INQUEST INTO THE DEATH OF AZARIA CHAMBERLAIN

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THE NEED FOR A FURTHER INQUEST INTO THE DEATH OF AZARIA CHAMBERLAIN

INTRODUCTION

A Brief History

Two inquests have been held into the circumstances surrounding the disappearance and presumed death of Azaria Chamberlain. The first inquest concluded on 20th February 1981 when the Coroner, Mr D. Barritt SM, found that Azaria Chamberlain died as a result of having been taken by a dingo from her parents tent at Ayers Rock on the evening of 17th August 1980.

On 18th November 1981 the Supreme Court of quashed the findings of the first inquest, and directed that another inquest be held.

A second inquest held by the Coroner Mr G. P. Galvin CM, began on 14th December 1981. On 2nd February 1982 the Coroner committed Mrs Chamberlain for trial in relation to the murder of Azaria Chamberlain. The Coroner also committed Mr Chamberlain in relation to a charge of accessory after the fact.

By an indictment presented to the Supreme Court of the Northern Territory on 13th September 1982 Mrs Chamberlain was charged with the murder of Azaria Chamberlain. Mr Chamberlain was charged with being an accessory after the fact. On 29th October 1982 Mr and Mrs Chamberlain were both found guilty as charged.

Appeals to the Federal Court and High Court against conviction were subsequently dismissed.

On 10th July 1984 Mr Galvin CM signed a Form of Inquisition purporting to record findings as to the cause and manner of death of Azaria Chamberlain.

In 1986 the Honourable Mr Justice T. R. Morling was commissioned to inquire into the correctness of the Chamberlain convictions. This resulted in the Royal Commission of Inquiry into the Chamberlain convictions and the Morling Report.

In 1988, on a reference under Section 433 A (1) of the Criminal Code (NT), the Court of Criminal Appeal of the Northern Territory quashed the convictions against Mr and Mrs Chamberlain.

The General Status of the Second Inquest

Section 49 of the Coroners Act 1993 deals with inquests commenced under the former Act and not completed before the commencement of the present Act. Subsection (2) provides:

"An inquest or inquiry commenced under the former Act, and not completed before the commencement of this Act shall, on that commencement, be deemed to be an investigation under this Act and the Coroner conducting the investigation has the jurisdiction, powers and functions vested under this Act."

The second inquest into the death of Azaria Chamberlain conducted by the Coroner, Mr Galvin CM, has never been completed according to the doctrine of functus officio. A coroner is not functus officio until an inquest is completed (See "Jervis on Coroners", 11th ed at 325; also Waller "Coronial Law & Practice in New South Wales" 3rd ed at 35). As the second inquest has not been completed, the inquest is deemed to be an investigation under the Coroners Act 1993, and a coroner conducting that investigation has jurisdiction under that Act to finalise the inquiry into the death of Azaria Chamberlain.

A CHRONOLOGY OF THE SECOND INQUEST

On 14th December 1981 Mr Galvin CM began a second inquest into the death of Azaria Chamberlain. The taking of evidence was concluded on 1st

February 1982. At the conclusion of the evidence submissions were made on 2nd February 1982 by counsel assisting the Coroner and counsel for Mr & Mrs Chamberlain as to whether the evidence was sufficient to put any person on trial pursuant to Section 37 (3) of the former Coroners Act. After giving due consideration to the submissions Mr Galvin CM committed Mrs Chamberlain for trial in relation to a charge of murder. The Coroner also committed Mr Chamberlain for trial in relation to a charge of accessory after the fact. The following extract is taken from the transcript of the proceedings on that day (at 779 of the transcript).

> "Coroner: Thank you, I have had opportunity of considering the matters that have been put to me, particularly in the last two days, and particularly in my capacity as an examining justice, I have considered the evidence tendered in the inquest, that is admissible evidence, and considered my obligations pursuant to the law.
>
> I have examined the evidence in regard to certain propositions, from which inferences can properly be drawn and the evidence which may weaken such inferences. The evidence is, to a large degree, circumstantial. It is my view, having considered all the evidence, that a jury properly instructed could arrive at a verdict. I therefore consider that it is a proper matter for a jury to consider on the two matters that are argued for by the Crown, and I propose to proceed on those two suggested charges.

> I do not propose to make public my findings on the evidence. These will be made available privately to the parties, but my full findings will not be published until after any trial. My reason for this is to not add material for further speculation, as I consider I have a very real obligation to attempt to prevent any prejudice to any jury trial which will take place in the future."

Notwithstanding Mr Galvin's indication that his full findings would not be published until after any trial, the transcript does not record the proceedings as having being adjourned either to a fixed date or sine die. Quite the contrary, at page 781 of the transcript the Coroner announced: "That completes the matters. Thankyou."

