
Imagining Evidence, Fictioning Truth

- REVISITING (COURTESY OF O J SIMPSON) EXPERT EVIDENCE IN THE CHAMBERLAIN CASE

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...Barker said, 'There will be evidence that a Mrs Lowe also heard a noise at this stage. Of course, on the Crown case, it was impossible that it was the baby, because the Crown says the baby was dead'. So Barker will say she heard it in her imagination.¹

One thing that offends the imagination is that no murder was committed at all.²

...it's now open for anyone at all to speculate and create all sorts of possibilities that are not founded on evidence but founded on imagination and that's where the real danger comes in on open findings.³

INTRODUCTION

Connoisseurs of bizarre criminal cases must have been revelling. Could there really have been any doubt that the two 'trials of the century' would hit the press in the same week, despite a time lapse of thirteen years? On 1 October 1995 the Australian press reported that a third 'limited scale' coronial inquiry into the death of Azaria Chamberlain was about to be opened in the Northern Territory in order to 'clear the public record'.⁴ This was to be Australia's eighth judicial inquiry into the marathon miscarriage of justice which was the Chamberlain case, the seven previous inquiries having failed, apparently, to clear the public record.

Three days later the media reported that the jury had reached its verdict in the OJ Simpson trial, North America's latest celebrity (read: media farce) murder trial.

Surely, the temptation to compare these two murder trials is irresistible. Consider, for example, their huge ratings on any richter scale of the bizarre. Consider too, the sensationalism of both trials, notwithstanding the duration of the respective sagas, and the passionately divided public opinion before, during and after the trials. And what about the blood 'evidence'—a car 'awash' with (denatured) blood/ a bloody (planted?) glove? Or the swiftness of the jury verdicts (three hours for OJ, six hours for Lindy), notwithstanding the presentation of 'mountains' of forensic evidence for the jury's deliberation? Again, both trials provoked culturally-inscribed jokes (Question: 'What would have changed the course of history? Answer: A dingo in Bethlehem' / Question: 'What's the difference between Superman and OJ? Answer: OJ's going to walk'). Of course, the juries 'read' the evidence put before them in vastly different contexts. One followed the always already racialised script (pre and post Larry King), of late twentieth century Los Angeles' style criminal justice. The other followed a more insidiously racialised, but more overtly misogynist script - that of white Australian 'common sense' know-how about the behaviour of dingos and mothers. But such specificities are sure to be lost in the rush for comparative superlatives. That said, this article does not venture into a comparative analysis of these two great trials by media. Instead, it pleads the provocation of the O J Simpson trial to revisit the Chamberlain case with a view to providing a new reading of the scientific or expert 'opinion evidence' which was submitted at the second coronial inquest, at the trial and at the inquiry into the Chamberlains' convictions. For without this evidence, the case would never have gone to trial, nor would it have had the outcome it did.

Actually, I do not need the excuse of the O J trial to revisit the Chamberlain case. It is enough, surely, that this case made a reappearance in the Australian media in November-December 1995, courtesy of the Chamberlains' bid to have a third and final coronial inquest find that they had nothing to do with Azaria's death, and that she died after being taken by a dingo. This was to be the 'final chapter' in the fifteen-year saga so that they could 'complete the grieving process' (Tipple quoted in Alcorn, *The Age* November 30 1995). But on 13 December 1995, the coroner in charge of this the most recent inquiry into the case brought down an open finding, ruling that the cause of Azaria's death 'cannot be determined and must remain unknown' (quoted in Nason, *The Australian* December 14 1995).

Although there was 'considerable support for the view that a dingo may have taken Azaria', he determined that the evidence was 'not sufficiently clear, cogent or exact to reasonably support such a finding on the balance of probabilities' (Alcorn, *The Age* December 14 1995). So much for the 'dingo hypothesis'. As for the objection that such a finding 'would lead to great mischief' and undermine the Chamberlains' 'right to the status of innocence', the coroner declared that speculation about the case would continue, regardless of his finding. But in his view,

What is important however, is that any such speculation, inevitable as it is, can never disturb the unassailable fact that as a matter of public record the law of the land holds Mr and Mrs Chamberlain to be innocent. (Quoted in Nason, *The Australian* December 14 1995)

Legal and media commentators were quick to criticise the coroner's 'open' finding as one which would provide a licence to speculate, 'probably forever' about the case:

This is our Jack the Ripper, our Lindbergh kidnapping. This is our greatest 20th-century mystery. And an open finding now gives us licence to speculate—probably forever. (Carney, *The Age* December 14 1995)

The effect of the 'open' decision, according to John Bryson, author of *Evil Angels*, was that in 'the back-rooms of this culture' someone will always be 'hard at work picking over the evidence', seeking fame by finding 'what everyone else missed, and pins the Chamberlains to murder' (Bryson, *The Age* December 16 1995). And, more to the point of this article, Denis Barritt, who held the first coronial inquest in the case in 1981, disapproved of the latest finding, declaring that:

it's now open for anyone at all to speculate and create all sorts of possibilities, that are not founded on evidence but founded on imagination...(Quoted in Alcorn, *The Age* December 14 1995)

He also predicted that the latest coronial finding:

will delight those people in the community who live for suspicion and gossip. It is right down the alley of the ignorant. (Quoted in Nason, *The Australian* December 14 1995).

But he got closest to the heart of the matter when he distinguished evidence from imagination, although as we shall see, the line between evidence and imagination was blurred all along in the Chamberlain case.

As a final introductory point, may I add the usual disclaimer: this is necessarily a selective reading of the expert evidence which swamped the Chamberlain case. Moreover, this evidence has been subjected to much critical scrutiny, including that of a Royal Commission inquiry. So be assured, my intention is not to reconsider the 'opinion' evidence as evidence, nor is it to rehash the much-disputed 'scientific' approaches to blood evidence. Incited by both the OJ 'blood' saga and the reappearance of the Chamberlain case in the Australian media, I want to revisit the expert 'opinion' evidence in that case in order to determine how it passed as truth and how it worked to exclude other knowledges and truths.

