fiction that an expert assists the Court and, to this extent, reinforces “scientific” claims to impartiality. However, within the courtroom, claims to impartiality and expertise are routinely challenged by lawyers and by competing experts.

Edmond deconstructs the scientific narratives employed in the Chamberlain case in order to demonstrate the methods by which each party laid claim to neutrality and objectivity, and the ways that these claims were challenged by opposing experts. Edmond identifies several techniques employed by these experts. In particular, he distinguishes “empiricist” representational practices and “deconstructive” discourses.

Empiricist representational practices portray “scientists’ actions and beliefs as following unproblematically and inseparably from the empirical characteristics of an impersonal natural world.” By demonstrating the scientist’s expertise and minimising the scientist’s apparent stake in the outcome of a particular case, a party renders that scientist’s conclusions as being only those “required by the nature of the physical world”. In other words, the scientist is presented as being constrained to report on what she or he observes, without fear or favour.

Deconstructive discursive techniques are designed to undermine empiricist representation. For example, a party seeking to deconstruct an empiricist representation may challenge a scientist’s expertise, methodology or objectivity. Both the defence and the Crown employed each of

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209 Edmond, “Azaria’s Accessories”, supra note 7.

210 Nigel Gilbert and Michael Mulkay Opening Pandora’s Box (1984) at 56, cited ibid at 400.

211 Ibid, at 401.

212 Ibid.
these deconstructive techniques in the Chamberlain case. Deconstructive techniques are significant because they demonstrate that law does not blindly “receive” science but that the courtroom is a site of contest between scientists.²¹³ Edmond argues that the “appearance of ostensibly neutral and self-evident pieces of evidence is a consequence of cultural and discursive practices adopted by scientists, lawyers and judges”.²¹⁴

Edmond notes that the scientific evidence underpinned broader competing discourses in the Chamberlain case.²¹⁵ However, he focuses on scientific discursive techniques rather than identifying the broader discourses, or explaining how the scientific evidence fit within those broader discourses. In fact, the scientific discourse intersected with and was shaped by constructions of Chamberlain’s motherhood. Whilst Edmond notes that “scientific” conclusions may be affected by personal inclinations or the social position of a scientist,²¹⁶ he does not deal with Crispin’s contention that the jury did not understand the scientific evidence.²¹⁷ The jury’s deliberative process and the appellate judgments suggest that the scientists’ relative testimonial confidence, as much as their scientific methodology, influenced decision making in the Chamberlain case.

²¹³ See Schuck, supra note 206 at 5 – 13 for a consideration of how legal proceedings provided a forum for airing professional disagreements and how law influenced the outcome of these disagreements in the Bendectin and Agent Orange Cases.

²¹⁴ Edmond, “Azaria’s Accessories”, supra note 7 at 401.


²¹⁶ Edmond, “Azaria’s Accessories”, supra note 7 at 401.

²¹⁷ Crispin, supra note 7 at 347.
Each party in the Chamberlain case presented its scientific evidence as rational, objective and reliable while contesting the scientific claims made by the other party. Each party used science to buttress its respective characterisation of Chamberlain as either the murderous or innocent mother. This evidence was neither unproblematic nor uncontested at trial. Scientists and lawyers challenged the methodology and expertise of opposing scientists. The scientific evidence was both informed by and, in turn, reinforced certain preconceptions about Chamberlain’s role in her daughter’s disappearance.

In this chapter I focus on the evidence adduced by the Crown and the defence as to the apparent presence of infant’s blood in the Chamberlains’ car and on objects that were in the car on 17 August 1980, describing the methods used by each party to establish the credibility of its own witnesses, and to undermine the conclusions of opposing experts. As I discussed in chapter one, scientific evidence was also introduced to identify the source of damage to Azaria’s jumpsuit as either human or dingo and to explain the significance of blood patterning on Azaria’s clothes.

The evidence regarding blood in the car is frequently identified as the most prejudicial aspect of the scientific case against the Chamberlains.218 Ian Barker Q.C. explained in his opening address that:

> The discovery of foetal blood in the car is a critical part of the Crown case. It would be preposterous to suggest that the dingo took the child from the tent and into the car, and we will submit that the discovery of Azaria’s blood in the car destroys the dingo attack

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218 See, for example, Crispin, supra note 7 at 347 – 8; Young, supra note 7 at 117 – 8. As I will discuss in chapter five, the jury apparently regarded the scientific evidence as to blood in the car as an important factor in its decision-making process; see Cain’s Notes, supra note 42. Section 3 of this chapter explains that the Full Federal Court also focussed a large part of its deliberations on this evidence.
explanation given by Mrs Chamberlain, whatever else there may be to support such explanation, and the Crown says there is almost nothing.

So, ladies and gentleman, this is a case of simple alternatives. Either a dingo killed Azaria, or it was homicide, because the child could hardly have inflicted injuries upon herself. If she was killed in the car, one can at once forget the dingo.219

Edmond has discussed the construction and deconstruction of some of the scientific evidence relating to the damage to Azaria’s jumpsuit.220 My discussion of the construction of the dispute over the nature of stains found in the car draws on Edmond’s methodology.221 However, aside from focusing on a different aspect of the scientific evidence, I have extended Edmond’s discussion in two ways: by challenging the distinction between scientific evidence and eyewitness evidence;222 and by linking the scientific evidence to the broader discourses about Chamberlain’s motherhood.223 Before describing the construction and deconstruction of scientific expertise at trial, I will explain the history of the dispute about the presence of blood in the Chamberlains’ car.

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219 Trial Transcript cited in Chamberlain, supra note 1 at 243 – 244.


221 Edmond, “Science in Court”, supra note 202 mentions the evidence regarding the presence of blood at 367, without deconstructing this aspect of the Chamberlain case.

222 Edmond, “Science in Court”, supra note 202 at 396 expresses disagreement with theorists who purport to distinguish between (“objective”) science and (“unscientific”) “trans-science” or “junk science”. However, he does not develop this reasoning in his published work.

223 Edmond, “Science in Court” supra note 202 at 365 mentions that Barker Q.C. intertwined the Chamberlains’ religious beliefs with their “mysterious” behaviour but does not discuss the role of Mrs Chamberlain’s motherhood in her conviction or in relation to the construction of science.
2. Boundary riding: constructing the presence of blood in the Chamberlains’ car

2.1 Framing the scientific dispute

The apparent discovery of blood (which the Crown contended to be infant’s blood) around the front passenger seat of the Chamberlains’ car and in a camera bag owned by Mr Chamberlain was central to the Crown’s case against the Chamberlains. Crown witnesses gave evidence that tests conducted by Mrs Joy Kuhl, a forensic biologist, indicated the presence of foetal haemoglobin around the front passenger seat of the Chamberlains’ car and in Mr Chamberlain’s camera bag.

The blood of a newborn baby contains roughly 75% foetal haemoglobin and 25% adult haemoglobin. The proportion of foetal haemoglobin in an infant’s blood normally decreases until, by the age of nine weeks (the age at which Azaria disappeared), approximately 25% of a child’s haemoglobin is foetal haemoglobin. By the age of about six months, any residual foetal haemoglobin is negligible. Therefore, if foetal haemoglobin is identified in a bloodstain, it is extremely likely that the blood comes from an infant below the age of six months.

(1) The history of the inquiry into bloodstains in the Chamberlains’ car

The first inquest into Azaria’s death concluded in February 1981. Coroner Barritt found that a wild dog or dingo had killed Azaria but that a person or persons unknown had disposed of her body. Barritt took the unusual step of ordering that his findings be televised, in the hope that

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224 Chamberlain FFC, supra note 3 at 27.

this would end the speculation that surrounded the case. Coroner Barritt expressed sympathy for the Chamberlains and castigated the Northern Territory police force for its poor forensic work:

Police forces must realise, or be made to realise, that courts will not tolerate any standard less than complete objectivity from anyone claiming to make scientific observations. Any standard less than the highest attainable, where the rights and interests of suspect and prosecutor alike are protected, negates the credit of [the forensic science] section and renders the probative value of its conclusions useless. I agree with [counsel assisting the coroner] Mr Macknay that supervision within the section must be negligent in the extreme.

Stung by this very public criticism and determined to vindicate their suspicions, the Northern Territory police force continued their investigation into the Chamberlains after Barritt had concluded his inquest. One aspect of this continuing investigation was to fly Azaria’s jumpsuit to Professor James Malcolm Cameron in England, for analysis. Professor Cameron found that the pattern of blood stains on the jumpsuit indicated that Azaria’s neck had been cut and that she had bled to death while being held upright. Sensationally, he claimed to have found the imprint of a “small adult hand” in blood on the back of the jumpsuit. This was sufficient for the police to re-open their inquiries into the Chamberlains. They hypothesised that if Azaria had been killed by Mrs Chamberlain, the murder must have occurred in the Chamberlains’ car.

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228 Margaret Jones, “TV news claims Azaria was decapitated” *Sydney Morning Herald* 23 September 1981 page 2.
On Saturday 19 September 1981 (the Seventh Day Adventist Sabbath), police executed a warrant to seize certain items from the Chamberlains’ house.\textsuperscript{230} The items they collected included the Chamberlains’ car.\textsuperscript{231} The police delivered the car to Mrs Joy Kuhl from the New South Wales Health Commission in order that Kuhl could test the car for blood. Crucially, the police did not ask Kuhl to conduct tests on a number of other items where positive results may have tended to exonerate the Chamberlains.\textsuperscript{232} From the outset, the police’s preferred narrative about Azaria’s disappearance directed the course of the investigation into where she had died.\textsuperscript{233} However, the details of the presumed police narrative were dynamic and evolved in response to both scientific findings and the Chamberlains’ narratives.\textsuperscript{234} Each party’s scientific narrative developed alongside the broader narrative regarding Chamberlain’s guilt or innocence. The scientific narratives also developed in conformity with the requirements of the legal process for which they were generated.

On 20 September 1981, the police applied to the Supreme Court of the Northern Territory for an order quashing the findings of the first inquest. The application was heard \textit{in camera}.\textsuperscript{235} It was

\footnotesize{\textsuperscript{230} Chamberlain, supra note 43 at 176; Crispin, supra note 7, at 82.}  
\footnotesize{\textsuperscript{231} Chamberlain, supra note 43 at 177; Bryson, supra note 2 at 262.}  
\footnotesize{\textsuperscript{232} These items included a floral mattress that had been in the tent when Azaria disappeared. The police also did not take two polystyrene drink containers that had been on the floor of the front passenger seat – despite the fact that Mrs Chamberlain asked whether they would be required. Chamberlain, \textit{Through My Eyes} supra note 43 at 178. However, Commissioner Morling found that the manner in which the Northern Territory police conducted their investigation did not prejudice the Chamberlain’s defence and that the police could not be held responsible for the deficiencies eventually identified in the scientific evidence. Morling Report, supra note 5 at 341.}  
\footnotesize{\textsuperscript{233} Edmond, “Science in Court”, supra note 202 at 366.}  
\footnotesize{\textsuperscript{234} Ibid, at 387.}  
\footnotesize{\textsuperscript{235} Crispin, supra note 7 at 84 – 85.}
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granted, and a new inquest into Azaria’s disappearance was ordered.\(^{236}\) Chief Magistrate Galvin was appointed as the coroner for the second inquest and Des Sturgess Q.C. was appointed to assist him. The second and third witnesses called to give evidence were Michael and Mrs Chamberlain. The Chamberlains were called before the scientific witnesses, including Kuhl.\(^{237}\) The Chamberlains’ solicitor requested copies of the scientific reports possessed by the Crown – these requests were refused.\(^{238}\)

Both of the Chamberlains were questioned at length about the possible source of any blood in the car. For instance, Sturgess asked Mr Chamberlain whether anybody had bled or suffered injury in the car. Mr Chamberlain responded that both Aidan and Reagan had bled on occasion and that he had picked up a man who had been wounded in a car accident and taken him to hospital. This man had been bleeding profusely. The following exchange then took place:

[Sturgess] Can you tell me anything else about possible contamination of the outside, or the inside, of the car by blood?

[Mr Chamberlain] Not within my memory, at this stage. No.

[Sturgess] Well, certainly we can be sure of this. There was no bleeding of the baby in the car, was there, that you know of?

[Mr Chamberlain] Not that I know of, no.\(^{239}\)

\(^{236}\) Justice Toohey’s reasons for quashing the first inquest are reported by Paul Molloy and Jason Dasey “Azaria’s parents: We’ve a lot to do” *Sydney Morning Herald*, Saturday 21 November 1981, page 1.

\(^{237}\) At a criminal trial, the Chamberlains would not give evidence (if they chose to do so) until after the Crown had called all of its witnesses.

\(^{238}\) Crispin, *supra* note 7 at 88.

\(^{239}\) Bryson, *supra* note 2, at 282 – 283.
When Kuhl was eventually called, she gave evidence that the results of tests conducted by Kuhl indicated the presence of foetal haemoglobin in the Chamberlains car, and in the camera bag. Kuhl’s methodology, but not her working notes or test plates, were checked by Mr Bryan Culliford, of the Metropolitan Police Laboratory in London. However, Culliford and Kuhl’s supervisor, Dr Simon Baxter, also gave evidence supporting the validity of the tests conducted by Kuhl.

It is likely that the police applied for a new inquest rather than simply charging Mrs Chamberlain with murder because an inquest gave them the opportunity to call the Chamberlains as witnesses and to require them to invoke the protection against self-incrimination if they refused to answer questions. By contrast, in a criminal trial, the defendant has the right to refuse to give evidence or to tender a sworn statement rather than giving evidence and exposing herself to cross-examination. The second inquest gave the police an opportunity to test their case against the Chamberlains before the trial itself. Because Sturgess controlled the order in which witnesses were called, the Chamberlains could be asked to give their evidence before they had heard of Kuhl’s work. This allowed the Crown to refine its case against the Chamberlains in light of their evidence, and forced the Chamberlains to make statements to which they would later be held in any criminal trial.

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240 See Justice Muirhead summing up, in Trial Transcript, supra note 1 at 3255 – 3261; Chamberlain FFC, supra note 3 at 26 – 29.

241 See Crispin, supra note 7 at 84 – 88.

242 Justice Muirhead excluded the Trial Transcript of the Chamberlains’ evidence at the second inquest from being tendered into evidence at trial. However, the Chamberlains were arguably still constrained by their earlier testimony in terms of the defences they could raise to the Crown’s case. Edmond, “Science in Court”, supra note 202 at 367.
(2) **Trial evidence about blood in the car**

By the time of the trial, the Chamberlains had retained a number of pathologists and forensic biologists to challenge Kuhl’s findings. The defence did not contest the apparent presence of blood in the car, although it strongly resisted the conclusion that the blood contained foetal haemoglobin. The decision to accept that the stains were blood was perhaps driven by explanations provided by the Chamberlains about possible sources of blood in the car but it seems to overlook the evidence of Dr Cornell, a consultant biochemist. Dr Cornell gave evidence that he had found no protein in samples provided by Kuhl. The absence of protein is strongly indicative of an absence of blood, since blood contains over 100 proteins. It is unclear why the defence did not rely more heavily on Dr Cornell’s evidence – his testimony is virtually absent from the closing submissions and from the subsequent appeals.

The defence called Professor Barry Boettcher and Professor Richard Nairn in reply to the evidence given by Kuhl, Baxter and Culliford. Boettcher was head of the Department of Biological Sciences at Newcastle University and Nairn was a Professor of Pathology and Immunology at Monash University in Melbourne. Boettcher and Nairn gave evidence that the

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243 The Seventh-Day Adventist Church underwrote the legal fees incurred by the Chamberlains during the inquests, trial and appeals.

244 Commissioner Morling criticised the defence lawyer’s treatment of Cornell’s evidence and their failure to call Dr Lincoln, who would also have disputed the presence of blood in the car. Morling Report, supra note 5 at 341. But see below, where I discuss the inequality of resources between Crown and defence.

245 Justice Muirhead, summing up, Trial Transcript, supra note 1 at 3268.

246 Crispin, supra note 7 at 100.

247 Ibid, at 159.
tests used by Kuhl were not “monospecific” – in particular, they suggested that a positive reaction in these tests could be obtained from adult blood.\textsuperscript{248}

The defence scientists were unable to review the tests performed by Kuhl, because the test plates had been destroyed in the course of normal laboratory duty.\textsuperscript{249} However, they had access to Kuhl’s working notes and suggested that her notes were indicative of false positives. In part, Boettcher and Nairn reached this conclusion because Kuhl recorded stronger positive reactions to tests performed on samples taken from the car than to her control sample of blood taken from an umbilical cord (which contained approximately 90% foetal haemoglobin).\textsuperscript{250} Boettcher and Nairn suggested that Kuhl’s tests were positive because they were reacting to the blood of a man the Chamberlains had driven to a hospital after a road accident.\textsuperscript{251}

2.2 Blood stains and ivory towers: the construction and deconstruction of scientific expertise

Edmond identifies several techniques employed by lawyers and scientists in the courtroom to buttress favourable expert evidence and attack unfavourable evidence.\textsuperscript{252} One significant practice he identifies is “boundary work”. The purpose of boundary work is to establish and manage

\begin{enumerate}
\item Justice Muirhead, summing up, Trial Transcript, \textit{supra} note 1 at 3262 – 3265A. See also Crispin, \textit{supra} note 7 at 109: “In some of the tests [Boettcher] used his own blood and noted, with some amusement, that he succeeded in scientifically demonstrating that his blood came from an infant under three months of age.”
\item \textit{Chamberlain} FFC, \textit{supra} note 3 at 29.
\item Crispin, \textit{supra} note 7 at 103.
\item Ibid, at 139.
\item Edmond, Azaria’s Accessories, \textit{supra} note 7 at 400 – 404.
\end{enumerate}
areas of professional competence, by reference to matters such as expertise, methodology and credibility.\(^{253}\)

(1) **The construction of expertise**

The Crown sought to establish Kuhl as an honest, careful witness with considerable expertise in forensic pathology. In summing up, Justice Muirhead stated that “there can be no doubt at all as to her work experience in the field.”\(^{254}\) Despite the extent of Kuhl’s experience, the defence challenged her expertise on the basis of statements she had made during the second coroner’s inquest. Foreshadowing the evidence to be given by defence experts, Phillips Q.C. employed the following line of questioning during cross-examination:

\[\text{[Phillips]} \text{ ‘Now, at the inquest did you swear this? “Human foetal haemoglobin is different from adult haemoglobin. While a baby, or a foetus is in utero it does not have any adult haemoglobin.”’}\]

\[\text{[Kuhl]} \text{ ‘Yes, I did.’}\]

\[\text{[Phillips]} \text{ ‘That was demonstrably false.’}\]

\[\text{[Kuhl]} \text{ ‘I used that statement for the purposes of making things clear and simple. It was not a false statement.’}\]

\[\text{[Phillips]} \text{ ‘I say false in the sense of incorrect.’}\]

\[\text{[Kuhl]} \text{ ‘It was incorrect, scientifically … it was used as an indication of the relative amounts.’}\]

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\(^{253}\) Ibid, at 403.