Subsequently the Coroner sent a letter to Mr Peter Tiffin, Crown Prosecutor, Department of Law, which was marked "Personal and Confidential". The letter which was undated enclosed a copy of the Coroner's findings of fact in relation to the inquest into Azaria Chamberlain. Those findings of fact are reproduced below:

"I find Azaria Chantel Loren Chamberlain came to her death at Ayers Rock on 17th August 1980.

I now propose to make findings in relation to certain categories of evidence under the following headings:

I. Deceased's Clothing

II. Evidence of Blood in Tent and in the Car

Ill. Whose Blood was Involved

IV. The Black Vinyl Bag

V. Injuries which Caused Death

VI. Presence of Dingos

VII. Tracksuit Trousers Belonging to Mrs Chamberlain

1. DECEASED'S CLOTHING

I find:

1. The clothing of the deceased child had been buried prior to its finding and probably contained the body of the child when buried.

2. Soil type of a PH found on the clothing is consistent with the PH of the soil at the camp and also with the consistency of the soil in clothing and at the site and is inconsistent with the type of soil and PH in the area in which the clothing was found.

3. There is no evidence on the clothing of dragging or catching nor the presence of saliva. It was argued that the absence of saliva was not remarkable as a witness gave evidence of heavy rain in the area. I find that the clothing was not subjected to heavy rain as there is evidence that such heavy rain would have adversely affected the blood staining on the clothing and this is not the case. This lack of dragging and presence of saliva is inconsistent with a dingo carrying the body a distance of some four kilometres.

4. The jump suit was completely done up by studs to the neck which remained closed while the child was bleeding.

5. After the blood had dried the two top studs were undone prior to the clothing being buried whilst containing the body of the child.

6. There is evidence provided by fluorescent examination to suggest the presence of a palm print of a small adult right hand and some evidence of the presence of a left hand caused by a person holding the child when that person's hands were contaminated with wet blood.

7. Single holes or indentations which appear in the clothing could be consistent with teeth marks of an animal but the absence of tissue stains in conjunction with those holes make it inconsistent with an animal holding the body of the child. The evidence clearly establishes that the clothing has

been cut and in places torn by a person or persons and in particular the cut on the collar was made after the blood staining had occurred, It was argued that one area of damage in the general area of the elbow may be consistent with an animal tearing, but the evidence is very strong that such a tearing by an animal would be inconsistent because of the lack of evidence of the presence of tissue staining which would inevitably be involved if an animal had caused the damage to the clothing.

8. Vegetation contamination on the clothing is inconsistent with vegetation found at the scene and inconsistent with the likely contamination which would have occurred if the clothing with a body in it had been carried by an animal. This supports the view that the vegetation contamination was caused by human intervention.

9. The clothes as found were not strewn around the area and this is inconsistent with an animal being responsible for their placement.

10. The clothing was found adjacent to a path near the base of a rock and adjacent to a dingo's lair.

11. Scissors were found in the Chamberlain's car on which there was present human foetal blood staining on the cutting edge and on the hinge areas. There is evidence to support that when comparable scissors are used to cut through blood that blood would be deposited on the cutting edge. An

inference can be drawn that these scissors were used to cut the deceased's clothing. I place no weight on the argument that the subject scissors were unable to cut clothing as this was after the stud had been removed from the scissors to enable certain tests.

CONCLUSION

The evidence in relation to the clothing is consistent with an attempt to simulate a dingo attack on a child by person or persons who recovered the buried body, removed the clothing, damaged it by cutting, rubbed it in vegetation and deposited the clothes for later recovery. Such deposition is indicative that the deposition was made with the knowledge that dingos were in the area.

In addition, there is no evidence to positively support the involvement of a dingo in the taking of the child, the carrying of the body some four kilometres and removing the body from the area where the clothes were found.

II. EVIDENCE OF BLOOD IN THE TENT AS COMPARED WITH THAT IN THE CAR.

A) The tent

1. No blood was found on the inside of the tent.

2. On the outside of the tent as it is being faced there is:

a). a spray pattern on the right hand side wall. This spray pattern ran for some two to three feet and contained a small amount of blood. There is evidence that this is not human blood.

b). two small drops were found on the left hand side rear outside of the tent.

3. Articles in the tent found to have blood:

a). each of the pink and purple babies blankets had small drops caused by a very small quantity of blood.

b). Mr Chamberlain's sleeping bag had eleven small blood spots of pin head size and these were found on both the upper underneath part of the bag.

c). Reagan's parka contained thin smears of blood on the right hand side of the hood, the right front and the left front and both sleeves.

d). an area of blood of approximate size of four centimetres in diameter was found on the cover of a tent mattress which stained through to the actual rubber mattress.

e). Mr and Mrs Chamberlain claim that several other items in the tent were also found to be blood stained, but on examination by Dr Scott this could not be supported. In fact, two items, namely, army bush hats which were said to be blood contaminated were not to be so contaminated. The evidence regarding the tracksuit will be considered later. It is

clear on the evidence that no significant staining was found on the

items made available to Dr Scott for examination.

f). Constable Morris on the night of the incident inspected the interior of the tent using a torch. This revealed “a couple of spots of blood on a couple of blankets and a sleeping bag in the tent”.

g). Mrs Lowe gave evidence of observing a pool of blood on the floor of the tent of the size of approximately a bread and butter plate. There is no objective support for this view and it is quite contrary to the other observations and objective findings. I am unable to find on the evidence that such a pool of blood was present.