A NOTE ON METHOD

First, however, I need to elaborate briefly on my poststructuralist approach to law. Broadly, poststructuralism, or rather, the kind of poststructuralist analysis which has informed my approach to law to date, examines power relations operating within regimes of truth. For example, within feminist theoretical debates which question what the foundational category 'Woman' authorises, and who it excludes or 'deauthorises', the feminist philosopher Judith Butler has argued convincingly that the point, indeed the 'whole point', of poststructuralism is that 'power pervades the very conceptual apparatus that seeks to negotiate its terms, including the subject position of the critic'. The aim then, of the poststructuralist, is to 'interrogate what the theoretical move that establishes foundations authorises, and what precisely it excludes or forecloses' (Butler 1990: 6-7; her emphasis). Thus within feminist scholarship, including feminist legal scholarship, poststructuralists have examined the discursive and political effects of the self-authorising, foundationalist resort to a universalising category of 'woman' in order to credentialise a feminist speaking position. To take another example, poststructuralists interested in the way power pervades conceptual apparatuses would find it notable that property law scholar Kevin Gray has conceptualised property as a 'power-relation', a power-relation moreover, which is 'constituted by legally sanctioned control over access to the benefits of excludable resources' (Gray 1991: 295). The point which can be taken from Gray is that whatever legal fictions are relied on in property cases, such conceptual apparatuses cannot disguise the power relations—(in property cases, power relations which rely on exclusions)—

which are at work within legal regimes of truth.

I have argued elsewhere that such an approach to law—one which attends to the power relations inscribed in legal fictions as well as to the self-authorising moves of law scholars—extends the ambit of a critical approach to law (Howe 1995a and 1995b). More broadly, I have argued that an attention to poststructuralist problematisations of foundational categories produces a better political and legal analysis (Howe 1995b: 64-72 and Howe 1995c: 218). Simply, it enables us to see more. Liberal legal scholars, unaware of or indifferent or hostile to poststructuralist interrogations of the power relations pervading law's conceptual apparatuses, preoccupy themselves with what might be called 'internal' questions of law. For example, in the context of courts' responses to evidentiary questions, the focus is on the functioning of legal rules. But from a poststructuralist perspective, one informed by Foucault's arguments about the power of discourse and, more particularly, the power of 'fiction to function in truth' and for 'fictional discourse to induce effects of truth' (Foucault 1980a: 193), it becomes apparent that much more is at stake. Restricting debate about legal rules to considerations of their 'proper' functioning in law, liberal law scholars overlook the fact that such rules perform other crucial functions. Most notably, they operate to 'induce effects of truth' and thus to conceal power relations at work in the conceptualisation of law.

It would not do, however, to suggest that no critical work has been done on the epistemological status of expert knowledges in the courtroom. Within the field of the sociology of scientific knowledge, studies of the deployment of scientific knowledges in legal settings have shown how legal procedures mediate the management of scientific uncertainty. By examining how what counts as expert knowledge is socially constructed by legal institutions and procedures, these studies have exposed 'the inherent fragility, or openness to questioning of scientific knowledge when placed in sceptical legal contexts'. More, they have shown how legal systems 'construct authority' from 'objective science' via social agreements about what constitutes acceptable evidence (Smith and Wynne 1989: 12-13). Sociologies of scientific knowledge not only undermine law's positivistic fact-value distinction, they delve into the specific ways in which legal processes 'constitute certain knowledges as expert and how this process gives a tacit evaluative character to decisions' (Wynne 1989: 32). Moreover, in the context of the criminal trial, a start has been made to the exploration of the relation between the supposedly value-free presentation of forensic knowledge and the adversarial structure of criminal court procedure (eg Smith 1989).

But I would maintain that poststructuralist theory extends the social analysis of scientific knowledge still further. Consider for example, Foucault's interrogation of the political status of science, the ideological functions which it can serve, its relationship with political and economic institutions and, more broadly, his interest in science's imbrication in relations of 'power and knowledge' (Foucault 1980b: 109). Clearly all this has a purchase when it comes to critically analysing the status and, more crucially, the discursive effects of the power peculiar to scientific statements which comprise opinion evidence in a criminal trial. More particularly, Foucault's insights about the valorising of the 'true knowledge' of scientific discourses at the expense of 'subjugated knowledges'—those 'low ranking' or 'disqualified' knowledges, 'naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity' (Foucault 1980c: 81-3)—has much to offer to a critical reading of the evidence in the Chamberlain case.

Yet, having relied for so long on a few select passages from Foucault and Butler to carry the weight of my poststructuralist critique of law, I now want to extend this critique by embracing Derrida's deconstructive methodology, (or at least, an abbreviated version of it) for arguably, this method has a particular purchase when it comes to interrogating the law of evidence. Derridean deconstruction has been characterised as concerned with the ways in which meaning is constructed through the operations of difference or negations. Fixed or binary oppositions - such as unity/diversity, presence/absence/, man/woman - 'conceal the extent to which things presented as oppositional are, in fact, interdependent' in that 'they derive their meaning from a particularly established contrast'. Moreover, for Derrida, this interdependence is hierarchical in that one term is dominant and the opposite term is subordinate and secondary. The analysis of meaning must therefore 'deconstruct' - reverse and displace - binary oppositions. Deconstruction then, analyses binary oppositions in order to reveal 'the interdependence of seemingly dichotomous terms and their meaning relative to a particular history'. It is concerned with exposing the powerful effects of the differences put to work by illusory binary oppositions (Scott 1990: 137-8).

As North American historian Joan Scott has demonstrated in her analysis of the 'equality-versus-difference' debate in the Sears sex discrimination suit, Foucauldian and Derridean methodologies can be forged together in productive ways (Scott 1990). What might such an approach bring to an understanding of the workings of opinion evidence in the Chamberlain trial? How, in particular, did this opinion evidence work to 'induce effects

of truth' as Foucault would have it? How did it come to be privileged over direct evidence such as that of eye-witness accounts? Alternatively, how did binary oppositions work to create an illusion of meaning in the presentation of evidence in court, as Derrida would have it? What were the subtle powerful effects of differences at work in that presentation? But more broadly, what is it that such an approach, one informed by Foucauldian and Derridean theorisations of language, truth, meaning and knowledge could hope to bring to an understanding of this case which might count as 'new'? And, more generally, what does it have to offer evidence scholarship? How, in short, can it live up to the promise of enabling us to see more?