\(^{254}\) Trial Transcript, supra note 1 at 3255.
[Phillips] ‘You are perfectly entitled to give an explanation which you have, but the fact
is, scientifically, that statement is utterly incorrect, is it not?’

[Kuhl] ‘Scientifically, it is not correct.’

The defence experts influenced and reinforced this challenge to Kuhl’s expertise. For instance,
Nairn commented that “I think her basic knowledge of immunology was deficient.” The
challenge to Kuhl’s expertise prepared the ground for a broader attack on Kuhl’s methodology.
The defence sought to demonstrate that Kuhl did not understand the “science” underpinning the
qualitative tests she conducted in her laboratory. Kuhl responded to this challenge by asserting
that her comments had an educational value, and that imprecision in communication did not
invalidate her opinion. Ultimately, Justice Muirhead wrote in the report of the Royal
Commission that the tests used by Kuhl “may have been unreliable” and that her failure to use
adequate controls suggested “that she was unaware of the dangers posed by” the length of time
between Azaria’s disappearance and Kuhl’s tests. However, at trial Kuhl expressed great
confidence in her results.

Ian Barker Q.C. used his opportunity to cross-examine Boettcher to do his own boundary-work
on behalf of the prosecution interpretations. His questions were designed to perform two
functions: to reassert Kuhl’s expertise and to characterise Boettcher as an academic scientist with
little practical understanding of applied forensics:

[Barker Q.C.] ‘You heard Mrs Kuhl give evidence?’

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255 Trial Transcript, cited by Crispin, supra note 7 at 139.

256 Trial Transcript, cited by Chamberlain, Through My Eyes, supra note 43 at 226.

257 Morling Report, supra note 5 at 139.
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[Boettcher] ‘Yes.’

[Barker Q.C.] ‘You heard her say that in her experience she has examined a wide variety of forensic exhibits?’

[Boettcher] ‘Yes.’

[Barker Q.C.] ‘That she regularly gives evidence in courts in New South Wales?’

[Boettcher] ‘I believe so.’

[Barker Q.C.] ‘That she works in a laboratory that handles some six hundred criminal cases a year.’

[Boettcher] ‘Yes.’

[Barker Q.C.] ‘There is no doubt, is there, that Mrs Kuhl has vastly more experience than you in forensic biology?’

[Boettcher] ‘I will agree that Mrs Kuhl has vastly more experience than I have in dealing with forensic samples.’

The distinction drawn by Professor Boettcher between forensic experience and applied experience was almost certainly lost on the jury. Barker Q.C. used a similar line of questioning with Nairn:

[Barker Q.C.] ‘May we take it, Professor, that you are not a forensic biologist?’

[Nairn] ‘In one sense I’m not, … in another sense I am responsible for the forensic pathology teaching in my medical school, and have been for the last twenty years’

…

[Barker Q.C.] ‘[In the state of Victoria,] is there a forensic science laboratory?’

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258 Trial Transcript cited by Bryson, supra note 1 at 480 – 481.
[Nairn] ‘Yes.’

[Barker Q.C.] ‘Does that employ biologists?’

[Nairn] ‘Yes.’

...  

[Barker Q.C.] ‘Does it concern itself with mayhem? Or wounding? Suspected cases, where blood requires to be examined for forensic purposes?’

[Nairn] ‘Yes.’

[Barker Q.C.] ‘By forensic purposes, we mean for the gathering of evidence for presentation to a court?’

Nairn agreed with the definition.

[Barker Q.C.] ‘This is the specialty of the forensic biologist, is it?’ ...

[Nairn] ‘Yes. As a matter of fact, the forensic pathologist to that group attended a course I gave sixteen years ago,’ ... ‘to learn how to do it.’  

Barker Q.C. successfully drew a stark distinction between “the professionals” – applied scientists, with a practical and competent approach to their work and the academics – those who concerned themselves with arcane matters of “scientific method” but were ill suited to perform the practical work of identifying blood stains. This was a clever distinction to draw, because it was closely consistent with Kuhl’s construction of her own work and blunted the force of the defence’s challenge to Kuhl’s theoretical knowledge.

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259 Trial Transcript cited by Bryson with Bryson’s narrative, supra note 2 at 492 – 493. Also cited by Crispin, supra note 7 at 160 – 161.
The contest over methodology

Boettcher and Nairn became concerned about the validity of Kuhl’s methodology for two reasons. First, they believed that Kuhl’s working notes indicated that she had obtained false positives. Second, they believed that the anti-serum on which she relied was not “mono-specific” – in particular, they alleged that it reacted to antigens in adult blood. The defence also suggested that, had Azaria been killed in the car and hidden in the camera bag, a lot more traces of blood should have been found.²⁶⁰

Phillips Q.C. cross-examined Kuhl about the issues raised by Nairn and Boettcher. For example, one of the notes Kuhl had made regarding a test she had carried out on material taken from the car read “foetal haemoglobin only”. Phillips Q.C. pressed Kuhl on the apparent inconsistency between her work notes and the evidence she gave at trial that the test exhibited both foetal haemoglobin and adult haemoglobin. Kuhl revised her narrative to account for the discrepancy, explaining that she did not note the presence of adult haemoglobin since adult haemoglobin was “the norm, the control.”²⁶¹ It was at this time that Kuhl revealed that her test plates had been destroyed in the course of normal procedure.²⁶²

Kuhl had prepared demonstration slides to explain her methodology to the jury. These slides exhibited signs that the anti-serum she had used was not mono-specific. Boettcher and Nairn

²⁶⁰ Morling report, supra note 5 at 50.

²⁶¹ Trial Transcript cited by Young, supra note 7 at 115 – 116.

²⁶² The Morling Report discussed the shortcomings in Kuhl’s evidence in some detail. However, Royal Commissioner Morling did not find that Kuhl had perjured herself or that she had intended to obstruct the course of justice. Morling wrote: “with the benefit of hindsight it can be seen that some experts who gave evidence at the trial were over-confident of their ability to form reliable opinions on matters that lay on the outer margins of their expertise” [at 340].
found marks on these test slides that they argued, were indicative of false positive reactions to the serum. Kuhl dealt with cross-examination on this subject by denying that these marks were consistent with false positives. Barker Q.C. contributed to Kuhl's defence of her methodology by asking Boettcher whether the batch of anti-serum he used in his experiments was the same batch as that used by Kuhl. The Crown constructed a boundary between Kuhl’s results and those attained by Boettcher on the basis that Boettcher could not prove that Kuhl’s batch of anti-serum was not mono-specific. This distinction was perhaps disingenuous, because Kuhl had refused to supply the defence solicitor with the details of the batch number of the anti-serum she had used. However, it provided a means of managing the defence’s attack on Kuhl’s methodology and was cited by the Full Federal Court and the High Court of Australia as a weakness of Boettcher’s criticisms of Kuhl’s evidence.

Another means employed by the Crown to deflect attention from the defence’s criticisms of Kuhl’s methodology was to shift the focus back to the Chamberlains’ behaviour. For instance, after Phillips Q.C. had completed his cross-examination, Barker Q.C. gave Kuhl the opportunity to re-state her conclusions. Her evidence concluded in the following way:

[Barker Q.C.] Did you form a view whether anything else had been done to [the camera bag] at any stage?

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263 Ibid. See also Crispin, supra note 7 at 140. The sting in Boettcher’s criticism of Kuhl’s methodology is indicated by Kuhl’s comments at a 1983 forensic science symposium that exhibition slides “simply allow arm-chair scientists to offer opinions on things they thought they saw”. Kuhl felt that her “job is not to offer the results obtained for interpretation either by lay people or by defence scientists.” Kuhl cited by Young, supra note 7 at 116. I will discuss these comment further in this chapter, infra.

264 Crispin, supra note 7 at 157.

265 Ibid.

266 Chamberlain FFC per Jenkinson J at 73; Chamberlain HCA per Gibbs C.J. and Mason J. at 555.
[Kuhl] Well, to me it looked like it had been through a washing machine, but I guess that's ... The vinyl was cracked, very flakey. It was in very poor condition.\textsuperscript{267}

Justice Muirhead immediately intervened to prevent Kuhl from speculating further. Justice Muirhead also told the jury after hearing Kuhl’s evidence (and before Chamberlain had testified) “don’t feel obliged to commit yourself to any view at this stage.\textsuperscript{268} Justice Muirhead was clearly concerned to ensure that Kuhl’s evidence did not prejudice the jury’s receptiveness to Chamberlain’s version of events. However, Barker Q.C. returned to Kuhl’s speculation about Chamberlain’s behaviour in his closing address. The link made by Kuhl between the Chamberlains’ possible behaviour and her scientific evidence is discussed further below.

2.3 Dirty work and eggheads: the distinction between practical scientists and academic scientists

In cross-examination, Barker Q.C. introduced the idea that Kuhl was a competent and experienced biologist when compared to the academic scientists engaged by the defence. In his closing remarks, Barker Q.C. returned to the distinction between “honest and competent” forensic biologists and “lofty” academics:

Mrs Kuhl says it is foetal blood, and I suggest to you that she ought to know and Dr Baxter ought to know what he is dealing with, because you know really, if the suggestions made about their work in this court have any substance, people in New South Wales are in constant danger of being wrongly convicted, whenever there’s some blood involved. And it’s really, I suggest, rather too ridiculous to contemplate that she would come into this, in the course of her daily work, as a professional forensic biologist, and muck it all up, not

\textsuperscript{267} Bryson, supra note 431.

\textsuperscript{268} Kerry Sharp “Chamberlain trial told test items destroyed” \textit{Northern Territory News} October 2 1982, pages 1 – 2 at page 2.
knowing whether she was dealing with adult blood or the blood of a child under three months of age. What we ask you to do is to respect her opinion. She didn’t come here for the greater glory; she came here because she got into the case as an employee of the New South Wales Health Commission.

... Professor Boettcher came along and criticised Mrs Kuhl and criticised the quality of the antiserum without ever asking her if he could test the actual antiserum which she used. Professor Boettcher, whose academic university life was preceded by life as a school teacher, and who has never been actively engaged in the day-to-day routine work of testing bloodstains, whose qualification to enter the arena seemed to be based in part upon a lofty concept of what he was pleased to call the ‘scientific method’, who teaches and engages in pleasant research and writes for learned journals about learned articles, never about forensic biology. Never about the dirty side of his profession: the sex crimes and the murders, the old bloodstains. He’s never been confronted with the difficulties which the poor old practical hardworking forensic biologist is confronted with – a biologist who, we say, does an honest and competent day’s work and goes to court to offer her honest opinion and finds herself confronted with the criticisms of academics who have probably never in their lives entered a forensic science laboratory. ... perhaps when Professor Boettcher has tested a few thousand trace samples of blood, and when Professor Nairn has scratched around in a car for a few days and tested it for blood, and when Professor Nairn takes time off from research and manages to test more than one blood sample a week, then each may be qualified to criticise Joy Kuhl.

Barker Q.C. appealed to Kuhl’s expertise by comparing it favourably with the defence experts’ academic pedigrees. However, Barker Q.C. did much more than that in this passage. By characterising Kuhl as “honest”, he invited the jury to judge the relative moral worth of the various expert witnesses. Implicit in Barker Q.C.’s defence of Kuhl is a suggestion that the jury would scorn the socially valuable work performed by the NSW Health Commission and its

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269 Trial Transcript, cited by Crispin, supra note 7 at 177 – 178.
scientists if it preferred Boettcher’s evidence to Kuhl’s.\textsuperscript{270} Also implicit is the notion that
defence scientists give evidence for quite different reasons: money or the “greater glory.” This
passage reveals Barker Q.C.’s own judgment about the jurors’ likely preference for hardworking
civil servants above ivory tower academics.\textsuperscript{271} The invitation to assess the expert witnesses as
people rather than as experts was likely to succeed because Boettcher and Nairn had
demonstrated (in the words of two judges of the Federal Court) “a rather unbecoming arrogance”
while giving evidence.\textsuperscript{272}

(1) \textbf{Structural factors influencing the discourse about expertise}

Barker Q.C.’s closing address appealed to the institution of the NSW Health Commission as well
as to Kuhl’s own credibility. This raises questions of the relationship between police officers and
forensic scientists. Unlike ordinary witnesses, expert witnesses such as forensic scientists are
permitted to give opinion evidence in their area of special skill if this evidence will assist the trier
of fact.\textsuperscript{273} The Federal Court of Australia’s \textit{Guidelines for Expert Witnesses} explain the
underlying justification for this exception – an expert’s role is not conceived as partisan, but as
assisting the decision-maker. However, the likelihood of an expert witness giving evidence that
tends to support the case of the party who calls that witness increases in trials such as
Chamberlain’s, where an expert works with one party over a period of time. Partisan

\textsuperscript{270} See Ericson and Baranek, \textit{supra} note 48 at 220 for a discussion of the ways in which crime enforcement
authorities are constructed as the “moral agent” of the state.

\textsuperscript{271} Crispin makes a similar point at 178 – 179.

\textsuperscript{272} \textit{Chamberlain} FFC, \textit{supra} note 3 at 30 per Bowen C.J and Forster J.

\textsuperscript{273} See for example section 79 of the \textit{Evidence Act} 1995 (Commonwealth of Australia). Similar exceptions to the
opinion rule exist in each State and Territory in Australia.
identification may be a natural consequence of the structure of forensic science. The reality of partisan identification was demonstrated by Kuhl when she remarked at a 1983 forensic science symposium that her “job is not to offer the results [she] obtained for interpretation either by lay people or by defence scientists.”

Kuhl was closely involved in the 19 September 1981 raid on the Chamberlains’ house. Transcripts of police conversations in the days following that raid included comments by policemen that Kuhl was “terribly excited [by the results of her tests]. She’s quite happy and what we appear to have is either the child was killed across the area of the console or was put there immediately after.” It seems that Kuhl regarded herself as a member of a team that also included Crown prosecutors and that the goal of this team was to establish that Chamberlain had murdered Azaria. Kuhl’s attitude towards the case was in stark contrast to the common law conception of expert witnesses, which presumes that Kuhl would distance herself and her conclusions from either party. Links such as those between Kuhl and the police officers with whom she worked are likely reinforced by the fact that senior police officers and forensic scientists will frequently work together on case after case. Both the relationships between police and scientists and the expertise of the individual scientist will be strengthened over time.

274 Young, supra note 7 at 116.

275 Chamberlain, supra note 43 at 195.

276 An extraordinary article that appeared recently on the www.news.com.au website (accessed on 16 June 2003) illustrates the longevity of law enforcement relationships and the enduring strength of professional enmity between scientists. The article reports that Professor Barry Boettcher (now emeritus) criticised Joy Kuhl’s role in the investigation of a murder that occurred in the Northern Territory desert in July 2002. Boettcher suggested that Kuhl had improperly overlooked an apparent bloody handprint on the door of the victim’s car. The parallels between the scientific evidence in this case and Chamberlain’s are bizarre, except that this time Boettcher argued for the presence of blood and Kuhl argued that no blood exists. http://www.news.com.au/common/story_page/0,4057,4204913%255E421,00.html.
Chapter four

To the extent that an expert identifies closely with one party in a given proceeding, his or her ostensible neutrality is further undermined.

The enduring relationship between police and forensic scientists highlights another, more important, structural aspect of the criminal justice system – the inequality of access to scientific resources. This inequality of access was obscured by the dispute in the Chamberlain case as to whether Boettcher and Nairn’s expertise matched that of Kuhl and Baxter. It is rare for a criminal defendant to muster the resources necessary to challenge the evidence given by government-employed forensic scientists.\textsuperscript{277} By default, therefore, forensic experience is concentrated within state law enforcement authorities.

The Chamberlains were able to call scientific experts to contest the Crown’s evidence because the Seventh Day Adventist church underwrote the Chamberlains’ legal costs.\textsuperscript{278} This, together with the public profile of the case, allowed the Chamberlains to employ scientists and lawyers who may not otherwise have found time for their case. However, there remains an institutional asymmetry between the depth of experience of government-employed forensic scientists and the experience of those employed elsewhere. Even when a defendant such as Chamberlain can

\textsuperscript{277} The High Court of Australia’s decision in \textit{Dietrich v. R.} (1992) 177 CLR 292 [\textit{Dietrich}] (accessed electronically via www.austlii.edu.au on 14 June 2003), discusses some of the disadvantages faced by defendants who are unable to access legal aid. The case illustrates the difficulties faced by defendants in gaining access to the resources necessary to mounting a proper defence.

The Legal Aid Commission of Victoria refused Dietrich legal aid unless he pleaded guilty to a charge of importing heroin. The judge hearing Dietrich’s case refused to adjourn the matter to allow him to seek alternative legal assistance. The majority of the High Court of Australia found that there is no general right to legal aid in Australia. However, in the circumstances of Dietrich’s case, his right to a fair trial was prejudiced by the judge’s refusal to adjourn the matter. \textit{Dietrich} per Mason C.J. and McHugh J. at para 37 and Deane J at para 17; Dawson and Gaudron J.J. gave separate concurring judgments. Justice Brennan was in dissent. Justice Deane made particular reference to the fact that “[a]n accused is brought involuntarily to the field in which he [sic] is required to answer a charge of serious crime. Against him, the prosecution has available all the resources of government.” \textit{Dietrich} per Deane J. at para 13.

\textsuperscript{278} Chamberlain, \textit{Through My Eyes, supra} note 43 at 117.
afford to retain scientists to contest the Crown’s forensic evidence, she may well be unable to access those scientists with the greatest forensic expertise and experience. Scientists who do not work for the Crown may also be less familiar than Crown scientists with giving evidence and may therefore appear less confident when testifying. These institutional factors may have had a significant impact on the jury’s reception of the Crown’s scientific case.

Royal Commissioner Morling suggested in his report that the creation of a national forensic institute to which both Crown and defence solicitors would have access could help to overcome this kind of partisanship.279 Such an institution could help to redress the inequality of access to scientific resources and could establish standards for methodology and testing that would help to avoid miscarriages of justice as extreme as that which occurred in the Chamberlain case. It would also ensure that confident and experienced forensic scientists are available to all parties. However, a national forensic institute is unlikely to overcome the tendency for police officers to form longstanding relationships with forensic scientists over the course of numerous cases. Criminal defendants and even criminal lawyers are far less likely to work repeatedly with the same scientists. Equally, all scientific knowledge is social and is therefore constrained by what we think we know.280 As scientific knowledge progresses, today’s truths become symbols of yesterday’s ignorance. While it is possible and desirable to strive for a more complete scientific knowledge and to provide more equal access to that knowledge, it will never be possible to remove science entirely from its cultural origins.281

279 Morling Report, supra note 5 at 316 – 317.


281 Ibid, at 15.
Barker Q.C.'s characterisation of the various experts rendered the Crown’s evidence closer to the “real world” by portraying the defence’s evidence as shrouded in the mysteries of “scientific method”. This provides a fascinating gloss on Foucault’s conception of science as possessing a certain power because it is discursively constructed as inaccessible and beyond the understanding of all but those practitioners who have access to truth because of their grasp of scientific method. Barker Q.C. made a very different argument in his closing address – he suggested that because Kuhl’s evidence fit better with the jurors’ cultural knowledge, the jurors should regard her testimony as true. He coupled this argument with an invocation of the institutional power of the NSW Health Commission, perhaps appealing to an ideological belief that forensic institutions are trustworthy because of their centrality to law enforcement.