B) Evidence of Blood in the Car.

1. Evidence of the presence of foetal blood was found in the following:

a). On the chamois and under the lid of its container.

b). On the carpet in front of the driver’s seat.

c). On the yellow towel found near the rear spare wheel.

d). A considerable quantity was found adjacent to and on a coin on the floor well under the front passenger seat and a flow of blood on the hinge of the right hand side of the passenger seat running down to the seat support and onto the floor of the well under the carpet.

e). An arterial spurt on the underside of the dashboard on the passenger’s side.

f). A pair of scissors from the console.

g). Extensive traces of blood were found in many places over the

inside of the motor car on vinyl surfaces and door handles within the vehicle.

2. It is a reasonable inference that these findings are the remains of a more considerable blood stain and that attempts have been made to clean up all visible blood. It is clear on the evidence, a quite considerable quantity of blood was needed to bring about the flow of blood staining under the hinge cover, on the hinge and down the leg to collect in the floor well.

3. I find that the blood staining of the tent and its contents is very minor compared with the extensive stainings inside the motor vehicle. Save for the large stain on the mattress, the evidence of blood in the tent is consistent with the secondary staining obtained from a person contaminated with blood moving inside the tent and on the articles being placed at a later time inside the motor car.

4. I reject the argument based on blood staining on the baby's clothes and articles in the tent that the injuries were caused by a dingo within the child's basket and blood contamination caused by the child bleeding while being taken through the tent.

III. IDENTIFICATION OF THE BLOOD IN THE CAR AND ON CLOTHING AND OTHER EXHIBITS.

1. The blood in the car was found to be from one year to two years old at the time of examination.

2. The blood on the jump suit was group 0 Hp 2-1 PGM I and is consistent with blood of the children from the union of Mr and Mrs Chamberlain.

3. Because of denaturation and contamination, a full grouping could not be made of the blood in the car, however, there is evidence that the blood from the passenger's seat indicated that it was probably Group 0 PGM, 1. Haptoglobin grouping could not be determined.

4. Human foetal blood was found at several places in the vehicle and its contents. Cross- examination of Mrs KuhI does not in my view lead me to say that her tests were not proper or that they may contain an error. I find on the evidence that there was human foetal blood present from a child not more than six months old.

5. The car was in the Chamberlain's possession from almost new in December 1977 and no other possible explanation for the presence of human foetal blood was given by those persons in evidence at the inquest.

6. The age of the other children is such that their blood would not contain foetal haemoglobin.

I find that the blood in the car was:

1. The blood of Azaria Chamberlain

2. The presence of the arterial spurt and the flow pattern on the seat hinge indicate that the deceased was bleeding heavily when within the car.

It is consistent therefore that the greater volume of blood in the car as compared with the tent means that the staining of articles in the tent was of secondary transfer.

IV. THE BLACK VINYL BAG

1. Trace reactions of blood were found in a number of places and foetal blood was found around the buckle and the zip clasp on the front compartment and human haemoglobin on the zip clasp of the middle compartment. This evidence was obtained from very small traces.

2. Some three tufts or loops were found which are consistent with the tufts produced from cutting the material of the jump suit.

3. Roberta Downes, in her statement, gave evidence of seeing the black bag in an awkward position in front of the driver. Her invitation to move and hold the bag was declined.

Mrs Kuhl was able, from tests conducted, to indicate an area of carpet in the front of the driver a little larger than the base of the bag.

V. CAUSE OF DEATH

1. There is opinion evidence that as the jump suit of the child was done up to the top of the neck that it would not be possible for a canine to cause injuries to the neck without also damaging the jump suit material. Any such wounds without damage to the material would have required the disarticulation of the animals jaws which, on the evidence, I find would be unable to do.

2. The blood flowed into the collar from above but also all around the neck and at the same time. This is inconsistent with wounds which would be expected to be inflicted by an animal at isolated points and is consistent with blood flowing circumferentially, that is all around the neck.

3. Ultra violet fluorescent photograph suggests the presence of a right hand of a small adult gripping the left hand side of the child within the jump

suit while that hand was blood stained. Less well defined is the presence of a left hand. It is reasonable to assume that the child met her death by unnatural causes and that the mode of death had been caused by a cutting instrument possibly circling the neck or at least cutting the vital blood vessels and structures of the neck.

4. I accept Professor Cameron and Sims' evidence as to the cause of death even though they have no specific experience with dingos. On the evidence they are experienced in their field and have considerable experience with canines and there is no evidence before me that their evidence would be affected by lack of specific experience with dingos.