ON THE LIMITATIONS OF CONVENTIONAL ANALYSIS

One way to appreciate the value of a poststructuralist methodology is to consider conventional approaches to evidentiary questions. As we shall see, evidence scholarship on the Chamberlain case leaves plenty of space for further inquiry. In particular, as the adverse finding in the most recent coronial inquiry makes clear, questions still persist today about human and animal involvement in the killing, a decade after a Royal Commission inquiry determined that the Chamberlains' convictions were unsafe. It is therefore abundantly clear that conventional legal and critical approaches have failed to produce a satisfying resolution to persistent doubts and it is unlikely that they ever will. In fact, 'internal' legal commentary is pretty well exhausted in the case. Moreover, as we shall see, critiques developed outside a legal framework have arguably provided more profound insights into the nature of evidence in Chamberlain than mainstream legal discourse. Indeed, they can even suggest an answer to two puzzles which still present themselves in evidence course materials in undergraduate law programs in Australia. First, at a general level:

How - given the existence of rules of evidence and procedure which are widely perceived as being unduly favourable to the accused - do the innocent ever get convicted? (Palmer 1995: 8)

More specifically, why was it that two of the five High Court appeal judges were 'able to recognise a miscarriage of justice which was obvious to a large and growing section of the public but apparently invisible to the other three members of the court?' (Palmer 1995: 15). And why, it might be asked, are so many people, including the coroner presiding over the most recent inquest into the death of Azaria Chamberlain, still unable to 'see' this miscarriage of justice or, more specifically, the evidence for a dingo

having taken the child? Today, fifteen years after the Chamberlains' convictions, the case is still in the media, it is still, officially, unresolved (read: 'open'), and the public remains as divided as ever about Lindy Chamberlain. Evidently, the case bears another reading.

As for evidence scholarship generally, it needs to be said that mainstream evidence discourse leaves much to be desired from any critical perspective. As Donald Nicolson argues, mainstream evidence scholars adhere to 'fact positivism'. This (usually undeclared) theoretical position encourages the view that fact-finding is a neutral and value-free process and that attention should be focussed on 'logic, whether of rules or of proof, and away from the inherently political and partial nature of law and facts' (Nicolson 1994: 726). Furthermore, Nicolson argues that the so-called 'new' evidence scholarship has failed to dislodge such limited preoccupations. The problem, apparently, is twofold. First, the new critical scholarship has been directed at the 'actual workings' of the system of fact-finding rather than at the 'theoretical underpinnings' of this process (Nicolson 1994: 726).⁵ Second, while critical evidence scholars have questioned the rationalist tradition's conceptualisation of reason, they have remained committed to a 'correspondence theory of truth' which defines truth as knowledge corresponding to an objective reality, as well as to 'expletive justice' whereby justice is achieved through the application of substantive law to correct facts. That is, the new evidence scholars have, for the most part, remained wedded to a foundationalist epistemology which has prevented them from developing a fully critical approach to fact-finding (Nicolson 1994: 727-9).⁶ It is Nicolson's view, and I concur, that if evidence discourse could sever its links with its positivistic assumptions about objective facts, factual truth and 'expletive justice', it could break out of its self-limiting preoccupation with the technicalities of law and develop a contextual approach to the theory and practice of fact-finding (Nicolson 1994: 744). Poststructuralist theory, it is suggested, promises a way out of the positivist quagmire of evidence scholarship.

Interestingly, Nicolson draws on feminist analyses of battered women cases to support his argument about 'fact construction'—the constructed nature of facts—in opposition to the positivistic notion of a reality of objective facts 'out there, waiting, neatly packaged, to be discovered and adjudicated upon in terms of law' (Nicolson 1994: 737-9). It is notable that feminist legal scholars, or some of them, have brought a poststructuralist approach to bear on the 'technologies of evidence' presented in these cases in order to expose the ideologically-loaded and far from value-free 'knowledge claims' of 'experts' (O'Donovan 1993: 427-8). What then can such

an approach, one devoted to exposing the constructed or ideologically-loaded nature of facts, including 'scientific' facts, and indeed, the constructed nature of evidence, including scientific evidence, presented to prove such facts, bring to a consideration of the expert opinion evidence in the Chamberlain case?

SCIENCE ON TRIAL: THE CHAMBERLAIN LEGAL FALL-OUT

The prosecution case in Chamberlain depended on circumstantial evidence which was almost entirely scientific evidence. This evidence was much-criticised during and immediately after the trial by expert witnesses for the defence, by other scientists. Because of this criticism and also because the scientific evidence became the subject of three further judicial inquiries—two appeals, one to the Federal Court⁷ and one to the High Court⁸ and a Royal Commission inquiry (Morling 1987)—it inevitably attracted a great deal of judicial and extra-judicial legal commentary. Much of the early critical commentary was directed at the question of the reliability of the prosecution's opinion evidence (Boyd 1984, Walker 1985, Stannard 1985). This led to discussions of the courts' handling of forensic evidence (Gerber 1984) and more generally to discussions of the place of science in the criminal trial and the role of the jury (eg Selinger 1984, Humphrey 1987 and Brown and Neal 1986). As for the issues pertaining to the law of evidence which arose in the case, standard evidence texts refer to the case in relation to questions about the burden of proof; about circumstantial evidence, including the so-called 'Chamberlain direction'; about the tests for appeals against a jury's verdict, and of course, about expert opinion (eg Byrne and Heydon 1991, Gillies 1988 and Gillies 1990).