Barker Q.C. invited the jury to devalue the academic expertise of the defence scientists. Whilst it may generally be correct to say that most people accept the findings of scientists at face value, the Chamberlain case suggests that Foucault’s characterisation of science does not always hold true. The “science” presented in the Chamberlain case was shaped to conform to the demands of the legal process and the jurors (who were not scientifically trained) were asked to mediate between competing scientific opinions. Arguably, the jurors preferred an opinion that they understood, that made “intuitive” sense and that was confidently delivered by experts they trusted to an opinion that manifested a better “scientific method”. The jury trusted Kuhl’s confidently delivered evidence even though Kuhl admitted that she had previously given evidence that was
To demonstrate the extent of the impact of Kuhl’s evidence, I have examined the notes taken by Juror Yvonne Cain during the trial.

By the time that Kuhl gave evidence about her findings that there was foetal blood in the Chamberlain’s car, Juror Cain seems to have been relying heavily on the *Northern Territory News*’s reports of the trial. An article about Kuhl’s evidence noted that Kuhl had admitted that she had not positively identified the presence of blood on scissor found in the Chamberlains’ car, but did not fully explain that Phillips Q.C. challenged all of her results.\(^{283}\)

In Cain’s notes about Kuhl’s testimony she noted: “Too much to try and write”, although she also wrote that the jury listened to Kuhl “like a bunch of schoolchildren”.\(^{284}\) After Phillips Q.C. had cross-examined Kuhl, Cain wrote that “Mrs Kuhl was able to give an answer and explanation to all questions fired at her ... There seems to be no doubt that the blood in the car is foetal blood.” [Emphasis in original.] In relation to Professor Boettcher, Cain again noted “to[o] much to try and write” but commented “Does not agree with Mrs Kuhl said tests were not correct had been to German company where [foetal anti-serum is made]”. Cain’s notes on Professor Nairn’s evidence read “Disagreed with Mrs K[uh], Doc Baxter and Mr Cullerford. On Cross examination Prof Nairn only does blood tests maybe once a week. Mrs Kuhl does it every day and it is her only job.” Cain made no note of the fact that Professor Nairn taught blood testing techniques to forensic scientists – she appears to have understood that Nairn and Boettcher

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\(^{282}\) See the extract from the Trial Transcript that forms the text to note 255.


\(^{284}\) See also Chamberlain, *Through My Eyes*, supra note 43 at 588.
challenged Kuhl’s conclusions, but also to have appreciated the importance of the Crown’s
collapse to the defence scientists’ expertise.

Cain’s notes about the scientists’ testimony provide several insights into the jury’s reception of
the scientific evidence. First, Phillips Q.C.’s attempts to challenge Kuhl’s findings on cross-

examination merely served to strengthen Cain’s acceptance of Kuhl’s opinions. Second, this
juror preferred Kuhl’s evidence because she was confident – she spoke like a schoolteacher and
“she had an answer and explanation to all questions fired at her.” Cain’s acceptance of Kuhl’s
testimony accords with psychiatric studies that suggest that people believe confident witnesses
more readily than they believe cautious witnesses, even though expert witnesses who express
their findings carefully may be less prone to tunnel vision than those who refuse to entertain
alternative hypotheses.

Some years after the trial, Cain said of Kuhl that she:

really did treat us like we were in a classroom, and she sat there and she went through the
whole lot … because we were able to understand Mrs Kuhl, she was very—she was a
woman, and she, I don’t know, I myself was able to listen to her and understand her.
Professor Boettcher I didn’t. I mean, I understood what he was saying, but Joy Kuhl got
to my mind better than he did about the blood tests.286 [Emphasis added]

This comment is revealing because it demonstrates that Kuhl’s manner greatly enhanced the
jury’s receptiveness to her evidence. It also seems that Cain placed some importance on the fact
that Kuhl is a woman – although further research would be necessary to establish exactly how


286 Young, supra note 7 at 118 quoting a television interview between Yvonne Cain and Paul Jenkins of Channel
Seven (Perth) that was screened on 26 November 1985.
this affected Cain’s views. In any case, Cain seems (perhaps subconsciously) to have had regard
to Kuhl’s behaviour when deciding whether to accept her evidence. This was in concordance
with Justice Muirhead’s direction that:

Merely because you can’t fully understand the techniques and methods employed in
modern scientific research, doesn’t mean you can’t act on the evidence resulting from
such scientific enquiry. Of course, you can. In the long run, it will depend on you
assessment of the witness as to how he or she appeals to you in the course of your
enquiry, and you are therefore entitled – like you do with any other witness – to look at
the demeanour, the manner in which the evidence [was] given, and utilize your
commonsense judgment as to the extent, if any, you rely on this evidence.\(^{287}\)

Justice Muirhead’s direction to have regard to the demeanour of expert witnesses formed the
basis of two of the grounds of appeal against the Chamberlains’ convictions.\(^{288}\) Interestingly,
Justice Muirhead may not have intended his comments about scientists’ demeanour to encourage
the jury to accept the evidence of the most confident experts. In his autobiography, Justice
Muirhead wrote that:

I sensed that the intense publicity and the spotlight on the [Chamberlain] trial had
influence on some of the expert witnesses. The demeanour of some suggested that they
felt their reputations were at stake. They were not, of course. The issues were far more
grave but the customary objectivity of experts was lacking in some cases, but not in all.
Opinions are but opinions, some are right, some are wrong, and the advances of science
are a caveat against dogmatism. But my recollection of this trial is that there was at times
a demonstrated reluctance to concede even the possibility of opposing hypotheses”\(^{289}\)

\(^{287}\) Justice Muirhead, summing up, Trial Transcript, \textit{supra} note 1 at 3230. See also Young, ibid.

\(^{288}\) Relevant grounds of appeal are reproduced in Appendix B. The grounds on which this passage was objected to
are grounds 12 and 13.

Justice Muirhead does not refer specifically to Mrs Kuhl. However, he was almost certainly aware that during the Royal Commission into the Chamberlain Convictions, Commissioner Morling found that:

the Crown was obliged to rely to a large extent upon [the] skill and experience of Mrs Kuhl … she lacked the considerable experience required to enable her to plan and carry out these complex and difficult testing procedures\(^ {290}\)

some experts who gave evidence at the trial were over-confident of their ability to form reliable opinions on matters that lay on the outer margins of their fields of expertise. Some of their opinions were based on unreliable or inadequate data.\(^ {291}\)

Chamberlain’s appeal against Justice Muirhead’s direction was dismissed by Chief Justice Bowen and Justice Forster in the Full Federal Court on the basis that the jury would understand that “if they did not know where accuracy and truth lay with respect to opinion evidence, then they could not act on it.”\(^ {292}\) I will discuss the importance of the jury’s attitude towards Kuhl further in the next chapter.

3. The relationship between the scientific evidence and behavioural evidence

I have already noted that the Crown deflected criticism of its scientific case by asking the jury to focus instead on the Chamberlains’ behaviour.\(^ {293}\) One example of the deflection tactic was Barker Q.C.’s cross-examination of Mrs Chamberlain on the subject of blood in the car. Despite

\(^ {290}\) Morling Report, \textit{supra} note 5 at 138 – 139.

\(^ {291}\) Ibid, at 340.

\(^ {292}\) Chamberlain FFC, \textit{supra} note 3 at 16 per Bowen C.J. and Forster J. Justice Jenkinson also dismissed these grounds at 106 – 107.

\(^ {293}\) I will refer to this aspect of the Crown’s narrative as the deflection tactic.
the fact that Mrs Chamberlain did not necessarily accept that the Crown had established the presence of blood in the car, Barker Q.C. asked Mrs Chamberlain to identify possible sources of blood. Crispin quotes the following extract from Barker Q.C.'s cross-examination of Mrs Chamberlain:

[Barker Q.C.] ‘If it were the case [that positive reactions to blood were obtained], do you know why there would be blood on the offside carpet?’

[Mrs Chamberlain] ‘No. It could have come from a number of places, I suppose. I don’t know.’

[Barker Q.C.] ‘What places would you suggest?’

[Mrs Chamberlain] ‘Children crawling around the car, or people moving. Or from people Michael had fixed up, with injuries, I don’t know.’

...[Barker Q.C., turning to the apparent presence of blood under the seat and on a ten cent coin found under the carpet] ‘What do you say about that?’

[Mrs Chamberlain] ‘I don’t know that I’ve got any opinion on it, particularly.’

There was an interjection by the judge who explained that she was not being asked whether she accepted the validity of the findings, but merely “if there were positive reactions, what have you got to say about it?”

Barker Q.C. persisted, ‘Can you account for the presence of blood on that side of the car?’

[Mrs Chamberlain] ‘I know Mr Lenehan’s blood is on that side of the car. And a number of other incidents that I have related here in court, but other than that, I don’t know anything about it.’

[Barker Q.C.] ‘The blood around the console? Can you account for that, if indeed it were blood?’

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[Mrs Chamberlain] ‘It could’ve got there – when Reagan hit the dashboard. I don’t know.’

This passage provides an illustration of the relationship between the scientific evidence and the Chamberlains’ testimony. Mrs Chamberlain did not necessarily accept the presence of blood in the car, but was nevertheless required to speculate as to its origins. The Crown successfully moved the contest from one over the expertise and methodology of its scientific witnesses, to an attack on Mrs Chamberlain’s credibility, thereby restoring Kuhl’s credentials. This distracted the jury from the possibility that there was no blood in the car and from the question of what blood in the car might mean. The shift was arguably facilitated by evidence given by the defence scientists, who seemed at times to accept that some blood might have been found in the car but challenged whether it was foetal blood. Because Mrs Chamberlain was unable adequately to explain the presence of blood in key areas of the car, her credibility was damaged and she may have appeared evasive or unhelpful – even though the Crown had been unable to prove conclusively that blood had been found in the car. This aspect of Barker Q.C.’s cross-examination also implied that as a mother, Chamberlain should be able to identify and explain each time a child had bled. By contrast, when Mr Chamberlain was cross-examined, Barker Q.C. asked him whether the children had ever bled in the car and did not question Mr Chamberlain’s explanation that he was unsure.

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294 Crispin, supra note 7 at 153.

295 See Crispin, supra note 7 at 295.

296 Trial Transcript, supra note 1 at 2712 - 2715.
4. **Conclusion: the role of science at trial**

The scientific testimony given in the Chamberlain case was inextricably linked with and also influenced by the narratives regarding Mrs Chamberlain’s guilt or innocence. The Crown’s perception of Mrs Chamberlain’s role in her daughter’s disappearance was influenced by police constructions of her motherhood and this in turn directed the course of the collection of scientific evidence. For example, the Crown’s decision not to seize items that would tend to corroborate Chamberlain’s story suggests that it did not entertain the possibility that Chamberlain was innocent. These perceptions about Chamberlain’s guilt, together with the imperatives of the legal process, shaped the Crown scientists’ testimony in substance and form. In turn, the defence scientists’ testimony was also moulded by certain assumptions such as an assumption that there was blood, but not foetal blood, in the car.

At trial, the case was framed around a dispute as to whether the “blood” in the car was foetal blood. Chamberlain didn’t accept the presence of blood and this impacted on her credibility. The confidence with which Crown scientists gave their evidence also affected the reception of that evidence. However, the scientific evidence ultimately had to be weighed against eyewitness evidence such as the evidence given by Sally Lowe that she had heard an infant cry after Chamberlain returned to the barbeque area. Lowe gave evidence that, *as a mother* and as the carer for several of her younger siblings, she was “positive” that she had heard Azaria cry and that she would not have mistaken Azaria’s cry for that of an animal or an older child.\(^{297}\) The jury’s decision to reject Lowe’s knowledge but to accept some of the scientific knowledge demonstrates an interesting privileging of public “scientific” knowledge over private

\(^{297}\) Trial Transcript, *supra* note 1 at 146 - 148.
“motherhood” knowledge. Ultimately, Lowe’s evidence was rejected because the jury had doubts about Chamberlain’s credibility.

A further aspect of the privileging of certain types of scientific evidence has not been fully explored in this chapter. That aspect is the failure to call aboriginal trackers to give evidence at trial. I have already explained that trackers gave evidence at the first inquest and during the Royal Commission that they had found dingo prints and an imprint that was consistent with a baby’s knitted jumpsuit in the sand dunes around and behind the Chamberlains’ tent. This evidence was included in the trial by means of the transcript of the first inquest, but it appears that the jury did not have regard to this evidence. The failure to call the trackers is inexplicable except on grounds of racism and it provides a stark illustration of the extent to which our understanding of “scientific knowledge” is culturally contingent and formed by certain assumptions.298 It is possible that, even if the trackers had been called to give evidence, their testimony would have been discounted by the jury because of the need to use interpreters, because of the trackers’ demeanour, or because Kuhl’s “western” knowledge would have trumped Aboriginal “superstition”. The treatment of tracking evidence in the Chamberlain case deserves further, and separate, scrutiny.

298 See Howe, supra note 9. Harding, supra note 280 at 37.
CHAPTER FIVE: "IN THIS COURT, A MOTHER STANDS HER TRIAL":
DECISION-MAKING IN THE CHAMBERLAIN CASE

1. Introduction

Despite law's pretence to autonomy and self-containment, social representations of Chamberlain in particular, and motherhood and science in general, influenced the legal outcome of the Chamberlain case. My previous discussion of the development of narratives about motherhood and science at trial was largely focused on the construction of these narratives inside the courtroom and the ways in which this construction was influenced by the criminal investigation. In this chapter, I consider the ways in which the narratives about science and motherhood influenced the legal decision-making process. Like legal argument, legal decision-making is necessarily influenced by the social context of the legal process. Juries and judges will (inevitably) have regard to social context when choosing between competing narratives and when constructing a "story" that explains the matters that they are asked to adjudicate. The interpretive grids employed by decision-makers are established long before they approach a particular fact situation. Narratives regarding motherhood and science are not spontaneously generated in the courtroom: they draw on cultural norms and on pre-existing ideology and, in the Chamberlain case, they were influenced and accompanied by media narratives about Chamberlain.

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2. **Trial by media? Conceptualising the media’s role in Chamberlain’s conviction**

From the time of Azaria’s disappearance, the Australian media were obsessed with the Chamberlain story. Several commentators have argued that Chamberlain was convicted of murdering Azaria because she was denied a fair trial due to the prejudicial effect of the speculation in the media before her trial. Adrian Howe puts this argument most graphically in her article “Chamberlain Revisited: The Case Against the Media”, in which she charges that “the Australian media, aided and abetted by a large cross-section of the Australian public, murdered, killed in cold blood, the possibility of a fair trial for Lindy Chamberlain”. Keogh suggests that in the months before the Chamberlains were committed for trial “the diversity, frequency and constancy of publicity forcefully invited public formation of opinion one way or the other.”

Craik argues that the public manifestation of the Chamberlain case was less about truth or Chamberlain’s right to justice than about “the pleasures to be obtained from the production and circulation of the serial itself.” Chamberlain and the jurors who spent more than six weeks hearing the case would perhaps disagree, and much of the media coverage was intensely concerned with the attribution of blame. Craik’s interpretation of the Chamberlain case seems to

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301 Most notably, this argument is made by Howe, *supra* note 9. Craik, *supra* note 9 and Johnson, *supra* note 9 have also discussed media representations of Chamberlain. Craik’s argument is discussed further below. Johnson does not deal with the relationship between Chamberlain’s portrayal in the media and her conviction for murdering Azaria. However, Johnson’s discussion of the media representations of Chamberlain becomes relevant in section 3 of this chapter.

302 Howe, *supra* note 9 at 262.

303 Keogh, *supra* note 9 at 23.

304 Craik, *supra* note 9 at 128.
me to overstate the imperative of the interested public – the rhetoric of the legal actors suggests that they were intensely concerned with “truth” and that those who accepted the prosecution story were determined to obtain “justice” through the legal process. The question of why the prosecution and, ultimately, the jury, convinced themselves of the “truth” of Chamberlain’s guilt leads back to the socio-legal construction of Chamberlain as a mother.

The “case against the media” framed by Howe, Keogh and Craik is similar to my conceptualization of the Chamberlain case in some important respects. In particular, both Howe\(^{305}\) and Craik\(^{306}\) argue that representations of Chamberlain by the media focused on “a belief that she had violated the sanctity of motherhood”.\(^{307}\) This belief was fuelled by Chamberlain’s apparently passive reaction to Azaria’s death\(^{308}\) and by what the media portrayed as her sexualised dress.\(^{309}\) Despite these similarities between our respective conceptions of the Chamberlain case, it seems to me that, by drawing a relatively direct equation between the media representations of Chamberlain and the jury’s guilty verdict, these authors render the media monolithic in their condemnation of Chamberlain – when in fact, some journalists and some media outlets reported the case in a way that was sympathetic to Chamberlain. Additionally, these authors do not adequately account for the re-negotiation of constructions of Chamberlain that took place within the courtroom, or for the groundedness of media discourse within broader cultural understandings of motherhood.

\(^{305}\) Howe, supra note 9 at 263 – 264.

\(^{306}\) Craik, supra note 9 at 128 – 129.

\(^{307}\) Kerryn Goldsworthy “Martyr to Her Sex” *The Age Saturday Extra* 15 February 1986 quoted by Howe, supra note 9 at 264.

\(^{308}\) Craik, supra note 9 at 132.

\(^{309}\) Howe, supra note 9 at 263.
One juror who was quoted anonymously by the *Sydney Morning Herald* commented that:

> I think all of us on the jury were aware of the circumstances of the baby’s disappearance prior to the trial ... but it is impossible to keep a prejudice, whether pro or anti, during a trial of that length of time because the system is so structured that you are forced to listen, to observe and to reason on the basis of the evidence which is given to you.\(^{310}\)

Arguably, the prejudicial media portrayal of Chamberlain could not have been totally counteracted at trial, particularly if jurors approached the case with pre-formed suspicions about the Chamberlains’ honesty. Inescapably, the media perpetuated cultural norms about motherhood and sought to categorise Chamberlain within those norms. However, the prejudicial publicity was one of many sources of information on which the jurors may have formed their view that Chamberlain was guilty. Other relevant sources of information included the evidence in the Chamberlain case and the jurors’ own culturally informed expectations of motherhood. I wish to re-conceptualize the media’s role in Chamberlain’s conviction. This re-conceptualization forms the basis of my broader argument that, although the jury members likely approached the trial with media influenced preconceptions, these conceptions were contested and subject to renegotiation during the course of the trial.