VI. PRESENCE OF DINGOS AT THE SCENE.

There is evidence before me of the presence of dingos that regularly scavenge in the camp area and indeed specific evidence of a footprint adjacent to the tent. The evidence of the Wests as to hearing a growl supports the presence but not the involvement of a dingo.

There is also evidence available as to the capacities of a dingo to carry a child, inflict wounds and remove the body from the jump suit.

Whilst there is evidence as to the presence and the capacity of dingos, there is total lack of objective evidence to support the view that any dingo was

actually involved in the incident that night and to the contrary a considerable quantity of evidence to suggest that a dingo could not have been involved.

VII. TRACKSUIT TROUSERS OF MRS CHAMBERLAIN.

1. The evidence before me is that Mrs Lowe stated that Mrs Chamberlain was not wearing the tracksuit trousers at the barbecue area when observed by her, and that she was wearing a certain floral dress. There is no evidence of blood staining on that floral dress.

2. Mrs Chamberlain claims that she put them on at approximately 10.00pm and that before that they were lying on the sleeping bag in the tent.

3. Mrs Ransom, at Mrs Chamberlain's request took the trousers to dry cleaners in Mt Isa on the 22nd of August. Special reference was made to marks, but she is unable to say if she was told that these were blood marks.

4. Mrs Hansell who worked at the dry cleaners stated that Mrs Ransom told her that they were blood stains. She sketched the stains which consisted of approximately 36 spots.

5. Mrs Chamberlain denied the conversation with Mrs Ransom in that she claimed she did not say that the trousers were blood stained nor that they should be specifically brought to the dry cleaners attention.

6. There is evidence that a person was seated in the front passenger seat while the child was bleeding and the arterial spurt under the dash is consistent with the child being held under the dash adjacent to a passenger's feet.

7. This would be consistent with such a person receiving stains on clothes from the knees to the shoes inclusive.

8. This would be consistent with the pattern indicated by Mrs Hansell although I would have some reservations in relying on that lady's memory of the pattern on the tracksuit trousers.

9. Such a pattern is consistent with the lack of blood staining within the tent and therefore an inference that such a staining did not occur within the tent.

10. Because of dry cleaning and washing no traces of blood remain on the trousers nor the shoes worn at the time.

CONCLUSION AS TO THE EVENTS ON THE 17TH OF AUGUST 1980

1. The evidence of the parties involved supported by Mr and Mrs Lowe is that the child Azaria Chamberlain was alive when held by her mother at the

barbecue area. The evidence of Mrs Chamberlain is that she then took the child to the tent and placed the child in its basket within the tent and returned to the barbecue area. In response to a query from Mr Chamberlain as to hearing a baby cry, Mrs Chamberlain goes in the direction of the tent, sees a dingo with what she thinks is something in its mouth, goes to the tent, inspects the tent and finds that the child is missing and, as a result of those observations, a search for a dingo takes place.

2. From conclusions based on the following evidence, namely:

a) the injuries which in fact brought about death;

b) the presence of the child's blood within the car;

c) the fact that the child was present in the car and bleeding;

d) the considerably larger amount of blood in the car as compared with the tent the latter being consistent with secondary contamination;

e) the lack of objective evidence to support the death by a dingo despite the presence of dingos in the area;

f) some further evidence relating to the black vinyl bag and the tracksuit trousers;

I do find that the death of Azaria Chamberlain was a homicide. I propose to now consider what evidence which exists to support any committal for trial for murder.

1. In relation to Michael Chamberlain, there is in my view, no case in relation to murder. He was seen when the child was alive by the Lowes and

was always in their presence until Mrs Chamberlain claimed that the dingo had taken the child.

2. On all the evidence, the child Reagan was asleep on return from Sunset Strip and remained so until after the disappearance of the child. These observations were supported by independent witnesses.

3. The child Aiden. (*sic*) A statement made by him was tendered in evidence at the inquest denying responsibility. The child was observed just before and again after the claimed incident of the dingo taking the child. It is clear from the evidence of the blood in the car that if such an act was carried out by a seven year old child, there would be some evidence of blood staining on his clothing or on his person. In fact there is no objective evidence linking Aiden in any way with the death of Azaria.

4. At no stage has there been any claim whatsoever that a stranger was involved in the death.

5. In relation to Mrs Chamberlain, I find as follows:

a) She was present with the child at the barbecue when both she and Mr Chamberlain and the independent witnesses say the child was alive.

b) She then left the barbecue area to place the child in the carry basket in the tent which she claimed she carried out.

c) In response to what was thought to be a child's cry, she approaches the tent, claims to sight a dingo with what appeared to be something in its mouth and cries out that "a dingo has got my baby". I find that there is evidence from which it can be reasonably inferred, that this was a false claim and that in fact the child had been killed in the car prior to that time.