Critical commentary on the use of expert opinion in the Chamberlain case has ranged from relatively mild rebukes to scathing attacks on the reliability of expert opinion evidence. As regards the judicial commentary, with the exception of Murphy J, who was scathing about the Crown's so-called 'scientific' evidence (Chamberlain 2: 270), most of the judges lined up at the conservative end of the spectrum of opinion when it came to assessing the expert opinion evidence in the case. The trial judge left it for the jury to figure out, notwithstanding any confusion they might be labouring under. Two of the Federal Court appeal judges, Bowen CJ and Forster J, determined that the jury was entitled to accept all of Crown's opinion evidence (Chamberlain 1: 508-9). Two of the majority judges in the High Court appeal, Gibbs CJ and Mason J, determined that while the jury could

not have been satisfied beyond reasonable doubt that the most crucial evidence, that pertaining to blood, was foetal blood, the evidence 'as a whole' entitled it to be satisfied beyond reasonable doubt (Chamberlain 2: 226). A third majority judge, Brennan J, determined that the issue of foetal blood was an open question for the jury to decide (Chamberlain 2: 288). And even though Mr Justice Morling was given a great deal of 'new' information about the prosecution's opinion evidence, he declined to criticise the prosecution's scientific experts for falsifying results or making scientific errors. Instead he restricted his remarks to generalised criticism of the scientists for being quick to comment outside of their expertise (Morling 1987: 310-21).

At the other end of the scale, critics have assailed the admissibility of such unreliable opinion evidence and even, on occasion, the judges themselves, for failing to pronounce more decisively on the dangers attending expert evidence (eg Freckleton 1987, Gerber 1987, Crispin 1987: 358-64, Brown and Wilson 1992). Yet for all of the furor at the time, the Chamberlain case has had a surprisingly ephemeral impact on evidence discourse. Certainly, the controversial 'Chamberlain direction'—the rule that juries cannot make inferences from facts unless those facts have been proved beyond reasonable doubt (Chamberlain 2: 239)—still stirs up debate (eg Ligertwood 1993, Robertson and Vignaux 1991 and 1993). And we still, apparently, need a reminder in the 1990s that the Chamberlain case is symptomatic of a very serious problem—notably, that unreliable scientific evidence can lead to miscarriages of justice when it is used to prove crucial circumstantial facts (Bourke 1993, Rivalland 1995). But with these exceptions, the case features minimally, if at all, in recent evidence scholarship on expert evidence (eg Aitken 1993 and Freckleton 1994).

More to the point, for all the legal commentary on Chamberlain, none of it gets to the heart of the matter—namely, how could some judges see a miscarriage of justice which was invisible to others? Central to this dilemma is the question of what really gives evidence its probative value in a criminal case. Clearly, the status of expert opinion evidence in the case begs a deeper reading than that provided by judges and mainstream legal scholars. For in Chamberlain, law's happy binary oppositions between fact and law, between admissible 'expert' opinion and inadmissible speculation ('mere' opinion) and more deeply, between reason and unreason, broke down in spectacular fashion. Conventional legal analysis cannot get a handle on this problem. Can a poststructuralist reading?

FORENSIC SCIENCE RULES OK

Forensic science was said to have been 'the loser' during the Morling inquiry (Simper, *The Australian* June 4 1987). But during the second coronial inquest, the trial and only to a slightly lesser extent during the appeals, it was a clear winner, at least for the prosecution. During the trial, it successfully paraded itself as the diviner of truth and, it followed here, guilt. Expert opinion evidence on blood (foetal blood, on anti-serum tests for foetal haemoglobin, on blood stains), on damage to baby's clothing, on plant material and on dingoes overwhelmed the direct or first-hand evidence of the people who were there at the 'scene'. The evidence of the white campers, who testified that they heard a baby cry after the time of the alleged throat-cutting, and of the Chamberlains themselves, was no match for expert scientific opinion. As for the Aboriginal trackers, who had identified dingo tracks leading from the tent and the places where the dingo had put the baby down, they were not called at the trial. I have argued elsewhere, in a commentary untouched by poststructuralist insights, that the Chamberlain case exemplified the tyranny of expert 'knowledge' over the knowledge and 'common sense' of ordinary people (Howe 1989: 6). In Derridean terms, common sense was the loser in the court-defined binary opposition between scientific/non-scientific witness evidence. Adding a Foucauldian gloss, the direct or 'local' knowledge of the white eye witnesses and the Aboriginal trackers became classic 'subjugated knowledges' in the courtroom - knowledges 'located low down on the hierarchy, beneath the required level of cognition or scientificity' (Foucault 1980c: 82).

But the question here is this: how did the Crown's opinion evidence—evidence which was to be discredited at the Morling inquiry—come to achieve such an authorial voice, one which was privileged by the jury over the defence experts as well as over the eye witness accounts? Bernard Jackson's theory about the 'narrativisation of pragmatics' provides some clues. He argues that truth is a function not simply of discourse (as Foucault has it), but of 'the enunciation of discourse'. That is, truth is judged not merely according to the 'semantic content' of stories. How persuasively the teller fulfils 'the sincerity conditions of the act of making a truth-claim' is also crucial. Moreover, judgments about the 'pragmatics of the act of enunciation' involve an assessment of the most persuasive enunciative act. How do we tell which is the most convincing story? Our judgments are informed by 'narrative models' which guide us on questions of plausibility —models which are 'constructed through social structures of understanding' that convey meaning (Jackson 1988: 2). In Chamberlain, the experts, or some of them, passed this test of truth with flying colours,

while the eye witnesses and other experts, notably the defence experts, failed dismally. So powerful was the enunciative modality of the Crown expert witnesses that their opinions obliterated the evidence of the eye witnesses and the defence expert witnesses completely. But the question is still: how? How, specifically, did the opinion evidence of the prosecution witnesses win the discursive battle for truth? How did it become the 'pronouncer of verity'? (O'Donovan 1993: 431) What structures of understanding ensured this outcome?