Howe and Keogh make two key assumptions about the relationship between law and the media in arguing that the media formed the jurors’ opinions of Chamberlain’s guilt. First, they assume that the performance of a “fair trial” is contingent upon the autonomy of the legal process (the “autonomy fairness assumption”).\(^{311}\) Second, but related, Howe and Keogh assume that

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\(^{310}\) "Juror reveals: How we reached Azaria verdict" *Sydney Morning Herald* 12 April 1984 quoted by Keogh, *supra* note 9 at 38.

\(^{311}\) See Rosen, *supra* note 9 at 512 for a critique of the autonomy assumption. In this article, Rosen replies to several articles that form a special issue of Law and Human Behavior focusing on media and the law. Rosen argues that the
prejudicial publicity negatively affects the decision-maker’s ability to determine whether a defendant has been proven guilty “beyond a reasonable doubt” (the “media effects assumption”).

The autonomy fairness assumption adopts the liberal conception of law as separate from social forces. It accepts the “image of law projected in the bulk of legal scholarship … [as] a ‘thing’ which stands apart from human society.” The autonomy fairness assumption is fundamental to law’s discursive power because it legitimises law’s authority over social relations. It is based on prior assumptions that it is both possible and desirable for law to remain autonomous from society.

Law’s apparent autonomy is buttressed by common law rules such as the prohibition against the publication of material that may interfere with the course of justice. The autonomy fairness assumption is an important facet of law’s role as a privileged mechanism by which the “truth”

authors of these articles accept the autonomy assumption unreflexively. The most relevant of these articles for my discussion are: Geoffrey P. Kramer, Norbert L. Kerr and John S. Carroll, “Pretrial Publicity, Judicial Remedies and Jury Bias” (1990) 14 Law and Human Behavior 409 and Edith Greene, “Media Effects on Jurors” (1990) 14 Law and Human Behavior 439. See also the introduction to this issue: Valerie P. Hans “Law and the Media: An Overview and Introduction” (1990) 14 Law and Human Behavior 399.

312 Ericson, “Mass Media”, supra note 10 at 220 – 221.

313 Pue, “Wrestling with Law”, supra note 299 at 570. See also Rosen, supra note 299 at 512; Stubbs, supra note 299 at 63.


315 I will question the possibility of autonomy in this chapter. The autonomy assumption also depends on an assumption that it is desirable for law to remain autonomous from society. This assumption is also questionable, not least on social justice grounds. See for example, Rosen, supra note 299 at 513; Pue, “Wrestling with Law”, supra note 299 at 577 – 578.

about past events can be objectively accessed and analysed.\textsuperscript{317} It was not of course possible for the legal decision-making process in the Chamberlain case to occur autonomously from the broader social discourse about the case. The assumption that the fairness of a criminal trial depends on its autonomy and self-containment overlooks law's socially constructed character.

The media effects assumption posits that sustained exposure to prejudicial information in the mass media cultivates social fears and has behavioral consequences for legal decision-making.\textsuperscript{318} The prejudicial information with which the media effects assumption is concerned may relate to a specific case or to a broader “social problem” such as an apparent rise in violent crime.\textsuperscript{319}

Ericson et al argue that the media effects assumption overlooks the social context in which mass media content is produced and consumed.\textsuperscript{320} They suggest that mass media have diverse and conflicting influences. These influences are a function both of the cultural context in which mass media content is produced and of the meanings ascribed to mass media content by individual readers.\textsuperscript{321} A reader does not unreflexively accept what she reads in the mass media, but “negotiates control” over mass media content by interpreting information in accordance with her organizational context and experience.\textsuperscript{322} Because of this process of negotiation, the success of

\begin{itemize}
\item \textsuperscript{317} Hunter and Cronin, supra note 68 at xi.
\item \textsuperscript{318} Ericson, “Mass Media”, supra note 10 at 220. For an example of media effects analysis, see Greene, supra note 311.
\item \textsuperscript{319} Kramer, Kerr and Carroll, supra note 311 discuss the prejudicial effects of pre-trial publicity about a specific case. Greene, supra note 311 discusses the broader effects of “distortion” in media reporting of certain categories of crime (eg the authors perceive that violent crimes are disproportionately given media attention and that this makes society seem more violent than it actually is).
\item \textsuperscript{320} Ericson, “Mass Media”, supra note 10 at 221 – 222.
\item \textsuperscript{321} Ibid.
\item \textsuperscript{322} Ibid at 222.
\end{itemize}
news discourse relies on its ability to claim to form “a part of common sense”, which in turn reinforces the cultural embeddedness of mass media.\textsuperscript{323} To the extent that received common sense includes ideologies such as the ideology of motherhood, news discourse is likely to reflect those ideologies. Therefore, mass media do not stand apart from social reality and social relations, but are integral to them.\textsuperscript{324} For these reasons, Ericson et al suggest that the role of mass media is to provide instruction not so much on “how things are” but on “where they fit” into a society’s interpretive framework for the order of things.\textsuperscript{325}

The question of “where things fit” is fundamentally a question of social ordering, and Ericson argues that law and media collectively aid in constituting realities of crime, justice and social order.\textsuperscript{326} Mass media are fundamental to the process by which the relatively “private world” of the courtroom is linked and integrated into the political and ideological order of social “public” life.\textsuperscript{327} However, as with all media content, this process of linkage is necessarily constrained by the pre-existing cultural “common sense”. Ericson therefore conceives of mass media as central to cultural knowledge about crime and criminal law, but not as instrumental. Rather than forming cultural knowledge or ideology, mass media draw on this knowledge and shapes it within the constraints of “common sense”. This process results in media discourses that are (in common

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\bibitem{Ibid} Ibid.
\bibitem{Ericson et al} Ericson et al, \textit{Representing Order}, supra note 323 at 4.
\bibitem{Ibid, at 222} Ibid, at 222. A courtroom is a public space and the public could and did attend Chamberlain’s trial. However, the media’s reach is far greater and it is court reporters (in conjunction with editors) who select and distribute information about trials to a wider public via the media.

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with all discourses) open to re-interpretation as a reader seeks to assimilate mass media content within her own subjectivity.\(^{328}\)

3. The “dangerous woman”\(^{329}\) and the “young mother with the faraway eyes”: \(^{330}\) media representations of Chamberlain

Those who have analysed the mass media reportage about Chamberlain have largely focused on her representation as a “dangerous woman: a dangerous, provoking, counter-stereotypical woman who refused to play her assigned gender role.”\(^{331}\) Negative representations of Chamberlain were pervasive, although they were particularly evident among the tabloid newspapers such as the *Daily Telegraph* in Sydney and the *Sun* and *Truth* in Melbourne. Chamberlain’s sexuality was a subject for comment among some journalists throughout the trial:

She dressed in a fairly sexy sort of way. She was obviously aware of how she looked. I think she was aware of her sex appeal. She obviously dressed to highlight her attributes.\(^{332}\)

[Chamberlain dressed] like a filmstar, with a black dress, red lips, shoes and handbag.\(^{333}\)

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\(^{328}\) Ibid.

\(^{329}\) Howe, *supra* note 7 at 2.


\(^{331}\) Howe, *supra* note 9 at 2; Craik, *supra* note 9 at 131 - 132. See also Johnson, *supra* note 9 at 90.


\(^{333}\) Malcolm Brown, “The Chamberlains, neat and tidy, hiding all the agony” *Sydney Morning Herald* 1 November 1982, quoted ibid at 100. Despite this reference to Chamberlain’s “filmstar” outfit, this article was extremely sympathetic to Chamberlain, describing her as “courteous, open and friendly” and suggesting that during the trial it “became obvious to anyone that Mrs Chamberlain was deeply distressed.”
Johnson argues that the mass media’s sexualisation of Chamberlain and their focus on her ability to change her image from vamp one day to demure the next has parallels with representations of witches in the Middle Ages. She suggests that references to Chamberlain inducing lust in male spectators were intended to portray her as calculating and manipulative. The depiction of Chamberlain as sexualized and manipulative stands in contradistinction to social conceptions of the ideal mother who, as discussed earlier in chapters two and three, is domesticated and down-to-earth.

Other reports were more circumspect about Chamberlain’s personal appearance, one noting that she “dressed smartly” for her first day at trial, “wearing a pink and white maternity dress”. This description of Chamberlain also foregrounds her femininity and, in particular, her maternity: but in this case, she is represented as a benign mother – neat and tasteful – rather than dangerously sexual. The varying characterisations of Chamberlain as “sexy” or “maternal” seem to have very little objective relationship to the clothes Chamberlain actually chose to wear and Chamberlain’s dress style did not change during the trial. The variety of representations of Chamberlain may have constituted a (probably unconscious) metaphor for individual reporters’ perception of Chamberlain either as a dangerous woman or as a victim. Written descriptions of Chamberlain were accompanied by images, which were also chosen to show her as more or less sexy, according to the tone of the article. Whilst feminist critiques of the reporting about

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334 Johnson, supra note 9 at 100. Howe argues that “the media’s preoccupation with Lindy’s body was the first step in the creation of Lindy the Witch. The witch, a figure embodying the power and threat of female sexuality, a wild, uncontrollable sexuality which must be tamed, tamed, in this case by the objectifying gaze of the media.

Chamberlain have focused on the sexualisation of Chamberlain in the media, this was only one aspect of the myriad ways in which Chamberlain was depicted.

The second, and perhaps more important, aspect of the negative reporting about Chamberlain was the focus on Chamberlain’s behaviour as “the unnatural mother”. Howe quotes an article that described Chamberlain’s responses to questions she was asked at one inquest as “words which sounded harsh coming from a supposedly loving mother’s lips.” Another journalist quoted by Howe asked “WHO is the REAL Lindy Chamberlain? What lies beneath the usually stern face which she has presented to the world?” Again, these reports were not the only representation of Chamberlain as a mother. They were matched by reports from journalists who admired and sympathised with Chamberlain. Malcolm Brown, writing for the *Sydney Morning Herald* regularly commented on the strain of the trial for the Chamberlains, for example: “The anguish for ... Lindy Chamberlain, charged with the murder of their baby daughter Azaria, is quite obvious.” The headline to another article written by Malcolm Brown illustrates both the emotional and visual aspects of the construction of Chamberlain as a good mother: “The Chamberlains: neat and tidy, hiding all the agony.”

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336 Howe, *supra* note 9 at 3.
337 Howe, *supra* note 9 at 4, source not cited.
338 Ibid, source not cited.
Comments such as these are representative of dozens of articles I reviewed from the *Sydney Morning Herald*,\textsuperscript{341} an impression confirmed by the findings of other commentators, including Howe and Johnson. Representations of Chamberlain were disparate and often conflicting. While the sexualized and unnatural mother described by Howe and Johnson was a recurring theme, other journalists who wrote for high-circulation newspapers portrayed Chamberlain as the good mother.

The progress of the Chamberlain case was exhaustively reported, especially during the trial. Newspapers included lengthy quotes from the transcript and analysed the effects of each day’s evidence.\textsuperscript{342} This reportage of the legal process ensured that, whether Chamberlain was portrayed sympathetically or as a dangerous woman, the mass media played an important role in the cultural interpretation of legal aspects of the Chamberlain case simply by providing (carefully constructed) daily updates on the events in the courtroom. This demonstrates the second aspect of Ericson’s conceptualization of mass media: while the media are not monolithic, they join with law in constituting “a deviance-defining elite that perpetually articulates morality and justice in all other social institutions.”\textsuperscript{343} This aspect of the media is central to its relationship with law – law and media work together to a certain extent to partly constitute realities of crime, justice and social order.\textsuperscript{344}

\textsuperscript{341} Appendix A summarises the date ranges of articles I reviewed from the *Sydney Morning Herald*.

\textsuperscript{342} See, for example, Malcolm Brown, “The Crown outlines its case”, *Sydney Morning Herald* 14 September 1982, page 2. Howe discusses the exhaustive reporting of the scientific aspects of the case, supra note 9 at 6.

\textsuperscript{343} Ericson, “Mass Media”, supra note 10 at 223.

\textsuperscript{344} Ibid.
4. “A trial according to law”:\textsuperscript{345} legal process and the reification of law in the Chamberlain case

4.1 “Evidence as we understand it in the criminal jurisdiction”:\textsuperscript{346} The relevance of evidence law to law’s claims to autonomy

The rules of evidence are predicated on the positivist conception of law.\textsuperscript{347} They underscore law’s claims to autonomy by purporting to serve as a “gatekeeper” between cultural knowledge and legal knowledge. Evidence law affects the law’s quest for truth by distinguishing between information that is \textit{legally} relevant to a given event (i.e. admissible evidence); and information that may be \textit{socially} relevant in the sense that it affects social perceptions of an event, but which is excluded from the legal process. For this reason, evidence law is central to the social construction of law as an autonomous and fair institution:

Procedural rules are critical to the resolution of disputes and the enforcement of substantive law in the courts. If the procedures are inefficient, access to justice is impaired. If the procedures are unjust, the outcome of the process is likely to be unjust. At the symbolic center of the system of procedural justice is the trial. While what happens before and after the trial is important, the trial is the central and most public part of the justice system. It is the showcase where the community can observe the law in action and assess whether justice is being done. To a very great extent, trial procedure is determined by the law of evidence.\textsuperscript{348}

\textsuperscript{345} Justice Muirhead, summing up, Trial Transcript, \textit{supra} note 1 at 3186.

\textsuperscript{346} Justice Muirhead, address to prospective jurors, Trial Transcript, \textit{supra} note 1 at 3.

\textsuperscript{347} See Stubbs, \textit{supra} note 299 at 64 – 65 for a summary of the precepts of legal positivism.

Evidence law excludes information that, though socially relevant,\textsuperscript{349} is thought to be unreliable or unduly prejudicial\textsuperscript{350} to a defendant. For instance, the rule against hearsay exists because “the truthfulness and accuracy of a witness whose words are spoken by another witness cannot be tested by cross-examination, and the light which his [sic] demeanour would throw on his testimony is lost.”\textsuperscript{351} Within the trial, the jury’s role is to hear evidence that meets basic (judge-administered) criteria such as relevance, and to decide matters of fact based on that evidence and on an assessment of related matters such as the credibility of various witnesses.\textsuperscript{352} The evidence heard by a jury is tailored to remove information that is regarded as likely to mislead or distort their understanding of the case.

The justification for seeking to limit jury decision-making to the evidence heard at trial is therefore twofold. First, the legal process is thought to exclude (socially relevant) unreliable or prejudicial evidence that may skew a jury’s decision. By contrast, before a matter becomes sub judice, the media may report on any matter, regardless of how prejudicial that matter may be.\textsuperscript{353}

Second, by limiting decision-making to the evidence heard at trial, the legal process emphasises

\textsuperscript{349} Rosen, supra note 299 at 512 – 513.

\textsuperscript{350} Evidence that may be adverse to a criminal defendant is excluded if its probative value is outweighed by the prejudice that would be caused by admitting the evidence. In this context, “prejudice” refers to the possibility that evidence will damage a defendant’s case by provoking “some irrational, emotional response” or because a jury may give the evidence more weight than it deserves. Odgers, supra note 208 at 242 citing Australian Law Reform Commission Report No. 26, Volume 1, par 957 (Evidence, Interim Report)

\textsuperscript{351} Teper v. R [1952] AC 480 at 486, cited ibid, at 493. See also Pollitt v. R (1992) 174 CLR 558 per Brennan J at 573. The rule against hearsay operates to exclude evidence of a statement made out of court, where the statement is introduced to prove its truth or accuracy. Subanamiam v. R [1956] 1 WLR 965 at 970 cited ibid.

\textsuperscript{352} Hunter and Cronin, supra note 68 at 124 – 5.

\textsuperscript{353} This freedom to report is subject to certain limitations, such as the requirements of defamation law. However, arguably even the laws against defamation provide weak protection against prejudicial reporting if the journalist or editor decides that an individual is unlikely to sue. Whilst journalists are unlikely to report information which they know to be false, they may be less rigorous in their fact-checking if they perceive that there is a low risk of legal proceedings.
the importance of witness demeanour in court to the ascertainment of the truth of a witness’s testimony. Each of these justifications is based on assumptions that arguably do not bear close analysis. However, for present purposes I am more concerned to consider the feasibility of separating the legal attribution of guilt from the social allocation of blame.

When faced with a trial with the profile of the Chamberlain case, it becomes at once more difficult and more important to safeguard the autonomy of the legal process. The difficulty arises because of the likelihood that jurors will have some prior knowledge of the particular case. The importance arises because the stakes were so high for Chamberlain and her family and because such a case will be more closely scrutinised than the usual trial. Highly public cases therefore have greater potential to influence public conceptions of law and criminal justice, including attitudes towards law’s claims to autonomy. Whilst the public profile of the Chamberlain case rendered the issue of law’s autonomy quite apparent, the case is not an anomaly but provides a paradigm example of the impossibility of separating legal decision-making from social context.

The measures adopted by Justice Muirhead to insulate the legal process of determining guilt in the Chamberlain case from the social process of attributing blame were unsuccessful because the

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354 This importance is reflected in the reluctance of appeal courts to disturb findings of fact made by first-instance decision-makers who have had the opportunity to assess the demeanour of witnesses. See for example, per Brennan J. (as he then was) in Chamberlain HCA, supra note 4 at 590.

355 Each of these justifications has been subject to challenge. For example, feminist legal scholarship in the area of sexual assault law has demonstrated the unreliability of evidence as to a complainant’s sexual history as an aid to determining whether the complainant consented to sexual intercourse. Despite this unreliability, that evidence is admissible at common law and statutory reforms to the common law rule have by and large failed to operate effectively to exclude sexual history evidence. See Hunter and Cronin, supra note 68 at 343. The point is not that evidence law is inconsistent in its gatekeeping function (although this can be demonstrated) but rather that the apparent dichotomies between “reliable” and “unreliable” evidence, and between “prejudicial” evidence and evidence that is unlikely to create prejudice are illusory. Studies have also been conducted to ascertain whether demeanour is an effective aid to determining truthfulness. These studies suggest that most people (including most judges and police officers) have little ability to detect when someone is lying. Hunter and Cronin, at 329 quoting Paul Ekman Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage, 1991.
jury necessarily had regard to social conceptions of motherhood and culturally-informed "common sense" in creating a story about "what happened" to Azaria Chamberlain. Indeed, the tension between law's claim to autonomy and the necessity for juries to employ their "common sense" is apparent in Justice Muirhead's summing up.