6. No motive has been suggested or proved and there is evidence that Mrs Chamberlain appeared to be taking care and consideration for the child on that day. On the other hand, the killing of a child by a mother is not an uncommon happening and as is evidenced by the provision in some jurisdictions for the offence of infanticide. It is an inference that the small hand print on the child's clothing could not be any other person than Mrs Chamberlain and there is evidence of the staining on the tracksuit and shoes.

On all these facts I find there is positive evidence linking Mrs Chamberlain to the homicide and I find that a prima facie case of murder has been made out.

In relation to Mr Chamberlain, there is the question of whether he should be charged with being an accessory after the fact to the murder of the child based on his knowledge of his wife's act from early after the incident and through subsequent investigations.

The relevant evidence is as follows:

1. The family car had headlights, two spotlights and a mobile spotlight. This was not used to assist the search as the car's ignition keys could not be found. In fact the car was moved later with no reference to why the keys could not be found. It is an inference that because of the condition of the car, he did not want it lit even though to do so would have added credibility to the dingo claim.

2. There is the incident of the black vinyl bag and Roberta Downes where he maintained the bag in a very awkward position despite offers to assist. There is also the question of the evidence of some foetal blood in connection with that bag.

3. It is a reasonable inference that Mr Chamberlain knew of the blood staining in the car, that he would have been involved in the cutting of the cloths and placing them in position to be found.

I find that a prima facie case has been made out against Mr Chamberlain for the charge of accessory after the fact."

One can only speculate as to when these findings were reduced to writing. However, one can be reasonably confident that these are the findings that Mr Galvin CM indicated would be made available privately to the parties (at 779 of the transcript).

On 10th July 1984 Mr Galvin CM signed a Form of Inquisition. That document read as follows:

“I do find as follows;

1. Azaria Chantel Loren Chamberlain came to her death at Ayers Rock on the 17th day of August, 1980.

2. Cause of death was extensive wounding to the child’s neck.

3. Alice Lynne Chamberlain has been charged with the murder of the said Azaria Chantel Loren Chamberlain and Michael Leigh Chamberlain has been charged as an accessory after the fact of the said murder.

4. Both persons were convicted of the said charges by the Supreme Court of the Northern Territory on the 29th day of October 1982.”

By way of letter dated 11th July 1984 Mr Galvin CM forwarded the Form of Inquisition to the Registrar, Registrar General’s Office, in accordance with Section 37 (IA) of the former Coroners Act.

On 12th July 1984 the death certificate relating to Azaria Chamberlain was amended. The cause of death was recorded as “Extensive wounding to the neck” rather than “Severe crushing to the base of the skull and neck and laceration to the throat and neck”, which was the verdict returned at the conclusion of the first inquest, the findings of which had been quashed.

There is no record of the inquest having been reconvened after the trial which resulted in Mr & Mrs Chamberlain's convictions and the subsequent affirmation of those convictions in the High Court. Nor is there any record of Mr Galvin CM ever having announced or published the findings of fact (extracted above) which he privately sent to the parties following Mr and Mrs Chamberlain's committal for trial. It would seem that the only findings as to cause and manner of Azaria's death which ever saw the light of day were those recorded by the Coroner in the Form of Inquisition.

THE TRUE STATUS OF THE SECOND INQUEST

As indicated at the outset, it is my opinion that the second inquest has never been completed. The validity of that opinion can only be tested by asking and answering the following question: when is an inquest conducted under the former Coroners Act regarded as having been completed; in other words at what stage is a coroner functus officio.

Before embarking upon a close analysis of the doctrine of functus officio as applicable to a coronial inquest, and the effect of Section 37 (1) of the former Coroners Act (which I consider has enormous bearing on the matter under consideration), I wish to say that what follows is only my opinion based on my understanding of coronial law and practice and its application to the facts of the present case. My opinion is expressed with the utmost respect to the learned former Chief Magistrate who may take an entirely different view of his

status in relation to the second inquest, a view which may, after all things considered, be the correct view.

- The Effect of Section 37 (1) of the Former Coroners Act.

It is logical to start with the provisions of Section 37 (1) of the former Coroner Act.

Section 37 (1) which required the coroner to record certain findings at the conclusion of an inquest provided as follows:

"At the conclusion of an inquest, the Coroner shall record his findings in relation to -

(a) the identity of the deceased person;

(b) when and where the deceased person came to his death; and

(c) the manner and cause of the death of the deceased person, and the particulars required by Section 10 (4) to the ascertained."

Can an inquest be regarded as having been properly completed before a Coroner records his findings in the terms set out in Section 37 (1)?

The meaning of the phrase "at the conclusion of an inquest" is critical. The word "at" may, in one sense, be read as meaning "before", but it cannot be read as meaning "after" (See Doe d Ellis v Owens (1842) 12 U EX 53 at 56

per Abinger CB). In the same case the phrase “at the commencement” received judicial consideration: “the words ‘at the commencement’ here, clearly have reference to time, and can only mean before or at the time of commencing the suit.” Similarly, the phrase “at the conclusion of an inquest” must be read as a reference as to time, and can only mean before or at the time of concluding the inquest.