As indicated above, one of Foucault's methodological directives was to explore how discourses induce effects of truth and how regimes of truth are produced. He was especially interested in the emergence of new scientific discursive regimes. More particularly, he was concerned with 'the politics of the scientific statement', that is, with examining 'what effects of power circulate among scientific statements'. But he warned that an examination of 'the effects of power peculiar to the play of statements' should not be confused with a search for 'systematicity' or 'theoretical form' (Foucault 1980b: 112-3). Furthermore, the goal is not to discover the truth, but rather to ascertain 'the ensemble of rules according to which the true and the false are separated' and the specific effects of power which are 'attached to the true'—the ultimate aim being to detach 'the power of truth' from the hegemonic social, economic and cultural forms in which it operates (Foucault 1980b: 132-3). Derridean deconstruction, on the other hand, examines the way binary oppositions operate to create meaning. How did the ensemble of rules work to produce truth in the Chamberlain case? And what play of difference was at work to produce meaning in the case? In short, what processes of 'meaningmaking' (Sherwin 1994: 48) can be detected there?

EXPERT (FORENSIC) SCIENCE/ NAIVE (ACADEMIC) SCIENCE ON SHOW

It has been noted in relation to the Chamberlain case that the status attached to expert opinion evidence is attributable to 'the aura of scientific certainty which created a shield of accurate objectivity' around it (Bourke 1993: 124). Scientific opinion evidence is objective and accurate, non-scientific opinion evidence is subjective and thus prone to inaccuracy. The binaries at work are simple: science/non-science; objective/subjective. But the privileging of the Crown's opinion evidence in the Chamberlain case required a double move of binary oppositions. A polarisation of 'expert' opinion/eye witness testimony fixed the superiority of the former. But the superiority of the Crown's opinion evidence had to be secured against that of the

defence by bringing a second crucially significant binary opposition into play—that between forensic science/ academic science. Here ‘field of expertise’ evidentiary rules pertaining to whether proposed witnesses were qualified in a particular field were manipulated adeptly by the prosecution in order to discredit academic science. The Crown’s dismissal of defence expert witness Barry Boettcher, who disputed the prosecution witnesses blood evidence, typifies this maneuver. Prosecutor Barker, cross-examining Boettcher, suggested that his expert opinion was ‘a mere theory of yours, isn’t it?’ He was ‘the odd man out’, putting his mere academic ‘opinions’ against ‘the leading authorities of the world’ (quoted in Brown, *The Australian* October 19 1982). Boettcher, Barker told the jury, was a man

whose academic life was preceded by life as a school teacher, and who had never been actively engaged in the day to day routine work of testing blood, whose qualifications to enter the arena seemed to be based in part upon a lofty conception 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 the profession (quoted in Freckleton 1987: 64).

Simply, there were ‘scientists who work at teaching’ and ‘scientists who work at testing blood’ and the former should ‘leave the field to the professionals’ (Freckleton 1987: 64). Forensic science was professional, ‘real’, ‘practical’ or hands-on and therefore truly ‘expert’. Academic science was theoretical, supine and naive.

In deploying such a strategy, Barker QC was not inventing the wheel. Barristers routinely use legitimating and de-legitimizing tactics to undermine the other side, including the tactic of pitting ‘academic’ science against ‘practical’ science. Indeed, such considerations shape the way experts are chosen, and if expert testimony remains invulnerable it is usually because barristers, particularly defence barristers, have not adequately prepared themselves for cross-examination (Oteri, Weinberg and Pinales 1989: 251). The Chamberlain case is a case in point. The prosecution strategy of playing a binary opposition between ‘hard’ or practical forensic science and ‘soft’ or theoretical academic science worked perfectly in the trial and the appeals, although it broke down somewhat during the Morling inquiry. During the trial, Boettcher could be dismissed by the prosecution side as an ‘egg-head...No one we’re worried about’ (quoted in Bryson 1985: 422). The appeal judges concurred: Boettcher and another defence expert witness, Professor Richard Naim, had exhibited ‘a rather unbecom-

ing arrogance' (Chamberlain 1: 520). Moreover, in the view of two High Court judges, Gibbs CJ and Mason J, a display of arrogance was not an unusual test for the determination of the validity of scientific opinion (Chamberlain 2: 256). Admittedly, the Crown's neat binary opposition between 'expert' Crown scientists/naive defence scientists nearly came unstuck at the trial when the judge described key prosecution witness Professor Cameron as 'a pathologist of great experience', yet went on to describe Professor Vernon Plueckhahn, a defence witness, as 'certainly no ivory tower man. He's worked very much in the coronial, the criminal enquiry field'. The problem for the prosecution strategy of privileging the opinions of their own scientific experts was that Plueckhahn would not 'have a bar' of Cameron's 'pictorial evidence'—his ultra violet photographic images—which he claimed lead to an impression of human fingers (Boyd 1984: 114). But the federal court appeal judges found a way around this problem. They determined that Professor Plueckhahn could be deemed to have 'less experience' than Professor Cameron 'because of the smaller population of Geelong compared with that of London'. And further, Plueckhahn 'lost his proper scientific detachment and objectivity' when he attacked Professor Cameron as part of the 'London Set' (Chamberlain 1: 525-6).

In this way, the trial and the appeal courts bought into yet another binary opposition which worked for the Crown—that of imported/local expert opinion. This deference to London expertise in the Chamberlain case has been attributed to the Australian 'colonial cringe' (Reynolds 1989: 11). At a deeper level, it can be attributed to the illusion created by the sets of binary oppositions between practical/academic science and between imported (British)/local (Geelong) science. These binaries operated very effectively for the Crown by constructing the prosecution expert witness as the expert witness par excellence - the expert above all other experts. It should also be said that the Crown's strategy of creating meaning through binary oppositions was performed admirably by its scientific experts. For example, Professor Malcolm Chaikin, the textile expert who gave it as his opinion that the baby's clothing had been cut by scissors, rather than torn by canine teeth, was said to be 'a great performer' (Bryson 1985: 407), a consummate exponent of the enunciative modality vund for establishing truth in a criminal trial. According to one observer, he was 'so sure and eloquent in his evidence that he was the one Crown expert whose evidence was virtually unchallenged' (Brown, Sydney Morning Herald June 6 1987). What did it matter that at the Morling inquiry he was to admit that he had expression this opinion without having done the basic experimental work he would have expected of a first-year student? Chaikin, who was found to have

made erroneous assumptions which were not based on 'research work, or any scientific writing' (Morling 1987: 316), was to tell the inquiry that his testimony about cut fibres was 'something I may have felt at the time', something he 'believed at the time' (Brown, *Sydney Morning Herald* November 26 1986). But while his expert opinions were revealed to be mere beliefs and feelings at the inquiry, Chaikin had induced effects of truth to scientific perfection where it mattered most—in his 'expert' testimony at the trial.