4.2 "The tide of opinion and innuendo": Justice Muirhead's characterisation of the Chamberlain trial

It's common ground that Azaria Chamberlain, a baby then only 9 weeks of age, died at Ayers Rock on or about 17 August 1980. In this court, her mother stands her trial on a charge of murdering her baby, and the father of being an accessory after the fact. Inquests have come and gone. The tide of opinion and innuendo has ebbed and flowed. And in a short time, you will retire to the jury room to decide the issues before you.\(^{356}\)

A judge's summing up affects the jurors' decision-making process by directing the jury's attention to the "legally" important issues arising from the evidence. Befitting the complex nature of the Chamberlain trial, Justice Muirhead's summing up was long and detailed.\(^{357}\) Certain themes emerged from Justice Muirhead's summary. Most importantly, these themes included the need to separate the legal decision-making process from the "tide of opinion and innuendo" created by the media and the fairness of the criminal trial process. Justice Muirhead in effect sought to distance the jurors' legal decision-making from their assessment of Chamberlain as a mother and a person. His summing-up suggests that he was extremely concerned to ensure that the jurors were fair to Chamberlain.

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\(^{356}\) Justice Muirhead, summing up, Trial Transcript \textit{supra} note 1 at 3183.

\(^{357}\) It constitutes about 150 pages of the Trial Transcript.
The most conspicuous fact about the Chamberlain case was its impact on the national consciousness. The number of column inches devoted to “Azaria” by newspapers reflected the level of public interest in the case. The trial was moved from Alice Springs to Darwin in an effort to gain some distance from the pre-trial speculation. However, from the outset Justice Muirhead recognised the impossibility of finding twelve jurors who had no prior knowledge about the Chamberlains. Instead, he focused on minimising the impact of that prior knowledge:

probably all of you have read about this matter or thought about it or talked about it; that again is not in itself unusual, ... but of course a difficulty about intense publicity is that people are apt to form views. I suppose you all know as well as I do, ladies and gentlemen, that any views you may have formed are not based on evidence as we understand it in the criminal jurisdiction, but they are views that are founded on gossip, on rumour, and on media reports – which may be accurate or may be inaccurate.

Before the Chamberlain jury was empanelled, Justice Muirhead gave a lengthy warning to the potential jurors that they would be expected to act only on evidence presented at trial, and on the inferences that could be drawn from that evidence. He warned the jurors not to act on any preconceived views that they might hold about Chamberlain because: “[n]one of you have heard the true facts. None of you have heard both sides of the stories.” However, Justice Muirhead

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358 See the text to note 2 in chapter one, supra.

359 Justice Muirhead, direction to prospective jurors, Trial Transcript, supra note 1 at 3: “the reason this trial is being held in Darwin rather than in the centre is because you people here were not subject to the intensity of the publicity which was imposed upon your fellow Territorians at Alice Springs”.

360 Ibid.

361 Justice Muirhead, direction to the jury, Trial Transcript, supra note 1 at 5.
did not take the step of isolating the jury, nor did he explicitly direct the jury not to read media reports of the trial proceedings.\textsuperscript{362}

Justice Muirhead returned to the difference between legal “fact” and cultural “innuendo” in his summing up. He reminded the jury that its role was to “decide whether an accused has been proven guilty of a crime”.\textsuperscript{363} In reaching that decision, “it is only the evidence and the inferences you fairly draw from that evidence upon which you will base your verdict.”\textsuperscript{364} This warning reinscribed the autonomy fairness assumption by emphasising that the legal process of ascribing guilt is different from and must be insulated against the social process of ascribing blame to an individual. Justice Muirhead stressed to the jury that they bore the responsibility for safeguarding law’s integrity against the intrusion of legally irrelevant information about Chamberlain.

Justice Muirhead’s efforts to isolate the legal process from the social discourse about the Chamberlain case extended equally to the scientific evidence and the behavioural evidence against Chamberlain. When dealing with the dispute as to whether foetal blood had been found in the car, Muirhead J. sought to limit the jury’s deliberations to the question of whether the presence of blood had been proven in this case. He directed the jury that its “verdict will not make or break any scientific reputation, any laboratory techniques.”\textsuperscript{365} Justice Muirhead told the jury not to act on the basis of conjecture and not to think that it was necessary to resolve

\textsuperscript{362} In fact, a warning not to read the media reports may well have been ineffective and may have tended to entrench any prejudice already held by the jurors. Research conducted by Kramer, Kerr and Carroll suggests that judicial instruction to ignore prejudicial publicity has no effect on decision-making at best and, at worst, may actually strengthen the impact of that publicity. Kramer, Kerr and Carroll, supra note 299 at 430.

\textsuperscript{363} Justice Muirhead, summing up, ibid, at 3185.

\textsuperscript{364} Ibid, at 3186. He repeated this point a number of times – for instance, he directed the jury that “[y]our verdicts … will be brought in in accordance with the evidence and absolutely nothing else.” [emphasis added]. Ibid, at 3183

\textsuperscript{365} Justice Muirhead, summing up, ibid at 3299.
"speculation and public controversy" about the scientific evidence.\textsuperscript{366} He reminded the jury that apparently "objective" scientific evidence could be skewed by the nature and purpose of the inquiry: expert evidence "is only as good or bad as the facts on which it is based [and these facts are] so often tinted by presumption and false assumptions."\textsuperscript{367} With the benefit of hindsight, this warning seems prescient. It also identifies the social pressures that were brought to bear on the jury, which was (despite Muirhead J's attempts to downplay the importance of this part of their role) asked to mediate between two irreconcilable and very public bodies of scientific evidence.

In relation to the behavioural evidence, Muirhead J reminded the jury that although there had been speculation as to Chamberlain's reaction to Azaria's disappearance, witnesses agreed that she had "showed signs of emotional stress."\textsuperscript{368} Justice Muirhead's reference to Chamberlain's "emotional stress" addressed the Crown's contention that Chamberlain's demeanour did not accord with that to be expected of a grieving mother. This contention was also a feature of much of the social discourse about Chamberlain. Justice Muirhead also pointed to the Chamberlains' retention of the car and camera bag after the first inquest as conduct that was inconsistent with guilt. When discussing this aspect of the evidence, Muirhead J. asked the jury "if you knew that your wife had murdered your child in that car, what would you have done over the ensuing months? Would you have still had the car? Would it have been thoroughly scrubbed? Would scissors still be left in the car?"\textsuperscript{369} It is noteworthy that Justice Muirhead prompted the jury to

\begin{itemize}
\item \textsuperscript{366} Justice Muirhead, summing up, ibid at 3299.
\item \textsuperscript{367} Justice Muirhead, summing up, ibid, at 3295.
\item \textsuperscript{368} Ibid, at 3209.
\item \textsuperscript{369} Ibid, at 3293.
\end{itemize}
ask questions that had not featured in the broader social discourse about Chamberlain, as part of their legal decision-making process.

Justice Muirhead discussed Chamberlain’s behaviour at some length before warning the jury not to allow religious prejudice to cloud their assessment of Chamberlain’s demeanour. Justice Muirhead’s warning against judging the Chamberlains on the basis of their religious affiliation is interesting when taken within the context of his attempts to re-inscribe law’s autonomy. The Crown did not at any stage of the trial suggest that Azaria’s death was related to Chamberlain’s religious belief. However, this suggestion had surfaced a number of times in the media discourse about the case and during the second inquest. In this instance, it seems that Muirhead J may have been concerned that the Crown’s case had been framed in a manner that left room for the jury to have regard to the Australian mistrust of non-mainstream religion and the resultant speculation as to whether there existed some religious motive for Chamberlain to murder Azaria. He addressed this speculation directly in order to exclude it from the legal process, thereby seeking to re-inscribe law’s autonomy from the broader social discourse. However, his decision to address the subject of the Chamberlain’s religious beliefs also demonstrates the frailty of law’s claim to autonomy: if the legal process could truly be self-contained from media reporting about a particular case, it would not have become necessary for Muirhead J. to deal with issues that had never been raised in the courtroom.

Justice Muirhead dwelt on the Chamberlains’ conduct for 17 transcript pages. He referred to the allegation that had been made about the Chamberlains’ reaction to Azaria’s death and to the Chamberlains’ explanations for those activities, concluding that:

370 Ibid.
You may think ... that the conduct of Mr and Mrs Chamberlain the following day was unusual. But accepting these things on that evidence, whilst they may have served to raise some suspicions and to have left some unanswered questions, they were totally inadequate to find Mr and Mrs Chamberlains criminally responsible for anything.\textsuperscript{371}

With this final warning, Justice Muirhead reasserted the difference between the legal process of determining criminal responsibility for an event and the social ascription of blame. "Suspicions" and "unanswered questions" may constitute grounds for further investigation, or for social censure. However, they are not sufficient for a jury to convict Chamberlain of murdering Azaria. This appeal to the unique character of the criminal trial process combined two of the themes of Justice Muirhead's summing up: law's autonomy, and the fairness of the criminal process. It is to the fairness of the criminal process that I now turn.

Justice Muirhead underscored his direction to ignore "gossip and innuendo" with an appeal to the fairness of the criminal law. He reminded the jury that its role was to "ensure that Mr and Mrs Chamberlain receive what we are all entitled to: a trial according to law."\textsuperscript{372} Justice Muirhead's discussion of criminal trial procedure contributed to his characterisation of the legal process as different from the social process of ascribing blame.

Justice Muirhead explained that whilst the police may act on "reasonably formed suspicion" when investigating a crime or making an arrest, a jury is only entitled to act on proof "beyond a reasonable doubt".\textsuperscript{373} This emphasis on the difference between a criminal investigation and a criminal trial apparently anticipated a common attitude to criminal law: the assumption that, if the

\textsuperscript{371} Ibid, at 3226.

\textsuperscript{372} Ibid.

\textsuperscript{373} Ibid.
police charge a defendant, they must have good reason to believe that person is guilty. Instead, Justice Muirhead reminded the jury: "it is the Crown that brings the charges and it is the Crown that must prove them."

Justice Muirhead directed the jury that the most important aspect of its role was the need to accord the defendant the benefit of any reasonable doubt:

In a criminal court, ... if at the end of a case a jury is still in doubt, if the facts are still a puzzle, then a jury cannot reach findings which justify a conviction for the simple reason that jury must have a reasonable doubt.

He directed the jury that the method by which it should determine whether a reasonable doubt remained was to have regard to the evidence: to decide which evidence to accept, and what inferences to draw:

It is for you to find the facts and it is absolutely for you to decide what inferences, if any, you are prepared to draw from those facts. It is for you to decide what evidence is of importance; it is for you to decide what evidence you can safely rely on, and where you find the evidence is not consistent, to decide if you find it necessary to do so, which evidence or which version to prefer. What evidence, which inferences you accept in the exercise of your common sense. ... I hesitate to suggest to you further how you go about your job. You bring with you into this court your combined common sense, your experience of life, and your sense of fair play. But in deciding the vital issue as to whether or not you are satisfied Mrs Chamberlain murdered her baby, and whether her husband is proved to have been an accessory after the fact, you will, I suggest, as counsel have both asked, look at the total

374 See Ericson and Baranek, supra note 299 at 222 – 225. See also Law Reform Commission Victoria, Unsworn Statements in Criminal Trials (Melbourne, 1981, report no. 11) at 28 [para 5.27].

375 Ibid, at 3186.

376 Justice Muirhead, summing up, Trial Transcript, supra note 1 at 3183.
picture drawn by the evidence, the events which you find occurred that night, the background of the whole affair, the events which immediately followed, the events and detailed investigations, the evaluation of experts, which later took place.  

This process of evaluation envisaged that the jury would consider far more than just “the evidence and absolutely nothing else.” It is here that the inherent contradiction within law’s claim to autonomy is revealed. While it fosters the impression of separateness, law is fundamentally a social construct: it provides a means of understanding and ordering social phenomena. Whilst legal process allows law some measure of separation from the social relations with which it is concerned (for example, by allowing Justice Muirhead to direct the jury to consider matters that had not surfaced in the social discourse about Chamberlain), the law can never be entirely dissociated from society. This is partly because in order to judge social relations, it must understand them. It is also because individuals, who are themselves a part of society, generate legal knowledge. Finally, it is because law, like the media, remains accountable to broader “common sense” and where the law departs significantly from people’s perception of the world, it must explain that departure or risk losing its discursive power and ideological authority.

Justice Muirhead sought to isolate the legal process from the social discourse, including the media discourse, about Chamberlain. However, despite Justice Muirhead’s attempts to put the social discourse at a critical distance from the legal decision-making process, judge and jury still

377 Justice Muirhead, summing up, supra note 1 at 3189.
378 Ibid, at 3183.
379 Justices L’Heureux-Dubé and McLachlin (as she then was) of the Canadian Supreme Court distinguished between judicial impartiality and judicial neutrality in R v. RDS [1997] 3 SCR 484 at 499. They found that “while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality".
had regard to this social discourse. I believe that Justice Muirhead overestimated the extent to
which it was possible to insulate the legal process from the social context of the case. Justice
Muirhead himself may ultimately have reached the same conclusion. In his autobiography, he
wrote:

I fear we delude ourselves by assuming that judicial directions to ignore extraneous
material are always heeded by every person on the jury. It is all very well to instruct the
jury to ‘put it out of your minds’. How many of them, with only limited comprehension
of the trial process, can perform this intellectual exercise? The majority perhaps, but
some will inevitably be influenced.\textsuperscript{380}

5. “Our poor jury” and the “world outside”: decision-making in the Chamberlain case

Crispin describes the jury as the “bulwark of justice”, explaining that juries “bring to criminal
trials a breadth of human experience which no single judge could contribute.”\textsuperscript{381} The normative
disinterested juror is portrayed as a passive receptacle and objective assessor of the evidence
presented in a courtroom. More recently, psychiatric studies of jury decision-making have
challenged this vision. Studies have demonstrated that, far from simply receiving raw evidence,
jurors are actively involved in the construction of guilt and innocence. For example, Cammack
argues that:

decision-makers actively construct representations of the trial evidence based on their
prior expectations about what constitutes an adequate explanation of the litigated event.
Furthermore, these representations, rather than the original "raw" evidence, form the basis

\textsuperscript{380} Muirhead, \textit{A Brief Summing Up}, supra note 289 at 166.

\textsuperscript{381} Ibid, at 351.
of the jurors' final decision. Thus, the jurors' prior assumptions about the nature of the social world are an important ingredient of the jury's verdict.\textsuperscript{382}

Legal fact finders conceptualise evidence holistically, as part of a story about "what happened".\textsuperscript{383} In order to construct a story, decision-makers supplement evidence with inference. The inferences drawn by legal fact finders are strongly influenced by their "world experience" or common sense. Though my focus in this thesis is largely upon the jury's decision-making process at trial in the Chamberlain case,\textsuperscript{384} the assertion that legal fact-finders bring life experience to decision-making applies equally to judges (although the stock of life experience on which a judge draws may well be different from that of a juror).

The Chamberlain trial ran for more than six weeks and involved dozens of witnesses. In accordance with criminal procedure, the evidence was not given chronologically but thematically – for instance, the Crown called all of the eyewitnesses first, and then textile experts, etc. Lindy and Michael Chamberlain gave evidence almost a month after the first eye witnesses had completed their testimony. The jury was presented with several parallel versions of Azaria's disappearance, and (given the length of the trial) was expected to retain the details of these versions over a considerable period of time. The jurors' retention of details was almost certainly

\textsuperscript{382} Cammack, \textit{supra} note 299 at 462.


\textsuperscript{384} I also mention to the decisions of the Full Federal Court and the High Court of Australia below. The High Court of Australia's decision is particularly relevant because the High Court reconsidered the scientific and behavioural evidence before the jury.
influenced by the closing remarks of John Phillips Q.C. for the defence and Ian Barker Q.C. for
the prosecution, and by Justice Muirhead’s summing up.

Pennington and Hastie have demonstrated that jurors seek to construct a story from the
conflicting versions of an event when they are asked to reach a verdict. Rather than dealing
with evidence in the form in which it is presented, jurors assimilate the various accounts into one
or more “stories”, which they test for coverage, coherence and uniqueness. That is, a juror will
seek to explain the evidence using a story that accounts for as much of the evidence as possible
whilst remaining internally consistent. If more than one story fits the evidence, a juror will be
less willing to believe any single version. A substantial proportion of the story constructed by a
juror will consist of inferences made to fill in gaps in testimony or evidence. The most likely
basis for these inferences is the juror’s “common sense” and life experience.

Jurors are cautioned to leave prejudice at the courtroom door, and the importance of this
admonition stems partly from the reluctance of appellate courts to disturb findings of fact.
However, jurors are entitled to bring their common sense and life experience to decision-
making. Indeed, Justice Muirhead directed jurors to use their common sense when deciding

385 Pennington and Hastie, ibid at 523.
387 Pennington and Hastie, supra note 383 at 536 suggest that only 55% of the events assimilated into a story by
jurors were actually included in testimony. The remaining 45% of events are inferred to “fill in” the story. Lempert,
supra note 383 at 573 suggests that Pennington and Hastie’s model does not account for the effect of opening and
closing statements on the stories constructed by jurors. This criticism is a significant one, but the point remains that
the “stories” constructed by fact finders venture far beyond the evidence actually given during trial.
389 In chapter 2, I discussed the relationship between common sense and the dominant ideology of motherhood. In
particular, I referred to the ways in which common sense can obscure relevant differences such as class, gender and
race.
which story to accept and what to reject in the Chamberlain case. This direction rendered explicit what would otherwise have been an implicit aspect of their decision-making process. A juror will evaluate the credibility of a witness through spectacles tinted by expectations as to how an individual "should" behave – it is hard to conceive of any other method of judging credibility when presented with competing narratives. The effect of this method of decision-making is that social inequities and dominant ideologies tend to be re-inscribed.

6. **"What else could we do": juror decision-making in the Chamberlain case**

In approaching the juror’s decision-making process, I have obtained access to an important source of information – a notebook kept by one juror, Yvonne Cain, during the trial and eight hour jurors’ deliberations. Although Young and Chamberlain have published extracts from Cain’s notes, the notes have not previously formed part of a socio-legal analysis of the Chamberlain case.

It is rare to obtain access to juror’s notes because convention protects the secrecy of jury deliberations on the basis that secrecy encourages full and frank discussion of the issues before the jury. At common law, information about the deliberative process of juries is not admissible

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390 Justice Muirhead summing up, Trial Transcript, supra note 1 at 3184 and 3188 – 89.

391 Juror Cain’s Notes, supra note 42. This note was written after the verdict and sentence were delivered.

392 The National Library of Australia holds a copy of Cain’s Notes as part of manuscript collection 8292 – the papers of Dr. Norman H. Young. My thanks are owed to Dr. Young and to the National Library of Australia for making these papers available to me.