Section 37 (1A) provided as follows:

“Within 14 days after the conclusion of an inquest, the Coroner shall cause to be forwarded to the Registrar within the meaning of the Registration of Births, Deaths and Marriages Act a copy of his findings and particulars required by subsection (1) to be recorded.”

The use of the phrase “after the conclusion of an inquest” in Section 37 (1A) is not without significance. It clearly indicates that the word “at” which appears in Section 37 (1) means something other than “after”, viz, before or at the same time.

The combined effect of Section 37 (1) and (1A) is that a Coroner’s findings are to be recorded either prior to the conclusion of an inquest or at the same time as an inquest is concluded, It is those findings which are sent to the Registrar of Births, Deaths and Marriages after the conclusion of an inquest. The recording of findings is an integral part of the inquest, and an inquest can

not be regarded as having been completed until and unless the Coroner records his findings in accordance with the provisions of Section 37 (1).

Section 37 (1) imposes upon the Coroner an obligation to record certain findings. The word “record” as used in Section 37 (1) is not defined. What then does it mean?

The Shorter Oxford Dictionary defines the verb “to record” as follows:
“…. to register, set down for remembrance or reference, put in writing or other legible shape, represent in some permanent form.”
Does the word “record” as used in Section 37 (1) bear its ordinary meaning?

The common law acknowledges that there are two dimensions to the recording of coronial findings. First, there are the actual findings made by the Coroner. Unless findings are made there is nothing to record. The second aspect is the reduction to writing of those findings by which means the findings are recorded. In that regard the following commentary appears at 244-245 of Jervis (11th ed):
“After the summing up, the coroner, or the jury if there is one, must consider what verdict is to be returned. The “verdict” in the strict and complete sense consists in the entirety of the answers required to enable the form of inquisition to be completed. The formal record of the inquest, containing the verdict, is called the inquisition. This should be drawn up immediately after

the verdict is given and signed by the coroner and, if there is a jury, by those members of the jury who agree with the verdict."

Section 22 (1) of the New South Wales Coroners Act which is not in dissimilar terms to Section 37 (1) of the former Coroners Act (NT) reads as follows:

"The coroner holding an inquest concerning the death or suspected death of a person shall, at its conclusion or termination, record in writing his findings or, if there is a jury, the jury's verdict, as to whether the person died and, if so-

(a) his identity;

(b) the date and place of his death; and

(c) except in the case of an inquest continued or terminated under section 19 or 21, the manner and cause of his death."

In his commentary on Section 22 (1) in "Coronial Law and Practice in NSW' (3rd ed, at 63 -64) Kevin Waller refers to the twin aspects of a coroners obligation to record findings:

"At the conclusion of the evidence and addresses the coroner may wish to sum up the evidence, giving reasons for his finding. This should be universal practice, as it seems reasonable that the relatives, witnesses and public are entitled to know not only the verdict, but also what evidence was accepted and what weight was given to various factors from which the coroner arrived at his conclusions. The summing up will give him the opportunity of making observations as to safety procedures, recommendations to public bodies,

commendations for bravery, and for giving such warnings to the public as appear apt.

> Jervis, 9th ed p178 supports the delivery of a brief summing up:
>
> If there be no jury, there may be no real necessity for the coroner to sum up the evidence: Even when sitting alone, however, it is as common practice for the coroner to refer as shortly as may be to the evidence that has been given before him and to state publicly what verdict he is recording. As to the Latter point, though there may be no authority upon it, it is clearly in consonance with the general principles of the publicity of our legal processes that a pronouncement of the verdict should be made in each case."

Although there is a minor difference between Section 37 (1) of the Coroners Act (NT) and Section 22 (1) of the Coroners Act (NSW) (the former requires the findings to be merely recorded whereas the latter requires them to be recorded in writing), in both cases the word "record" either presupposes or incorporates the making of findings.

Therefore, an inquest conducted under the former Act could not be regarded as having been completed until and unless the coroner had both made and recorded findings in accordance with Section 37 (1).

Another way of identifying the point at which an inquest held under the old Act is completed is to apply the doctrine of functus officio as it generally relates to coronial proceedings, and as qualified by the provisions of Section 37 (1) of the Coroners Act.

- The doctrine of functus officio in relation to coronial proceedings.

Jowitt's Dictionary of English Law, 2nd ed (1977), defines the term functus officio as 'having discharged his duty; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted."

Osborn's Concise Law Dictionary (sixth ed. 1976) also defines the term "functus officio" as "having discharged his duty". It gives the following example:
"Thus once a magistrate has convicted a person charged with an offence before him, he is functus officio, and cannot rescind the sentence and re-try the case."

Black's Law Dictionary, 5th ed (1979), defines functus officio as "a task performed: having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc, which

has fulfilled the purpose of its creation, and is therefore of no further virtue or effect."