The evidence before the Morling inquiry may have been 'radically different' from the evidence presented at the trial (Crispin 1987: 301). It may have demonstrated beyond reasonable doubt that there was no arterial spray of blood under the dashboard, that there was little if any blood in the car, that the teeth of dingoes could cut fabric, that there had been a matinee jacket, that there were dog hairs on the jumpsuit. It may have also discredited the opinion evidence of the prosecution witnesses to the point where Morling J would declare that he 'would not hang a dog' on the Crown evidence that blood was present on the dashboard (quoted in Brown, *Sydney Morning Herald* March 18 1987). But although Morling J found the new evidence that the spray pattern was sound deadening material to be compelling (Morling 1987: 106 and 313), this did not entail a total discrediting of the prosecution opinion evidence presented at the trial. It still had a certain epistemological status which enabled it to attempt to induce new effects of truth at the inquiry. It was still open, for example, for textile expert, Ross Griffith, to proffer his 'brand-new Wiltshire Staysharp knife hypothesis' (Crispin 1987: 290) and for another expert, Canadian pathologist Professor James Ferris, President of the International Association of Forensic Scientists, to come forward and express his opinion that the staining pattern on the clothing suggested that the baby's throat had been cut after death. In his view it was a 'post-mortem decapitation' and there was no evidence to support the dingo theory (Stephens, *Sydney Morning Herald* January 24 1987). Apparently, Professor Ferris felt able to express such an opinion, notwithstanding his declaration that 'what happened in the Chamberlain trial was that expert witnesses were invited to speculate in areas that were probably beyond their normal area of expertise' (quoted in Beale, *Sydney Morning Herald* January 27 1987). No one was about to pick him up on it. Such opinions, after all, were expressed by men said to have a 'great deal of experience' in forensic investigations (Morling 1987: 188).

While Morling J declined to indict the expert opinion evidence presented during the trial in his report, he did conclude that the 'new' scientific evi-

dence left the Crown case 'in considerable disarray' (Morling 1987: 324). He then pondered the question of 'how it came about that the evidence at the trial differed in such important respects from the evidence before the Commission' (1987: 340). He found the answer in the 'over-confident' propensity of expert witnesses to form opinions on matters lying 'on the outer margins of their field of expertise' and also in the failure of the defence to challenge those opinions (1987: 340-1). But, with respect, a deeper answer can be found at the epistemological level, at the level of the production of regimes of truth which depend on the working of power, knowledge and, perhaps most crucially, on dominant understandings of what counted as the relevant 'experience'.

'EXPERIENCE'

In the Chamberlain trial, the twin criteria relied on to distinguish expert opinion evidence from really expert opinion evidence were knowledge and 'experience'. Knowledge could be gleaned from qualifications, and much was made of academic and professional credentials. But knowledge - mere theoretical knowledge - was not enough; 'experience' was of pivotal importance in the buttressing of opinion evidence in order to establish 'knowledge'. Thus, as we have seen, the London-based Professor Cameron was judged to be a pathologist 'of great experience'—greater than that of a local, Geelong-based pathologist. But 'experience' was not assessed solely on a geographical basis during the trial. The Crown could be said to have made the most of the poststructuralist insight that what counts as experience is 'always already an interpretation and in need of interpretation' (Scott 1990: 37) in order to credentialise its own opinion evidence and to discredit that of the defence. The operative 'experience', the experience which counted to establish truth, or at least guilt in the courtroom, was 'practical' forensic experience as Barker made clear to the detriment of the evidence of Professor Boettcher. Much as Boettcher might want to criticise the scientific findings of key prosecution witness Joy Kuhl, she had the relevant 'experience'. She had testified that 'in her experience she had examined a wide variety of forensic exhibits'; she regularly gave forensic evidence in court, and she worked in a forensic laboratory. In short, Boettcher had to concede that Joy Kuhl had 'vastly more experience' in forensic biology than he did (Bryson 1985: 480-1). Barker was to hammer this point home to the jury: with all her experience, if she said it was foetal blood, 'I suggest to you that she ought to know' (quoted in Morling 1987: 48). And it is notable that prosecutor Barker, who appears to have understood very well how the pragmatics of narration worked, spent little time in his final

address to the jury on the mass of forensic evidence at his disposal. He preferred to dwell instead on 'just who was best qualified to testify on the evidence' and the best qualified were, of course, the ones with the most 'experience' (quoted in Brien 1984: 359).

The binary of practical/theoretical experience worked to similar effect in the court discussions about dingo experts. Here the prosecution's manipulation of 'field of expertise' rules was a resounding success. Les Harris, the defence's dingo expert might have knowledge of dingo attacks, but the prosecution would not permit him to testify about blood left on dingoes' prey. Why? Because he was constructed as not having the relevant 'experience' and expertise. He might have been qualified to speak about dingoes but 'the man is not a pathologist dealing with the body of a baby' (Bryson 1985: 489).⁹ In sharp contrast, the British pathologists said explicitly that they knew nothing about dingos, but were still permitted to express opinions about the eating habits and teeth of dingos. For example, at the second coronial inquest, Professor Cameron gave it as his opinion he did not believe that a dingo took the baby, an opinion supported at the inquest by his London colleague Bernard Sims, who declared that 'there is no evidence of any member of the canine family having ever been in contact with Azaria's clothing' (quoted in Maquire, *Daily Telegraph* December 26 1981).