393 Young, supra note 7.

394 Chamberlain, supra note 43.

in judicial proceedings – for example, information about juror deliberations cannot generally form the basis of an appeal. Very limited circumstances exceptions apply to this rule such as where court officers have improperly influenced the jury’s verdict or the jury has reached the verdict by inappropriate means.\(^{396}\) The convention that jury deliberations remain secret has in some places become an anachronism – especially in relation to popular trials – because where it is legal to do so, journalists will seek to interview jurors about their deliberations. Illustrating this trend, some time after the Chamberlain trial took place, Cain and one other juror chose to make public statements about the jury’s deliberations.\(^{397}\) Some commentators argue that protecting the secrecy of jury deliberations is antithetic to the interests of justice, especially given that the remainder of the trial process is so closely scrutinised.\(^{398}\) Countering this trend, some jurisdictions – including the Northern Territory – have enacted legislation to prevent incursions into the “black box” of the jury.\(^{399}\) The Northern Territory’s legislation does not apply to information that is already in the public arena.

\(^{396}\) See *R v. Emmett and Masland* (1988) 14 NSWLR 327, extracted by Hunter and Cronin, ibid, for a summary of the common law position. In this case, several court sheriffs expressed the view that the defendants were guilty and that the court “needed a verdict” to avoid the cost of another trial. The NSW Court of Appeal admitted jurors’ affidavits detailing this conduct. Justice Enderby (at 335) and Justice Lee (at 339) each quoted Atkin LJ in *Ras Bahari Lal v. King-Emperor* [1933] All ER Rep 723: “Finality is a good thing but justice is better.”

\(^{397}\) Brian Johnstone, “Juror Reveals: how we reached Azaria verdict” *Sydney Morning Herald* 12 April 1984; “Lindy guilty on the basis of her story” *Courier Mail* 12 April 1984; “Juror: I always believed the verdict was wrong” *Courier Mail* 8 April 1986.

\(^{398}\) Hunter and Cronin, *supra* note 68 at 118 – 120 discuss suggestions to make jury deliberations more open. The Arizona Supreme Court Committee on the More Effective Use of Juries recommended in 1995 that jurors be required to take notes in some trials. The recommendations of this committee are reproduced and discussed by Stephen Landsman in “The Rules of Evidence in the Age of the Resurrection of the Jury”, (1999) International Commentary on Evidence, available at [http://www.law.qub.ac.uk/ice/papers/evident2.html](http://www.law.qub.ac.uk/ice/papers/evident2.html). Landsman suggests that, if the recommendation to require notetaking were implemented, it is highly likely that challenges to the rule against introducing evidence about juror testimony would certainly increase, and may eventually lead to the reconsideration of this rule.

\(^{399}\) In 1998, the Northern Territory legislature amended the *Juries Act* (NT) to prohibit the publication of information about jury deliberations. See section 49A of the *Juries Act*. However, information that was publicly available before
Cain took notes throughout the trial. She recorded her impressions of the defendants, of various witnesses and of Barker Q.C. and Phillips Q.C. and kept minutes of the jury’s deliberations. Her notebook naturally only records one person’s perspective on the trial process, and her minutes of the deliberations are not comprehensive. They fill approximately six pages of a notebook and focus on the issues about which the jury disagreed. I will focus on the relationship between juror disagreements and the resolution of those disagreements in order to seek to identify what issues were crucial for the jury. However, her notes provide an important insight into the pattern of the jury’s decision-making process and, for this reason, they are a “real life” opportunity to test psychological theories about how jurors conceptualise the case before them and to reconsider the various explanations offered for “what went wrong” in the Chamberlain case.\footnote{400} The notes also provide some insight into the pressures inherent in being a juror in a high-profile case.

Some limited information about how other jurors viewed the case is available from newspaper articles. The *Sydney Morning Herald* published an article titled “How the Azaria jury was swayed” in the week after the verdict was returned.\footnote{401} This article does not cite any sources but it appears to have been gleaned from notes taken out of the wastepaper basket in the jury room.\footnote{402} After the High Court of Australia dismissed the Chamberlains’ appeal, an anonymous juror (not Yvonne Cain) made some public comments about the basis on which the jury made its

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\footnote{400}{It is unclear whether Cain anticipated at the time of the trial that her notes would eventually become public. She released them to Dr Norman Young after becoming increasingly convinced that Chamberlain had been wrongly convicted. However, it is clear that she was acutely aware of the high profile of the Chamberlain case during the trial. See Young, *supra* note 7 at 284.}

\footnote{401}{Malcolm Brown “How the Azaria jury was swayed” *Sydney Morning Herald* 2 November 1982, page 1.}

\footnote{402}{Chamberlain, *supra* note 43 at 588.}
decision. Though I return to these articles later in this section, as well as to comments made by Yvonne Cain after Chamberlain was released from prison, I will focus on Cain’s notes because they were taken contemporaneously and because they track the development of the jury’s deliberations.

6.1 “Too much to try and write” – notes taken during testimony

The testimony given in the Chamberlain case lasted for six weeks, and was at times extremely technical and difficult to understand. Cain’s notes include summaries of the testimony of various witnesses, together with her impressions of those witnesses. Cain did not try to create an exhaustive record of the various accounts – her notes provide a summary and a set of personal responses. Each time she was overwhelmed, she wrote “too much to try and write”.

In relation to Mrs Whittacker, who stayed at the top campsite on the night of Azaria’s disappearance, and who comforted Chamberlain during that evening, Cain wrote “Mrs Whittacker senior is a very religious lady she is also a social worker and nursing sister she said that Mrs Chamberlain did show signs of distress that night.” Cain’s notes also record moments when Chamberlain became distressed in the courtroom during eyewitness testimony: “[Chief Inspector Gilroy] read the whole transcript of his conversation with the Chamberlains on the Monday morning [the day after Azaria’s disappearance]. Lindy broke down and cried during this

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404 “Juror: I always believed the verdict was wrong” *Courier Mail* 8 February 1986; Chamberlain, *Through My Eyes* *supra* note 43 at 587 – 591.

405 Cain’s Notes, *supra* note 42. Cain’s notes are unpaginated, so I will henceforth refrain from providing citations. Instead, I will indicate when a particular entry was written relative to the conduct of the trial process (eg, what witness a note refers to, or that the note was made during deliberations).
transcript”. Her notes about Chamberlain’s testimony read “very sad, had a very low voice and cried a couple of times. Still keeps to the original story. It is hard to think she might be lying.”

Cain’s observations suggest that she was aware of the importance of Chamberlain’s behaviour inside the courtroom and in the period after Azaria’s disappearance. Barker Q.C. had focused at length on the incongruities in Chamberlain’s behaviour in his opening address and the Chamberlains’ behaviour had also been the subject of much press speculation. It is difficult to identify the source(s) of Cain’s concern with Chamberlain’s behaviour, but it is likely that Barker Q.C.’s opening address reinforced information that the jury already possessed about Chamberlain’s demeanour. Either way, it seems that at this stage, Cain viewed her role as a juror to include considering whether Chamberlain’s behaviour was consistent with that to be expected of a grieving mother.

At some point, Cain appears to have decided to use newspaper articles as an aide memoir for the testimony. From her notes, it appears that she clipped articles from the Northern Territory News about the previous day’s proceedings and then included these articles with her notes about the testimony. She was able to do this because the jury was not sequestered during the trial. Cain’s decision to use newspaper articles is interesting in light of Muirhead J’s direction that the jury must make its decision on the basis of “the evidence the jury hear within these walls and see within these walls, and absolutely nothing else.” Muirhead J did not expressly advise the jury not to read newspapers – perhaps because he assumed that this was implicit in the more general

\begin{footnotes}
\item[406] Barker Q.C., opening address, Trial Transcript, supra note 1 at 45 – 55/56.
\item[407] Young, supra note 7 at 11 citing, for example, an article published in Truth on 6 September 1980 which published rumours “of a black dress, child abuse, and [the Chamberlains’] lack of public grief.”
\item[408] Justice Muirhead, direction to prospective jurors, Trial Transcript, supra note 1 at 5.
\end{footnotes}
direction. Cain’s decision to rely on newspaper articles suggests that she did not understand Justice Muirhead’s direction, or that she did not remember it.

The first of the articles contained in Cain’s notes appeared in the *Northern Territory News* on Saturday, 18 September 1982.\(^{409}\) It reported that a police officer who had collected a blanket from the Chamberlain house had given evidence that he could not see paw marks on the blanket when Mrs Chamberlain suggested that those paw marks could clearly be seen.\(^{410}\) Ironically, the journalist reported: “Before allowing the jury to retire yesterday, Justice Muirhead again urged members not to discuss the case with anyone. ‘Don’t worry about this over the weekend,’ he told the jury. ‘Relax and enjoy yourselves.’”\(^{411}\) It appears that juror Cain, at least, did not heed this advice. Indeed, it would have been difficult for her to completely avoid the front-page article.

Other articles appeared next to Cain’s notes about the evidence given by the district nurse who assisted Chamberlain after Azaria disappeared.\(^{412}\) Later articles appeared next to notes about scientific testimony and those about Chamberlain’s testimony. The articles included with Cain’s notes are reasonably equally divided between reports about defence evidence and reports about

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\(^{409}\) Ken White, “‘Paw Marks’ mat shown to jury”, *Northern Territory News* 18 September 1982, page 1 – 2. This article appeared the first weekend after the trial commenced on Monday 13 September 1982.

\(^{410}\) The police officer’s evidence was the subject of particular controversy during the Royal Commission. Counsel for the Chamberlains alleged that the officer who gave evidence at trial was not the same officer who had collected the blanket in 1980. Justice Morling found that this officer’s evidence was “less than satisfactory” and that his diary “makes no mention of him having collected the space blanket, if indeed he did.” Morling Report, *supra* note 5 at 252. Justice Morling concluded that the evidence before him left “a serious doubt in my mind as to the identity of the police officer who collected the space blanket from the Chamberlains’ home.” *Ibid* at 255. However, Justice Morling refused to find that the way in which the police conducted the investigation prejudiced Chamberlain’s trial – *ibid* at 341.


Crown evidence. They largely refrain from commenting about Chamberlain’s appearance or demeanour. The exceptions are articles about Chamberlain’s evidence, which reported that Chamberlain “hung her head and wept when asked to identify clothing worn by baby Azaria”; that a female juror had also wept during Chamberlain’s evidence413 and that Chamberlain had objected to Barker Q.C.’s questions about how blood had fallen onto Aidan’s parka.414

Overall, the articles about Chamberlain’s evidence give the impression that her credibility was damaged by Barker Q.C.’s cross-examination. This impression is conveyed by subtleties of phrasing – for example, the articles state “Mrs Chamberlain refused to speculate how the spray pattern [alleged to be blood] got under the dashboard on the passenger’s side of the vehicle.”415 Another article reports “Lindy Chamberlain denied in the Supreme Court yesterday afternoon that she had ever cut Azaria’s jumpsuit with scissors … Mrs Chamberlain said, however, she was aware that the garment had been damaged.”416 I have previously identified Barker Q.C.’s cross-examination of Chamberlain on the subject of blood in the car as a rhetorical device employed to deflect attention from the shortcomings of the Crown’s scientific case. The *Northern Territory News* article makes no reference to the scientific dispute over whether blood had in fact been


414 Kerry Sharp and Ken White, “We are talking about my baby” *Northern Territory News* 14 October 1982, page 1 – 2: “In an anguished outburst this morning, Lindy Chamberlain cried ‘we are talking about my baby daughter, not some object.’ Mrs Chamberlain, *due to have her fourth child in less than a month*, put her hand to her face and sobbed bitterly.” [emphasis added] Like many of the articles I have studied, this article could be interpreted several ways. The relevance of Chamberlain’s pregnancy is unclear from the context but it highlights her maternity. Equally, depending upon the reader’s perspective, Chamberlain’s emotion (“anguished outburst”, “sobbed bitterly”) could represent the genuine torment of a “good mother” or the manipulations of a “murderer”.

415 Kerry Sharp and Ken White, “We are talking about my baby” *Northern Territory News* 14 October 1982, page 1 – 2 at 1 [emphasis added]. See the discussion of this passage of cross-examination in chapter four.

found in the car. Similarly, Barker Q.C.'s cross-examination of Chamberlain on the question of
whether the jumpsuit had been damaged created a false dichotomy – damage to the jumpsuit was
not inconsistent with the theory that Azaria was taken by a dingo. On each of these questions, the
*Northern Territory News* articles adopt the Crown’s inference that the scientific evidence cast a
shadow over Chamberlain’s credibility. The articles demonstrate two processes at work: first, the
journalists accepted the objectivity of scientific evidence which I have shown to have been
influenced by a belief that Chamberlain murdered Azaria; second, the articles support the
conclusion that the scientific evidence was successfully deployed during Chamberlain’s cross-
examination as a means of reinforcing negative preconceptions about her honesty. The operation
of these two processes ultimately strengthened doubts about Chamberlain’s status as a good
mother.

The inclusion of the *Northern Territory News* articles with Cain’s notes provides positive
evidence that at least some members of the jury interpreted the trial partly through the media’s
eyes even while they were participating in the trial. It demonstrates, in a particularly graphic
manner, the difficulty of separating the legal process from the social context of the case,
especially in a trial as notorious as this one. While the publication of the articles themselves were
not in contempt of court, had the defence known that the jury may have used media reports to
assist their deliberations, it would have had additional (and probably stronger) grounds to appeal
from Chamberlain’s conviction. An exception to the inadmissibility of information about jury
deliberations applies if the information suggests that external matters improperly influenced the
jury when undertaking its deliberations.\(^{417}\)

188 and other cases cited in those pages.
Despite the legal impropriety of Cain’s decision to resort to news articles to assist her recollection, the articles probably weren’t decisive in the jury’s decision-making process – although they provided an “interpretive frame” and the selective reporting of evidence may have affected the jurors’ recollection of testimony. Ericson argues that when interpreting mass media content, a reader will “negotiate control” over that content by interpreting it within the context of her other experience, including her personal knowledge of the matters being reported.\textsuperscript{418} Cain’s notes of the deliberative process (discussed in more detail below) suggest that the news articles were simply one ingredient in the mix that led to a finding that Chamberlain was guilty of murdering Azaria.

6.2 \textbf{The importance of the scientific case to the decision to convict Chamberlain}

Young and Crispin have argued that scientific evidence was the crucial feature in Chamberlain’s wrongful conviction.\textsuperscript{419} However, this argument provides an \textit{ex post facto} explanation for Chamberlain’s conviction insofar as it takes its cues from events that took place after Chamberlain was convicted. In other words, this argument focuses on the fact that the Crown’s scientific evidence was eventually discredited rather than on the question of whether the scientific evidence was fundamental to the jury’s reasoning. There are several reasons why “bad science” has come to be a predominant explanation for the outcome in the Chamberlain case. One reason is that the scientific evidence formed the basis of Chamberlain’s appeal to the Full Federal Court and the High Court of Australia. Second, the campaign to free Chamberlain was centred on

\textsuperscript{418} Ericson, “Mass Media”, \textit{supra} note 10 at 222.

\textsuperscript{419} When I was an undergraduate law student, the Chamberlain case was also taught to me as an example of the dangers of opinion evidence. Implicit in our class discussion on the case was the assumption that Chamberlain was convicted because of bad scientific evidence.
efforts to disprove the scientific evidence adduced by the Crown at trial. 420 Finally, the Morling Report focused on the shortcomings of the Crown’s scientific case for conviction. For these reasons, public discourse about the Chamberlain case also shifted away from Chamberlain – who was in any case imprisoned for much of this time and therefore removed from the public gaze 421 – and towards the scientific “proof” of her guilt or innocence. I will discuss each of these reasons in turn before considering Cain’s notes. Cain’s notes provide an important insight into the decision-making process – and their effect is to challenge the “bad science” explanation for Chamberlain’s conviction.

The grounds of appeal argued on behalf of the Chamberlains appear in Appendix B. Eight of the twenty three grounds of appeal dealt specifically with scientific evidence. These grounds focused on Justice Muirhead’s summing up and on his decision to admit certain scientific evidence including evidence about the presence of blood in the Chamberlain’s car. Most of the remaining grounds dealt generally with matters that included the scientific evidence (for example, ground 5 was that the verdict was against the evidence and the weight of the evidence). The scientific evidence probably formed the focus of Chamberlain’s appeal because of the rule that an appeal

420 Young provides a full account of this campaign in Innocence Regained: the Fight to Free Lindy Chamberlain, supra note 7.

421 The effect of Chamberlain’s imprisonment on discourses about the case is demonstrated by the Sydney Morning Herald’s reportage of the discovery of Azaria’s matinee jacket and Chamberlain’s subsequent release from prison. On 7 February 1986, the paper reported that the matinee jacket “must trigger an inquiry into [Chamberlain’s] murder conviction – Margaret Harris “It brought it all back to her ... she was very much upset” Sydney Morning Herald 7 February 1986 page 1 (despite the headline, this article focused on the circumstances in which the matinee jacket was found and the evidentiary importance of the matinee jacket to the Chamberlain case). An editorial published that day focused on the scientific evidence in calling for a judicial inquiry into the case – “And now, a baby’s jacket” Sydney Morning Herald 7 February 1986 page 10. But an article by Malcolm Brown was headlined “Lindy Inc, an industry resurrected” – Sydney Morning Herald 7 February 1986 pages 1 and 5. Sure enough, when Chamberlain was released a few days later, the tone of the reporting changed instantly: Sue Javes “Kids’ new life with mother” The Sun Herald 9 February 1986, page 1; Ken Black “Prison years have caused strains on family life” Sydney Morning Herald 10 February 1986, page 1; Malcolm Brown “Lindy and Michael’s marriage and family survive the test, mother says”, Sydney Morning Herald 11 February 1986.
court will not interfere with a trial court’s assessment of the credibility of witnesses. This rule renders the jury’s assessment of the credibility of the Chamberlains and other eyewitnesses final and therefore irrelevant to any appeal.

The leading judgment in the Full Federal Court’s decision to dismiss the appeal also focused on the scientific evidence against the Chamberlains. Chief Justice Bowen and Justice Forster concluded that:

"a consideration of the arguments and criticism of counsel for the [Chamberlains] does not lead us to the conclusion that the evidence of the [defence’s scientific] experts is so strong that we could say the jury was wrong to accept the evidence of the Crown experts."

However, Justice Jenkinson found that:

"those means of evaluating evidence which the jury enjoys by hearing and watching witnesses, and which are denied an appellate tribunal, could not in my opinion have enabled the jury reasonably to have eliminated the doubt, as to whether the matter tested contained foetal haemoglobin, which a careful consideration of the transcript of evidence and the exhibits raises in the mind."

Nevertheless, Justice Jenkinson found that the jury could have come "very close to satisfaction beyond a reasonable doubt" that the blood in the car contained foetal haemoglobin. When this evidence was combined with other scientific evidence which had been proven beyond a

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422 See, for example, Chamberlain HCA, supra note 4 per Brennan J (as he then was) at 595.