The application of the doctrine of functus officio varies depending on whether the decision maker is performing a judicial function, like a court, or acting in a quasi-judicial or administrative capacity, like an arbitrator or administrative tribunal.

The general rule, derived from the decision of the English Court of Appeal in Re St Nazaire (1879), 12 Ch D 88, that a decision of a court can not be reopened, applies only after the formal judgement has been drawn up, issued and entered (See also Re VGM Holdings Ltd (1941) 3 ALL ER 417 (Ch.D). However, in the case of a decision made by a quasi-judicial or administrative body, the doctrine of functus officio applies once the decision has been made, and the formal recording of the decision has no bearing on the matter. According to the doctrine of functus officio, the function of a quasi-judicial or administrative body is complete once it hands down its decision.

The general rule, derived from the decision of the English Court of Appeal in Re St Nazaire (1879), 12 Ch D 88, that a decision of a court can not be reopened, applies only after the formal judgement has been drawn up, issued and entered (See also Re VGM Holdings Ltd (1941) 3 ALL ER 417 (Ch.D). However, in the case of a decision made by a quasi-judicial or administrative body is complete once it hands down its decision.

The following extract is taken from Sykes, Lanham and Tracey "General Principles of Administrative Law." (Second Edition, Butterworths at para (2043) at 221: ". . . if proceedings have reached a stage that the tribunal has no further duty or function to perform then it is functus officio, and there is nothing on which an order for a writ of prohibition can be grounded: Estate and Trust Agencies (1927) Ltd Singapore Investment Trust (1937) AC 898 at 917-8. However the "something further to be done" may amount merely to executing or carrying out the decision " (R v North: ex parte Oakley (1927) 1 KB 491: Estate and Trust Agencies (1927) Ltd Singapore Improvement Trust, supra, al 918). Moreover, the High Court has vastly contracted the scope of the functus rule by holding in two decisions (R v Hubble: ex parte Broken Hill Ptv Ltd (1920) 28 CLR 456, and R v Connell: ex parte Hetlon Bellbird Collieries (1944) 69 CLR 407) that a lower tribunal or body is not functus officio if anything remains to be done in respect of its decision by anyone even though the act to be done is by another body or tribunal altogether."

It is implicit in the combined judgement of Knox CJ and Gavan Duffy J in ft)L Hubble: ex parte Broken Hill Ptv Ltd (supra) that where a tribunal is empowered to reach a decision the decision maker is not functus officio until a decision is made and published. Even greater force is given to this fundamental proposition in the dissenting judgment of lsaacs J and Rich J. At page 475 of their combined judgement their Honours state: "The Tribunal has finished and is functus officio, as soon as its award - if it is its award - is

promulgated". The word "promulgated" must be read in its normal sense, namely, to make known to the public; to disseminate; proclaim" (See the Concise Oxford Dictionary").

Jervis (11th ed: at 325) says of the application of the doctrine of functus officio to coroners:

"A coroner's power to enquire into a particular death is not general and capable of exercise from time to time, but limited, and in the absence of statutory or judicial authority can be exercised only once. Enquiry into the death having been completed, the coroner no longer had any jurisdiction in relation to it: he is functus officio (R v White (1860) 3 E & E 137; 121 ER. 394)."

In R v White (supra) Cockburn LJ stated:

"We are all of the opinion that this rule must be made absolute. We have the authority of Lord Hale and the uniform practice in support of the proposition, that a coroner cannot hold a second inquest while the first is existing. If the coroner were allowed, mere motu, to hold two inquests, the greatest inconvenience might arise from the inconsistent findings of the respective juries. In holding an inquest, the coroner performs a judicial duty, and he is functus officio as soon as the verdict has been returned."

The last statement suggests that the coroner is functus officio once the verdict is given. However, the headnote to R v White suggests otherwise:

"A coroner has no power, after holding an inquest super visum corporis and recording the verdict, to hold a second like inquest, mere motu, on the same body; the first not having been quashed, and no writ of melius inquirendum having been awarded".

A similar observation is to be found in Jervis (9th ed at 188 see 2 Hale PC 58,59). These observations, if correct, are entirely consistent with the effect of Section 37 (1) of the Coroners Act.

The verdict in the strict and complete sense consisted of the entirety of the answers required to enable the Form of Inquisition to be completed. (See Jervis 11th ed at 244). A similar view is taken by Knapman and Powers, in "The Law and Practice on Coroners: (Thurstan's Coronership, 3rd ed) at para 20.15, viz that the whole inquisition apart from the caption at the top and the attestation parts represents the verdict. The Form of Inquisition is the formal record of the inquest, containing the verdict. The inquisition is drawn-up immediately after the verdict is given and signed by the coroner, and, if there was a jury, by each member of the jury.