Remarkably, it was not until the Morling inquiry that Professor Cameron's authority to speak about dingos was questioned. Cameron may have been 'a pathologist of great experience in London', but Morling J pointed out that his experience in identifying staining on clothing was limited to his work on the Turin shroud. In Morling J's view, the issue of the blood stain pattern lay on 'the boundary of the field of expertise of the forensic pathologist', and thus could not provide 'the basis for firm conclusions' (Morling 1987:188-9). As for Cameron's expert opinion that the baby's throat had been cut and that there was no evidence of any dingo involvement—opinions not challenged by the defence—that opinion was based on improper inferences and erroneous assumptions. At the trial Cameron had stated that from 'past experiences of assaults by members of the canine family on human victims' he did not require 'experimental evidence' in order to express an opinion about damage to clothing in such attacks. But his 'experience' was limited to dog attacks and, according to Morling J:

He had no experience of the way in which a dingo or other wild animal would treat a clothed baby as prey and, except for his efforts with the Shroud of Turin, he had no experience in ascer-

taining the cause of death where only blood stained clothing of the deceased is available. (Morling 1987: 192)

The new evidence presented at the inquiry about dingo behavior made it clear that Cameron was not justified in holding the opinion that he did not require experimental evidence. Furthermore, he did not have the requisite experience to hold 'expert' opinions about dingos, and objection to his qualification to express such opinions should have been taken by the defence.

Given that Cameron's finding of a bloody handprint on the jumpsuit had led to the re-opening of the investigation and the quashing of the finding at the first inquest, Morling's criticism of the defence for failing to question the prosecution experts' experiential standing to speak about dingos must surely be seen to have been the mildest of rebukes. However, it should be noted that the barrister representing the Chamberlains at the second inquest was alert to the absurdities of Cameron's opinion, opinion which was to pass as 'expert' at the trial. Moreover, in his address to the coroner, Phillip Rice QC actually foresaw how imagination was to be substituted for evidence in the case:

All right, we have Professor Cameron and we have him attending huge numbers of post mortems every year, but I wonder how many times he has been involved in the interpretation of a stain on a jumpsuit...If Your Worship looks at these photographs, goodness - knows...I suppose if one looks at a cloud in the sky one can see Father Christmas very occasionally. (quoted in Brien 1984: 187)

Unfortunately for Lindy Chamberlain (and the credibility of the Australian criminal justice system), the coroner, the trial jury, several appeal court judges and a wide cross-section of the Australian people were to accept Professor Cameron's expert opinion about a bloody handprint. None of them grasped Rice's point that the experiential basis for Cameron's opinion had about as much foundation as that for a vision of Father Christmas in the clouds.

During the trial, scientific experts for the defence found it very difficult to challenge the prosecutor's construction of the relevant scientific 'experience', but occasionally they were successful. For example, when questioned about the experience which gave him standing to speak, Professor Richard Nairn refused Barker's binary oppositions between blood expertise/other expertise by declaring that 'I don't accept that blood is any dif-

ferent from any other tissue.’ He insisted that he had a great deal of experience, some of it forensic, in identifying human and animal tissues. Barker wanted to confine the discussion to blood—that is, to blood talk founded on his notion of ‘experience’—but the trial judge demurred to the witness’s challenge to the operative concept of ‘experience’:

‘I think what he was trying to point out is, you can’t really confine your discussion on immunology only to blood, when you are looking at questions of *experience* and endeavour’. (quoted in Bryson 1985: 494; my emphasis)

However, such challenges were rare and, in any event, ultimately ineffective. The defence team’s efforts to construct an alternative picture of the relevant experience were defeated by the ‘political, economic, institutional regime of the production of truth’ (Foucault 1980b: 133) which determined what counted as ‘knowledge’ and ‘experience’ in the court and which, by extension, helped to determine guilt.

IN THE REALM OF THE SPECULATIVE AND THE IMAGINARY

The Chamberlain case was read at the time as a victory for forensic science. Yet it is notable that some observers felt that the production of truth at the trial and the subsequent determination of guilt had nothing to do with science. Listen to these reporters observing the proceedings:

The reporter sitting next to Brown whispered, ‘God knows how much of this the jury can understand’. ‘It doesn’t matter, Brown said. ‘It’s not the point’. (Bryson 1985: 431)

Again:

‘We’ve answered the Crown, scientist for scientist’...the phrase ‘scientist for scientist’ seemed to miss some deeper and more elusive issue. He wondered if this were a scientific case at all. It had more to do with simpler beliefs. (musings attributed to Malcolm Brown in Bryson 1985: 513)

Simple beliefs, unsubstantiated and demonstrably false opinions and speculations, despite the seemingly best efforts of the law to exclude them, governed the case. The trial judge warned the jury that ‘opinions are opinions;

impressions are impressions' (Chamberlain 1: 598) and he reminded them that: 'We are not in the realm of speculation; we are not in the realm of science; we are in the realm of proof' (quoted in Shears 1982: 226). But no one seems to have heeded his warnings which did not, in any event, get to the heart of the problem, namely, that the Chamberlain case was firmly situated in the realm of scientific speculations which passed as proof. It was left to Murphy J, one of the High court appeal judges, to point out that the jury should have been directed that Cameron's opinion evidence about the handprint was 'not "scientific" but highly imaginative' (Chamberlain 2: 270). Paradoxically, only Lindy Chamberlain, the central non-expert witness, seemed to understand why there was a legal rule against opinion evidence. Invited by the Crown to provide an explanation for the spray pattern under the dashboard, she replied: 'I'm not convinced in my mind how that got there'. Pressed further for suggestions, she insisted: 'It would only be pure speculation':

'You prefer not to speculate', Barker said. 'You have no idea how it got there.' She was firm. 'I'm not going to speculate how it got there'. (Bryson 1985: 466)

If only the experts could have been so circumspect when they proffered their speculations as opinion evidence. Instead, they fictioned truths on the basis of highly dubious, but very effective, imaginative speculations.