423 Chamberlain FFC, supra note 3, per Chief Justice Bowen and Justice Forster at 30 – 31. Justice Jenkinson also dismissed the appeal, on a similar basis.

424 Ibid, per Justice Jenkinson at 81 – 82.

425 Ibid, per Justice Jenkinson, at 89.
reasonable doubt,\textsuperscript{426} the jury could properly have concluded that the Crown had established Chamberlain’s guilt.

In the High Court of Australia, Chief Justice Gibbs and Justice Mason adopted Justice Jenkinson’s reasoning and dismissed Chamberlain’s appeal. Justice Brennan also dismissed the appeal, but he found that:

\begin{quote}
The argument for the applicants elevated the dispute about the blood in the car into a position of false importance as though uncertainty about identification of the blood in the car necessarily carried with it an uncertainty as to the applicants’ guilt. The argument mistakes the force of the other evidence and the critical importance of the impressions which the testimonial appearances of Mr. and Mrs. Chamberlain respectively must have made upon the jury. An appellate court cannot hope to divine what those impressions were or the effect which they had in satisfying the jury that the applicants were guilty. The jury were severely cautioned by the learned trial judge about the scientific evidence to establish the identity of the blood in the car. The jury may well have rejected the scientific evidence led to prove that the blood found in the car was Azaria’s blood and yet returned verdicts against Mr. and Mrs. Chamberlain on the other evidence in the case and on their impression of the applicants in the witness-box. In truth, doubt about the scientific identification of the blood in the car was consistent with satisfaction beyond reasonable doubt of the applicants’ guilt.\textsuperscript{427}
\end{quote}

Justice Brennan’s comment reflects his view that the scientific evidence was not crucial to the jury’s guilty verdict and that the jury’s judgment of Chamberlain’s credibility may well have been more decisive. Given that the jury’s assessment of the Chamberlains’ demeanour could not be subject to any appeal, the Chamberlains’ decision to elevate the importance of the dispute

\begin{footnotesize}
\textsuperscript{426} Such as evidence adduced by the Crown that damage to Azaria’s jumpsuit was made by scissors and not by a dingo. Like the evidence that foetal blood had been found in the Chamberlains’ car, this evidence was eventually discredited.

\textsuperscript{427} Chamberlain HCA, supra note 4 per Brennan J. (as he then was) at 595.
\end{footnotesize}
about the blood in the car seems natural and perhaps not worthy of censure. Leaving this aside, my interpretation of Cain's notes of the jury's deliberations leads me to believe that Brennan J.'s assessment of the relative importance of the scientific evidence to the jury's decision was quite accurate. That is, Brennan J. correctly identified the centrality of the jury's assessment of Chamberlain's behaviour to her conviction.

The second reason I have identified for the focus on the role of scientific evidence in Chamberlain's conviction is that the campaign to free Chamberlain was centred around disproving the Crown's scientific case. The Chamberlain Innocence Committee's campaign continued for the duration of Chamberlain's imprisonment, but was most intense after the High Court of Australia dismissed the Chamberlain's appeal. They sought to keep the Chamberlain case in the public eye and to discredit her conviction. For example, the committee prepared a statement challenging Kuhl's methodology and her conclusions that foetal blood was present in the Chamberlain's car. This statement was signed by 31 Australian immunologists and submitted to the Northern Territory government.\textsuperscript{428} A scientist who became interested in the Chamberlain case discovered that the alleged "blood spray" on the under dash of the Chamberlains' car was in fact a bitumen compound used in all Toranas as a sound deadener – this information was presented to politicians and publicised with the aid of the media.\textsuperscript{429}

Ultimately, the report of the Royal Commission into the Chamberlain Convictions also focused on the scientific evidence presented at trial. Justice Morling reported that:

\textsuperscript{428} Young, supra note 7 at 144.

\textsuperscript{429} Ibid, at 124.
The evidence leads me to conclude that if there were any blood in the car, it was present only in small quantities in the area of the hinge of the passenger’s seat and beneath. It has not been established that any such blood was Azaria’s. ... There is compelling evidence that the [alleged blood] spray [underneath the dash] was made up of a sound deadening compound and contained no blood at all.\footnote{Morling Report, \textit{supra} note 5 at 332.}

Scientific evidence was crucial to maintaining pressure on the Northern Territory government to free Chamberlain, and to Commissioner Morling’s finding that “I do not think that any jury could properly convict [the Chamberlains] on the evidence as it now appears.”\footnote{Ibid.}

However, the jurors themselves differed about whether the scientific evidence was crucial to the decision to convict Chamberlain in the first place. A report published by the \textit{Sydney Morning Herald} the week after the verdict suggested that:

\begin{quote}
one of the critical periods in the trial, from the jury’s point of view, is believed to have been the cross-examination of Professor Barry Boettcher ... At least some people on the jury are understood to have felt Professor Boettcher’s evidence casting doubt on the presence of foetal blood in the Chamberlains' car had not stood up.\footnote{Malcolm Brown, “How the Azaria jury was swayed” \textit{Sydney Morning Herald} 2 November 1982, page 1.}
\end{quote}

In February 1986, Cain told the \textit{Courier Mail} that she understood Justice Muirhead’s summing up as an instruction that she should “consider the forensic stuff only”.\footnote{“Juror: I always believed the verdict was wrong” \textit{Courier Mail} 8 February 1986. See also Young, \textit{supra} note 7 at 118. This article does not explain exactly what Cain felt she must not consider but she was quoted as saying “I always believed in my heart that she was innocent.”} Cain’s perception was at odds with that of another juror, who said in 1984 that:

\footnote{430 Morling Report, \textit{supra} note 5 at 332.}
\footnote{431 Ibid.}
\footnote{432 Malcolm Brown, “How the Azaria jury was swayed” \textit{Sydney Morning Herald} 2 November 1982, page 1.}
\footnote{433 “Juror: I always believed the verdict was wrong” \textit{Courier Mail} 8 February 1986. See also Young, \textit{supra} note 7 at 118. This article does not explain exactly what Cain felt she must not consider but she was quoted as saying “I always believed in my heart that she was innocent.”}
I think I can say that a lot of the technical evidence (on blood stains in the car) was not fundamental to the jury ... it really came down to whether you believed Mrs Chamberlain’s story or whether you didn’t.\footnote{Brian Johnstone, “Juror reveals: how we reached Azaria Verdict” Sydney Morning Herald 12 April 1984 page 3. Another report of the same press conference appeared in the Courier Mail: “Lindy guilty on the basis of her story”, Courier Mail 12 April 1984.}

This juror’s comments cast doubt on whether “bad science” was the only reason, or even the most important reason, for Chamberlain’s conviction. Taken together, the two jurors’ comments also provide a reminder that, for twelve jurors, there may have been twelve reasons (and various combinations of reasons) to vote “guilty”. Bearing this fact in mind, the notes taken by Cain during the jury’s deliberations shed some light on the relationship between the scientific evidence and the behavioural evidence during the decision-making process. Despite Cain’s comments that she believed she should only consider “the forensic stuff”, her notes demonstrate that the jury discussed far more than just the scientific evidence.

6.3 The jury’s deliberations

Cain’s notes reveal that, when the jurors first retired to the jury room, four were voting for conviction, four for acquittal and four were unsure. The foreman asked the four undecided jurors “to explain what they were unsure of”. This question seems to have framed a process of testing the Crown’s narrative (which was of course predicated on a story of guilt) and the jurors’ attention was directed to identifying and reasoning through weaknesses in the Crown’s narrative. One juror pointed to the fact that Chamberlain had only been away from the barbeque area for ten minutes. Oddly, this seems to have occasioned little discussion. The next undecided juror asked “where was baby when they were packing car from tent[?]” This question sparked some speculation on the part of the jurors. Cain wrote:
Did Mr Chamberlain carry the clothes in the camera bag on the night of the incident over to where the clothes were found that’s how the [foetal blood] test showed up. The baby could have been in the bag he could have thrown the baby in a dingo lair.

Assuming that these notes provide an accurate summary of the discussion, this passage provides a fascinating insight into the decision-making process. At least some members of the jury appear to have formulated a story of guilt at this stage, and to have tested it for coherence and coverage.\(^\text{435}\) Where the Crown’s account of Azaria’s disappearance seemed inadequate, the jury sought to fill the gaps by finding explanations that remained consistent with the evidence. This begs the question of why the jurors chose to use the Crown’s story as a baseline for their deliberations. One reason may lie in the jury’s interpretation of Muirhead J’s instruction that “it is the Crown that brings the charges and it is the Crown that must prove them.”\(^\text{436}\)

Justice Muirhead’s instruction was quite standard – it was an instruction to consider whether the Crown had proven its version of events as it is required to do. It appears from Cain’s notes that the jury partly tested the Crown’s story by identifying the weaknesses in that story and considering whether those weaknesses were fatal to the Crown’s account. However, this process of inquiry was framed within the context of the Crown’s story. In this instance, the fact that nobody saw Azaria’s body was explained with the aid of Kuhl’s evidence that the camera bag had tested positive to foetal haemoglobin. At least for the moment, the jury set aside the question of whether Kuhl’s evidence was reliable.

Where the Crown had not explained a weakness, the jury moved on. For example, the Crown’s account never adequately explained how Chamberlain could have left the barbeque area with

\(^{435}\)Pennington and Hastie, supra note 383 at 527 – 528.

\(^{436}\)Trial Transcript, supra note 1, at 3186.
Aidan, murdered Azaria, cleaned herself and the car, collected a tin of baked beans and can opener and returned calmly to the barbeque area with Aidan within the space of five to ten minutes. Aidan had given a statement to the police that tended to corroborate Chamberlain’s version of events, but he was too young to give evidence at her trial. However, Commissioner Morling wrote in the Report of the Royal Commission into the Chamberlain Convictions that “[the] statement is corroborative of his mother’s account of what happened. More importantly, it is entirely consistent with what he said immediately after the alarm was raised. ... Aidan had not been coached by his parents.”

Another weakness identified by “uncertain” jurors during the earliest stages of deliberation was: “How come Mrs Lowe and Aidan and Michael heard the baby cry”. Once again, this question prompted speculation on the part of jurors. Lowe was certain that the cry she had heard was that of a very young baby and not of a child or an animal and Phillips Q.C referred to Lowe’s evidence as “an absolute bar to conviction.”

Cain’s notes about the jurors’ discussion of Lowe’s evidence read:

Could have been Reagan in his sleep. Dispute about whether Mrs Lowe really heard the baby cry.

Maybe she heard a cry previous and afterwards put it to that time? Maybe it wasn’t that baby cry?

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437 In his dissenting judgment, Deane J. identified this aspect of the Crown’s case as “being, in its own less spectacular way, almost as unlikely as is the story of the dingo.” Chamberlain HCA, supra note 4 per Deane J. at 628. See also Chamberlain HCA per Murphy J at 572. Justice Morling also singled out the Crown’s contention that Chamberlain could have murdered Azaria in this timeframe as a serious weakness in the Crown’s version of events. Morling Report, supra note 5 at 333 – 334.

438 Morling Report, supra note 5 at 265 – 266.

439 Phillips Q.C., closing address, Trial Transcript, supra note 1 at 2839.
Once again, this passage illustrates that jurors will rely on inferences to fill gaps in testimony and that these inferences are drawn on the basis of “common sense” as much as on the basis of the evidence. The Crown sought to explain Lowe’s evidence by arguing that she may have mistaken the cry. However, there was no evidence at trial to suggest that there was another baby anywhere nearby – Reagan was four years old and unlikely to cry in this way. The Crown never implied that Lowe had mistaken the time at which she heard the cry. The jurors’ explanations implicitly rejected Lowe’s claims that she knew exactly what a young baby sounded like from her own experience of babies and children. This rejection of Lowe’s confident evidence suggests that some jurors demeaned maternal knowledge in favour of other forms of knowledge, including scientific knowledge. The jurors also seem to have disregarded the context of Lowe’s evidence.

Lowe testified:

Well [Chamberlain] was just standing there. I heard the baby cry, quite a serious cry but not being my child I didn’t sort of say anything. Aiden said: ‘I think that’s bubbie crying’, or something similar. Mike said to Lindy ‘Yes, that was the baby, you better go and check.’ Lindy went immediately to check.

Lowe’s account makes a very clear link between hearing the cry, Mr Chamberlain’s comment and Mrs Chamberlain’s decision to check on Azaria. Taken in that context, it seems highly unlikely that Lowe could have been mistaken about the time. However, at this stage of the deliberations, the jurors were considering the weaknesses in the Crown’s case and they took Lowe’s evidence in the context of the Crown’s account. The “story” they were constructing (but had not yet necessarily accepted) needed to explain away Lowe’s evidence, and in order to make

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440 Pennington and Hastie, supra note 383 at 536.
441 Testimony of Sally Coral Lowe, Trial transcript, quoted in the Morling Report, supra note 5 at 20.
that explanation, the jurors looked beyond the evidence and arguments they had heard at trial.

The fact that the jury commenced its deliberations by considering the Crown’s version of events was not decisive – after this discussion took place, six jurors were voting for conviction and six for acquittal. However, it makes an interesting starting point to the extent that it may have framed the discussion which followed.

After mentioning some other weaknesses in the crown’s case, the jurors returned to the question “was it foetal blood?” Cain’s notes on this part of the deliberations read as follows:

Was it foetal blood?

Defence never tested theres [sic].

Show of hands 6 – 6 G – NG.

Round the table talk on what we think or how we feel shes g or ng.

As Lindy went towards the tent and saw dingo coming out, wouldn’t she automatically call “Michael, there’s a dog in the tent” not go in and then come out again.

When Michael heard an urgent cry as if the baby was being squeezed and then cut off, why then say to Lindy – “was that bubbly crying” Wouldn’t he drop what he was doing and check himself.

They did not search, 300 people were out searching, Lindy and Michael went to the Ooleroo Motel at Midnight and spent the night there, next morning he did not ring the Police to see if there was any news, he rang his Mother and said a Dingo had taken Azaria and they did not expect to find the body. After that they went out taking Photos for newspapers, they were at the local Aboriginal Camp taking snaps of the camp dogs when they bumped into the police and told them they were leaving the next day to Mt Isa. Lindy had suggested they take a trip out to the Olgas!

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442 Uluru
How could anybody even contemplate leaving so soon?

... [A sheriff] popped in to get something from the Court, told us there was mobs of people outside waiting for our verdict.

It worries me knowing so many people are out there.

Why didn’t the Defence test the blood in the Car??? was it because they didn’t dare take the chance? or did they and obviously could not tell us the results!

The most striking fact about this passage is that it touches on almost every aspect of the Chamberlain case. The question of whether the Crown had established the presence of foetal blood seems to have been abandoned for a subject about which the jury could more easily agree – Chamberlain’s strange behaviour after the disappearance. At this stage, Cain was voting “not guilty”. Yet her notes betray real qualms about the Chamberlains’ behaviour: “They did not search ... Lindy had suggested a trip out to the Olgas! How could anybody even contemplate leaving so soon?” Also evident is the intense pressure created by the knowledge that this jury was being asked to decide a very public case.

After Chamberlain’s behaviour and the pressures of making a decision in such a notorious trial had been canvassed, the jury returned to the difficult question of whether the Crown had established the presence of foetal blood in the car. This time, it seemed that the jurors were more willing to engage in speculation on this subject. That speculation may have been coloured by the discussion of Chamberlain’s behaviour – the notes suggest that some jurors no longer trusted the defence. The jury also made an error of law at this stage – “Why didn’t the Defence test the blood in the Car??? ... or did they and obviously could not tell us the results!” If the defence had

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tested the car and received positive results, it would have been a serious breach of legal ethics for Chamberlain’s lawyers to have argued that the blood was not foetal blood.⁴⁴⁴ (Given the profile of the case, it is also unlikely that the lawyers would have succeeded with such a cover-up, even if it had been attempted.) It is impossible to know whether this error affected the final decision, but it is a manifestation of the lack of trust with which some jurors viewed the defence. Most significantly, this open mistrust of the entire defence case (as opposed to the former speculation about whether particular witnesses were mistaken or lying) appears after the jury has discussed their perceptions of Chamberlain’s reaction to Azaria’s disappearance.

No vote appears to have been taken immediately after the passage extracted above. Instead, the jurors took a break to eat dinner (“decided to eat it in the court, all had some fun sitting in the judge’s chair”) before deciding to look at the Chamberlains’ car and tent. Cain recorded that the jurors noticed that the light from the passage did not illuminate the inside of the tent: “there was no way that we could have seen that the baby was not in the basket”. The importance of this observation is not immediately apparent from the context of this note. However, earlier Cain wrote: “Did she make the alarm after coming out of the tent or before she got to the tent, evidence points both ways.” This refers to one aspect of Chamberlain’s evidence that was never really resolved. Lowe testified that Chamberlain had cried out “My God. My God. A dingo has got my baby” when she was about 5 metres from the tent. Chamberlain testified that she had not seen Azaria in the dingo’s mouth but that she could not recall whether she called out before or after entering the tent.⁴⁴⁵ Accepting Chamberlain’s account for a moment, if Chamberlain could

⁴⁴⁴ For example, rule 21 of the New South Wales Bar Association’s rules reads: “A barrister must not knowingly make a misleading statement to a court on any matter.” Similar rules apply in each Australian state and territory. Breaching these rules leaves a barrister open to the possibility of professional disciplinary action.

⁴⁴⁵ Trial Transcript, supra note 1 at 2072.
not see inside the tent and did not see Azaria in the dingo’s mouth, she could not have cried out before checking the tent. Given the speculation that Lowe mistook the time at which she heard Azaria cry, the apparent decision taken by some jurors to accept Lowe’s evidence that Chamberlain cried out before entering the tent suggests a predisposition in favour of the Crown’s narrative. After the jury had completed its inspection of the tent, another vote was taken. Ten jurors voted guilty and two voted not guilty.

An hour and twenty minutes later, the jury reached a unanimous verdict. Cain does not record the discussions that took place in this period. However, she later said that “I have always believed I was wrong in my judgment.” She told Chamberlain that she had allowed herself to be persuaded by “more vocal and outspoken members of the jury”. When the verdict was given, several jurors cried. Cain’s notes read:

“GUILTY”

awfull [sic] feeling in the pit of my stomach shaking from head to toe …

LIFE HARD LABOUR, HORRIBLE IT SOUNDS LIKE SHE WILL HAVE TO SMASH ROCKS FOR THE REST OF HER LIFE (SORRY)

What else could we do.

A diagram underneath this passage shows the jury room, with “our poor jury” inside the room and “WORLD” “OUTSIDE” beyond. These notes give the reader a strong sense of the pressures felt by Cain given the high profile of the trial but also of the possibility that a verdict was reached because some jurors were too exhausted or insufficiently articulate to continue debating the case.

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446 “Juror: I always believed the verdict was wrong” Courier Mail 8 February 1986, page 10.

447 Chamberlain, Through My Eyes supra note 43 at 587.
Taken in their entirety, Cain’s notes provide some important insights into the Chamberlain case and into jury decision-making. The notes show that the jury’s deliberations went far beyond the scientific evidence – indeed, some jurors’ assessment of the scientific evidence appears to have been mediated by their perception of Chamberlain as a person and especially as a mother. Second, the notes are consistent with Pennington and Hastie’s storytelling model of jury decision-making\(^{448}\) – it appears that the jury constructed a story that accounted for as much evidence as possible, and drew inferences in the places where the evidence “ran out”. Arguably, when constructing that story, some jurors used the Crown’s account as a baseline, and this resulted in the decontextualisation of some evidence that was crucial to the defence – with negative consequences for the defence story. Finally, the notes show the extraordinary pressures of acting as a juror in any serious criminal case, but especially when the case is notorious.

In his autobiography, Justice Muirhead suggests that, while a jury may inject democracy into the criminal process in the ordinary case, democracy may be antithetic to justice when “‘popular prejudice’ is against the accused.”\(^{449}\) He explains that the existing system is inadequate to the extent that:

> The law assumes that the directions given by the Trial Judge to the jury, that they must put extraneous material out of their minds, is a sufficient safeguard. Most jurors will endeavour to follow such directions, but with a jury of twelve, is it a safe assumption? I think not and the danger is that the one or two whose minds are influenced by earlier impressions or prejudices may, in turn, influence the balance of the panel.\(^{450}\)

\(^{448}\) Pennington and Hastie, \textit{supra} note 383 at 523, 527 – 8.

\(^{449}\) Muirhead, \textit{A Brief Summing Up}, \textit{supra} note 289 at 175.

\(^{450}\) Ibid.
Justice Muirhead recommends that defendants should be entitled to waive the ‘right’ to trial by jury. His justification for preferring “judge alone” trials to trial by jury is not that a judge is less likely to be influenced by ‘popular prejudice’ but that a judge is required to give reasons for her decision and, therefore, that a defendant is better placed to appeal a wrongful conviction. An alternative solution proposed by others to some of the difficulties created by the “black box” model of jury decision-making is to require jurors to take notes and to make these notes available to a defendant who wishes to lodge an appeal\textsuperscript{451} or to videotape juror deliberations.

Each of these solutions seems an improvement over the present system insofar as it would provide a remedy in a case where the decision maker makes errors of law such as those made by the jury in the Chamberlain case. However, they do not address the broader issues I have discussed in this thesis. The attribution of legal blame depends in large part on the application of “common sense”. Though it is based on a kernel of truth, common sense may be wrong when it is elevated to the status of a universal norm – for instance, when it maintains that a mother’s “strange” reaction to her child’s death is necessarily indicative of foul play. The effectiveness of legal solutions to law’s shortcomings is necessarily limited by other social factors – ‘popular prejudice’ or ideology. Altering the jury system would not have altered the fact that the Chamberlain case was framed as a contest between those who characterised Chamberlain as a “good mother” and those who believed her to be a murderer. Nor would it necessarily have explained Chamberlain’s conduct in ways that didn’t entail her guilt.

Resolving the more fundamental problem of the perpetuation of social inequalities through law partly requires broader social change designed to re-value women’s knowledge and to admit the

possibility that there are many ways to be a good mother. By drawing attention to assumptions such as the assumption that a mother who has the primary care of a child is responsible for and can explain any harm that may befall the child, it becomes easier to reveal the ways in which those assumptions are perpetuated within the legal process. Instead of challenging assumptions about motherhood, Chamberlain’s lawyers sought to redefine Chamberlain in such a way that she fit within those assumptions. Ultimately, that strategy caused the jury to become suspicious of the defence as a whole. Chamberlain’s lawyers prepared a case strategy in enormously difficult circumstances and it may have been even more difficult to argue Chamberlain’s defence if Phillips Q.C. had also chosen to challenge social assumptions about good mothering. However, arguably defence lawyers in these circumstances should be more innovative in their approaches to “hard cases” and more willing to face up to the challenge of defending a client who does not easily fit dominant conceptions of a good mother.
CHAPTER SIX: CONCLUSION

Almost twenty years after Chamberlain was convicted of murder, her story continues to fascinate the Australian public. Azaria's black dress is now a prized exhibit in the National Museum of Australia and an opera titled “Lindy” debuted at the Sydney Opera House during 2002, ten years after Chamberlain was compensated by the Northern Territory for her wrongful conviction. In legal terms, the Chamberlain story ended with the payment of compensation. Yet the continued fascination with Chamberlain suggests that, at least in the eyes of the Australian public, the interminable legal process never sufficiently explained “what happened” to Azaria Chamberlain on 17 August 1980.

The public fascination with Azaria’s fate inevitably leads back to Chamberlain’s knowledge of what happened that night. At the Royal Commission, Barker Q.C. said “all the facts are not known and never will be known because the sole repository of all facts is Mrs Chamberlain and she will not disclose what happened.”\(^{452}\) The Crown and police focus on Chamberlain’s knowledge obscured the events before and after Chamberlain raised the alarm about Azaria – a few seconds before Chamberlain saw a dingo emerging from the tent, Sally Lowe and Michael Chamberlain heard Azaria cry. Within a few moments afterwards, at least four people had started to search for Azaria, starting from the tent and car. Within hours, 300 people had joined the search. Yet Chamberlain alone was credited with the ability to explain what happened to Azaria. Even in 1986, after the Crown’s scientific case for convicting Chamberlain had been thoroughly discredited, Crown lawyers and certain Northern Territory state officials remained convinced of

\(^{452}\) Crispin, supra note 7 at 310. See also ibid.
her guilt – they reasoned that if Chamberlain could only be made to tell the truth, that guilt would be clear.

The Chamberlain case has many unusual features: location; casting; not least, the intricacies of the plot itself. So much went wrong that it is tempting to write the case off as an aberration – an example of how life can be stranger than fiction. However, to do so is to overlook the things that Chamberlain can teach us. In particular, the case demonstrates the ways in which the legal process adopts social constructions of gender and motherhood even while it purports to create a separation between law and society. The ways in which Chamberlain was evaluated as a mother influenced the way that the case was investigated, framed, conducted, decided and reported. For example, the police decided soon after Azaria disappeared that Chamberlain had murdered Azaria. This decision was taken on the basis of her apparently strange behaviour – and it led to "tunnel vision" in the investigation and prosecution of Chamberlain.

The police were highly suspicious of Chamberlain well before any scientific evidence reinforced those suspicions. The collection and presentation of scientific evidence by the Crown was itself shaped by the belief that Chamberlain was guilty. Despite the manner in which the scientific evidence was influenced by suspicions about Chamberlain, it supplied an apparently objective foundation from which to prosecute those suspicions. The apparent objectivity of the Crown’s conclusions was enhanced by the confidence with which Kuhl gave evidence. Kuhl presented as a credible witness, and the Crown used her testimony to damage Chamberlain’s credibility during Chamberlain’s cross-examination.

Law’s claims to autonomy and self-containment give rise to the positivist assumption that legal process allows the law to demarcate a space within which judges and juries might ascertain the
“truth” about past events, free from the pressures and prejudices of society. Justice Muirhead strove to establish and to monitor this separation during the Chamberlain trial – by warning the jury and, indirectly, the Australian public of the need to be fair to Chamberlain and to decide Chamberlain’s guilt solely on the basis of what was seen and heard in the courtroom. Yet the tensions inherent in this demarcation were apparent from Justice Muirhead’s summing up – for instance, the fact that he reminded the jury to put aside the “tide of opinion and innuendo”\textsuperscript{453} that had flowed through the cultural discourse about the case demonstrated that he recognised the difficulty inherent in separating this case from its cultural context in view of the enormous media attention it had received.

The intensity and scope of media attention directed at the Chamberlains has led some commentators to suggest “the Australian media, aided and abetted by a large cross-section of the Australian people, murdered, killed in cold blood, the possibility of a fair trial for Lindy Chamberlain.”\textsuperscript{454} In the Chamberlain case, the court faced at least two major impediments to self-containment. The first impediment, which was recognised by Justice Muirhead, was that the extent of media attention devoted to Chamberlain made it likely that any prospective jurors would have at least some preconceptions about Chamberlain. Indeed, my review of Cain’s notes has shown that the jury continued to interpret the case partly through the media – and that this may have influenced their recollection of parts of the evidence. However, I have also argued that the opportunity to see and hear Chamberlain in the courtroom allowed the jury an opportunity to negotiate control over the media discourses about Chamberlain. The second impediment to self-

\textsuperscript{453} Trial Transcript, \textit{supra} note 1 at 3183.

\textsuperscript{454} Howe, \textit{supra} note 9 at 1.
containment that can be observed in the Chamberlain case is a more pervasive problem – despite its claims to autonomy, law is grounded within broader social discourses. Legal discourse draws upon and contributes towards social “common sense”. The jury is in many ways the ultimate injection of common sense into the law – Justice Muirhead reminded the jury that “You bring with you into this court your combined common sense, your experience of life, your sense of fair play.”

I have suggested that the common sense on which the jurors drew likely included the dominant Australian ideology of motherhood.

The jury’s decision-making process demonstrates the resilience and power of cultural expectations of motherhood – the jurors’ suspicions about Chamberlain’s behaviour as a mother (“how could anyone even contemplate leaving so soon?”) infected their assessment of the honesty of the defence as a whole and made them more willing to accept the Crown’s controversial scientific evidence. Chamberlain herself challenged the jury and the Australian public to understand that a mother can be angry and innocent, aggressive and virtuous. The dominant ideology of motherhood is sufficiently flexible to account for a mother’s anger or protectiveness – provided that these emotions are adequately explained. However, the defence sought to portray Chamberlain as the loving, sentimental mother with a “new mum glow”.

The new mum is a stalwart of cultural representations of motherhood – but in the Chamberlain case, it served to enhance juror suspicions about Chamberlain because it simply didn’t fit with the mother who sat before them. Worse, it was directly inconsistent with the anger and bitterness that Chamberlain articulated clearly while giving testimony. This disjunction between the defence narrative and the juror’s own perceptions of Chamberlain served to reinforce suspicions

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455 Trial Transcript, supra note 1 at 3189.
about the bona fides of Chamberlain and of her legal counsel. It would be fascinating to compare Chamberlain with other cases in which a mother is convicted on the basis of circumstantial evidence in order to ascertain whether discourses about motherhood play out in those cases in similar ways.

Justice Muirhead’s reminder that “it is the Crown that brings the charges and it is the Crown that must prove them”\textsuperscript{456} provides an insight into an important aspect of jury decision-making. I have suggested that the jury, perhaps encouraged by Justice Muirhead’s admonition, adopted the Crown account of Azaria’s disappearance as a baseline story by which the evidence was tested. Without a better understanding of jury decision-making in a range of circumstances, it is difficult to know whether the adoption of the Crown story is a common approach or whether it only occurs when the jury harbours particular suspicions about the defendant. However, the adoption of the Crown story accords with the commonly held assumption that “the police are effective and efficient screeners of guilty people”\textsuperscript{457} and that, if a person is charged with a crime, he or she is inherently suspect. Some aspects of the legal process arguably reinforce this assumption. One of the jurors (not Cain) who spoke publicly about the trial after the High Court of Australia dismissed Chamberlain’s appeal commented that:

I think in this case the judge made every effort to ensure the Chamberlain’s [sic] did get a fair trial.

If there was anything [Justice Muirhead] considered that would in any way jeopardise that, he took every step he could to ensure it wasn’t admissible.

\textsuperscript{456} Trial Transcript, \textit{supra} note 1, at 3186.

\textsuperscript{457} Ericson and Baranek, \textit{supra} note 48 at 74.
In fact, we spent a great deal of time outside the courtroom while the lawyers argued points of law about which none of us (the jury) know anything. We were never told and we never inquired.\textsuperscript{458}

Where gaps existed in the Crown’s story, it is possible that some jurors attributed those gaps to the rules of evidence law. The rules of legal process, which are intended to ensure that a defendant is not prejudiced, may also create a willingness on the part of juries to trust that prosecutors have good reason to believe that a defendant is guilty, even though that reason may not be admissible. It is not possible to conclude that this is what the jurors actually thought during the Chamberlain case – but it may have influenced their acceptance of the Crown account. The likelihood that this occurred is enhanced by the jury’s evident suspicion of the defence’s honesty. The institutional power enjoyed by the Crown and its scientists manifested itself partly in the jury’s apparent willingness to trust the Crown’s integrity.

Chamberlain was neither the passive victim nor the dangerous woman described in many accounts of the case. She exercised some agency in the course of her trial – she chose to give evidence and she sought to protect Azaria’s memory by challenging Barker Q.C. when she felt it appropriate to do so. However, her choices were limited to unappealing alternatives and her ability to decisions to exercise her agency came at the price of being judged, and judged harshly, by the jury and within broader Australian society. Her refusal to comply with expectations of how a mother “should behave” when faced with the loss of a child led many people to become suspicious of Chamberlain. Ultimately, Chamberlain infuriated some people, including police officers, journalists and possibly Barker Q.C. Chamberlain frustrated them because, having decided that she was guilty, they believed that she must be made to tell what happened to Azaria.

\textsuperscript{458} “Lindy guilty on the basis of her story” \textit{Courier Mail} 12 April 1984, page 2.
Chamberlain’s defiance of cultural expectations of motherhood, and her unapologetic attitude, caused the police and prosecution to be unfailing in their efforts to reveal what they believed to be the truth about Azaria’s fate.

I was told so often “If you will only give up your fight for innocence and say you’re guilty, you can go home. ... I’ve learned, more than ever, not to show my true feelings. Whenever I did, in the early days, I was wrong. I didn’t behave the way some people thought I should, so of course I was guilty.”

459 Chamberlain, supra note 43 at xi – xii.
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## APPENDIX A

**DATE RANGES FOR SYDNEY MORNING HERALD NEWSPAPERS SEARCHED**

<table>
<thead>
<tr>
<th>Date Range</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Azaria’s clothing (not matinee jacket) is found at the base of Uluru on 24 August 1980.</td>
</tr>
<tr>
<td>16 - 24 December 1980</td>
<td>First inquest into Azaria’s disappearance commenced.</td>
</tr>
<tr>
<td>20 – 28 February 1981</td>
<td>Coroner Barritt delivers findings in first inquest on 20 February 1981.</td>
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<tr>
<td>February 1982</td>
<td></td>
</tr>
</tbody>
</table>
Petition of 131,000 signatures supporting Chamberlain’s release from prison is presented to the Governor-General of Australia on 3 May 1983.

Chamberlain Innocence Committee calls for an inquiry into Chamberlain’s conviction on the basis of new scientific evidence presented to the Northern Territory government on 4 June 1985.


Azaria Chamberlain’s matinee jacket is found at Uluru on 2 February 1986.

Lindy Chamberlain is released from prison on 7 February 1986 after positively identifying Azaria’s matinee jacket.

Report of the Royal Commission into the Chamberlain Convictions is released to the public on 2 June 1986.

NT Supreme Court quashes Chamberlain convictions on 15 September 1986.
APPENDIX B

GROUND OF APPEAL

<table>
<thead>
<tr>
<th>Number</th>
<th>Ground</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>The learned trial judge erred in rejecting submissions by counsel for the second appellant that the jury should be directed as a matter of law to find him not guilty in that the jury properly directed should not on the evidence convict him.</td>
</tr>
<tr>
<td>3</td>
<td>The learned trial judge erred in rejecting submissions by counsel for each of the accused that at the end of the evidence the case against each of the accused was so tenuous that even with a proper direction it would be unsafe to let the case go to the jury.</td>
</tr>
<tr>
<td>4</td>
<td>The learned trial judge erred in rejecting submissions by counsel for each accused that the jury be advised at the conclusions of the evidence that it was unsafe to convict either accused.</td>
</tr>
<tr>
<td>5</td>
<td>The verdict [sic] was [sic] against the evidence and the weight of the evidence.</td>
</tr>
<tr>
<td>6</td>
<td>The verdicts of guilty against each accused are –</td>
</tr>
<tr>
<td></td>
<td>(a) unsafe and/or unsatisfactory;</td>
</tr>
<tr>
<td></td>
<td>(b) dangerous in the administration of justice;</td>
</tr>
<tr>
<td></td>
<td>(c) dangerous or unsafe in the administration of the criminal law …</td>
</tr>
<tr>
<td>8</td>
<td>That his Honour erred in law in directing the jury as to the appropriate standard of proof and as to what constituted a reasonable doubt.</td>
</tr>
</tbody>
</table>

460 Chamberlain FFC decision, supra note 3 at 3 – 4.

461 Ground 1 was abandoned, ground 7 was formal, grounds 10 and 11 were not argued, ground 23(i) was abandoned and grounds 23(ii) and (iii) was rendered inapplicable because the Full Federal Court refused to allow the appellants leave to tender further evidence.
9 That his Honour misdirected the jury in law by instructing them that, if the Chamberlains’ evidence left them to conclude that there was a reasonable possibility that they were not guilty, they were to act on that.

12 That the trial judge misdirected the jury in law by informing them that merely because they could not fully understand the techniques and methods of employed in modern scientific research did not mean that they could not act on the evidence resulting from such scientific inquiry.

13 That the trial judge erred in law in instructing the jury that in the long run it would depend on their assessment of the scientific witnesses “as to how he or she appealed to you”.

14 That the trial judge misdirected the jury by instructing them that, even if they had doubt as to whether blood found in the family car was foetal blood, they were still entitled to ask how the blood came to be there.

15 That the trial judge misdirected the jury in law in relation to the evidence of the appellants by instructing them that it was not the sanctity of the oath which in these days weighed heavily but the fact that they had exposed themselves to cross-examination.

16 That the trial judge erred in law in not putting the sworn evidence of the accused to the jury [in summing up].

17, 18, 19 That his Honour erred in law in admitting the evidence of F.B. Cocks and B. Sims and in admitting parts of the evidence of Professor Cameron.

20 Concerned evidence which could be given by a certain witness at trial, which was said to be “fresh” evidence.

21 The learned trial judge erred in relation to his charge to the jury in that he failed to issue [certain] warnings in respect to the evidence concerning blood samples.
That the learned trial judge should not have permitted the Crown case to go to the jury in so far as same related to evidence adduced by the Crown concerning blood samples in that:

(i) evidence adduced by the Crown concerning its allegation that the foetal blood was found behind the underdash of the Torana motor vehicle (Reference and Engine No. 8C77RG J 588763X) was unreliable in that it failed to establish beyond reasonable doubt that such blood was foetal blood from the body of Azaria Chamberlain;

(ii) the evidence adduced by the Crown in relation to the scissors (Exhibit No. 56 at trial) was of such a nature as to be unreliable in respect of the Crown allegation that there was found to be present thereon foetal blood from the body of Azaria Chamberlain.