The defence barrister, Phillips QC, put the situation exactly—perhaps more exactly than he realised—when he said: 'Your Honour, we submit this is going right into the realm of speculation' (Chamberlain 1: 605). He was referring to leading questions put to a forensic dentist about dingo teeth. The trial judge, Muirhead J, took the point in his address to the jury: the odontologist, Dr Sims, may have been familiar with dog attacks, but he had no experience of dingo attacks and this was important. He advised the jury to note that the odontologists were 'giving evidence in an unfamiliar field' (Chamberlain 1: 587). But Phillips had got it right: the prosecution witnesses had gone into a realm of speculation, undeterred by their lack of familiarity - that is, expertise - in the field of dingo attacks. Moreover, they got away with it. In a bizarre reversal of logic, their wild speculations were to pass as expert evidence, while an eye witness's evidence was reduced to a figment of her imagination. The prosecution suggested that Sally Lowe, the camper who testified that she heard a baby cry after the time of the alleged murder, heard the cry 'in her imagination' (Bryson 1985: 510). By contrast, as we have seen, Professor Cameron, as an expert witness, could testify to seeing a bloody handprint which later turned out to be nothing

other than a figment of his over-active imagination and nothing more than anyone's vision of Father Christmas in the clouds. Such was the power of forensic science's regime of truth. Such was the effect of a binary opposition between imagination and evidence which the prosecution effectively turned against the 'soft' imaginings of eye witnesses and in favour of the 'hard' evidence of the most credentialled experts.

The role of speculation and of imagination in the presentation of expert opinion evidence has attracted some interesting non-legal commentary which provides crucial insights into the production of truth in Chamberlain. In her photographic interrogation of 'The Nature of Evidence' in the case, photographer Catherine Rogers explores how photographs of Lindy Chamberlain became the evidence by which we judged her criminality. She asks:

What is our evidence (and I mean yours and my evidence?)

It is images of HER.

Does she look like a murderer?

What does a murderer look like?

We look at her in the newspapers and on television.

The only information that we have of her is provided for us, and comes from the radio, the newspapers, television, books and magazines. From these sources we make our assessment of her. We have judged her and found her guilty of murder!

Images of HER.

Camera close-ups: the camera scrutinizes her body, her face and presents us with photographs of HER.

An expression frozen in time. From these images we make our assessment of HER. (Rogers 1986)

Reviewing Rogers' work, Helen Grace reads it as an exploration of the 'aesthetics of the forensic' which reveals the extent to which

imaginative interpretation of evidence produces our stories of guilt and innocence, cutting through the possibility of objectivity

which is taken to be the fundamental guarantee of truth before the law. (Grace 1986-7: 6)

More, Rogers' work suggests that the trial can be read as a 'theatre review in which performance is judged according to theatrical and dramatic conventions for tragedy' and guilt is established on the basis of 'aesthetic judgment' (Grace 1986-7: 7). In this reading then, an aesthetic judgment based on an imaginative interpretation of the evidence, including especially the expert opinion evidence, predetermined Lindy Chamberlain's guilt.

There is much to support this reading of the nature of evidence in Chamberlain—evidence which required the jury to leap into the realm of the speculative and the imaginary. Indeed, imagination was accorded pride of place in the Crown's case. Reasonable doubt is the conventional standard of proof in a criminal trial, but what has not been previously realised is that the prosecution in Chamberlain invented a new test, that of impossibility of imagination. Michael Adams, counsel for the Northern Territory Crown and police made this clear at the Morling inquiry. As he put it, the problem with the defence argument that a dingo took the child was that it was offensive to his imagination: 'One thing that offends the imagination is that no murder was committed at all' (quoted in Brown, Sydney Morning Herald March 19 1987). In his closing address to the inquiry, prosecutor Barker elaborated on this new test of proof, impossibility of imagination:

It is really, with respect, impossible to imagine that all that could have taken place with the only blood being the small quantity we have been told about in the tent which stopped at the entrance to the tent and that fact, I respectfully submit, stands squarely in the way of the proposition that all this happened as the Chamberlains would have Your Honour believe. (quoted in Crispin 1987: 313)

The prose is convoluted, but the point is clear: impossibility of imagination was substituted for reasonable doubt as the standard of proof in Chamberlain. That this could happen is eloquent testimony to the power of scientific 'regimes of truth' which created illusions of meaning through carefully orchestrated and hegemonically acceptable binary oppositions between expert opinion and mere speculation. They were powerful illusions. They led to two wrongful conviction, including one for murder, and they played a pivotal role in preventing several of the judges involved in the case and also a wide section of the community from seeing a miscarriage of justice unfold before their eyes. Sadly, there is little evidence that such illusions have lost their force today.

NOTES

1. Remarks attributed to defence lawyer Stuart Tipple in Bryson (1985: 510).
2. Michael Adams, counsel for the Northern Territory Crown and police, quoted in Brown, *The Age* March 19 1987.
3. Denis Barritt quoted in Alcorn, *The Age* December 14 1995.
4. This the latest inquest was arranged at the behest of the Chamberlains who were seeking to have the finding of the second coronial inquest quashed (Green, *The Age* October 1 1995).
5. The same point is made by Twining (1990: 76).
6. Nicolson exempts Jackson's Law, Fact and Narrative Coherence (1988) from this criticism. But it is interesting to note that while Jackson is for discursive frameworks and against the reification of law, he still feels the need to endorse a conception of 'truth-telling' which, as he puts it, avoids 'some of the worst excesses of postmodernism' (1988: 5).
7. Chamberlain v R (No 1) (1983) 46 ALR 493. (Hereafter Chamberlain 1)
8. Chamberlain v R (No 2) (1984) 51 ALR 225. (Hereafter Chamberlain 2)
9. By the time of the Morling inquiry, the defence team seemed to have caught on to this tactic. Defence barristers now worked to ensure that the evidence of ranger Arthur Roff could not be lightly dismissed by presenting him as 'a practical man with much knowledge and experience with dingos' (Morling 1987: 222).

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