In lay terms, the verdict consisted of the conclusion of the coroner or jury (as the case may be) as to cause and manner of death. As David McCann puts it in his article "The Range of Findings open to the Coroner" (in "The Aftermath

of Death" editor Hugh Selby, The Federation Press, 1992):" ... when the word "verdict" is used, it is usually meant to refer to the definitive determination which is the culmination of the proceedings and which is encapsulated in one word which describes how the deceased came by his or her death" (at 12).

In the context of Section 37 (1) of the Coroners Act, findings in relation to the manner and cause of death are tantamount to the coroners verdict. Arguably, the verdict also includes findings in relation to paragraphs (a) and (b) of Section 37 (1) together with the particulars to enable registration of the death.

It will be noted that the text-book writers when describing the point at which a coroner is functus officio employ circular reasoning: a coroner is not functus officio until an inquest is completed. The authorities are also ambivalent: is a coroner functus officio the moment he hands down his findings or only after he has recorded those findings.

As the application of the doctrine of functus officio varies depending on whether proceedings are judicial or administrative (or quasi-judicial) in nature it becomes relevant to determine in what capacity a coroner acts, and discharges his function. If a coroner acts in a judicial capacity, like a court, then the functus officio rule does not apply until the verdict or findings are recorded. If, however his jurisdiction is either quasi- judicial or administrative in nature, his function is complete once he hands down his verdict or findings, and the doctrine of functus officio applies then and there.

The following extract is taken from Jervis (11th ed at 186):

“The coroner’s court today is an (inferior) court of record. A court of record is one of which the acts and judicial proceedings are enrolled in its archives and are conclusive evidence of what is required. Amongst the incidents pertaining to a court of record are the power to commit a person for contempt of court, and immunity for the judge for acts done by him in the execution of his duty. However, although a court, the coroners court is a court of a peculiar kind, being inquisitorial in nature rather than accusatorial. This gives rise to certain important differences in procedure, compared with ordinary civil and criminal courts and also to the rather curious consequence that the inquest verdict is not binding on any person raising the same issue in subsequent litigation.”

The important distinction between an accusatorial process such as a criminal trial, and an inquisitorial process, such as a coroner’s inquest, was stated by Lord Lane CJ in R v South London Coroner, ex parte Thompson (1982) 126 SJ 625 DC:

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

of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

In the same case, Lord Lane CJ described the function of a coroner's inquest in these terms: "The function of an inquest is to seek out and record as many of the facts concerning the death as public interest requires."

Notwithstanding the statement made by Cockburn CJ in R v White (supra) to the effect that in holding an inquest, the coroner performs a judicial duty, there is ample authority establishing that a coronial inquiry is not a judicial proceeding.

In Maksimovich v Walsh (1985) 4 NSW LR. 319 at 327 Kirby P stated:
"Proceedings in an inquiry are not judicial proceedings: see Re: Grosvenor and West - End Railway Terminus Hotel Co Ltd (1897) 76 LT 337; Re: Pergamon Press Ltd (1971) 1 CH 338; Maxwell v Department of Trade and Industry (1974) QB 523; Hearts of Oak Assurance Co Ltd v Attorney -General (1932) AC 392."

In the same case Samuels JA stated (at 337) "It is true that proceedings in an inquiry are not judicial proceedings." For that proposition His Honour relied upon the same line of authority as Kirby P.

In Director of National Parks and Wildlife and Dennis Joseph Barritt and Attorney - General for the Northern Territory of Australia (an unreported decision of the Supreme Court of the Northern Territory, delivered 17th day of October 1990), Kearney J echoed the statements in Maksimovich v Walsh (supra): “A coronial inquiry is not a judicial proceeding” (at 13).

Applying first principles, if a coronial inquest is not a judicial proceeding, then a coroner is functus officio the moment he hands down his findings (although it is arguable that a coroner is not functus officio until the verdict is recorded:

R v White supra 33). However, that general proposition can always be displaced by statute, notwithstanding that coronial proceedings remain administrative or quasi judicial in nature. This is where Section 37 (1) comes into play.

In my opinion the effect of Section 37 (1) of the Coroners Act is that an inquest is not completed, or put another way a coroner is not functus officio, until he or she makes, publishes and records findings in accordance with the requirements of Section 37 (1) of the Act.

However, the doctrine of functus officio does not stop there. The principle that a coroner is functus officio when an inquest is completed presupposes, of course, that the inquest has been validly held and completed. (See Jervis 10th ed at 245: “Thus, if a coroner attempts to make further enquiry and in particular to hold a second inquest into a particular death (the first having

been validly held) without having been ordered to do so by the court, he may be restrained from so acting: R v White (1860) 3 E 7 E 137, 121 ER 394).

Although a coroner may purport to complete an inquest, he may fail to dispose of the matter before him in the manner required either by the common law or by statute. For example, a coroner may fail to give proper findings, fail to publish them, or fail to properly record them in accordance with common law or statutory requirements. If a coroner fails to discharge his duty in any of those respects, the coroner is in the same position as a coroner who makes no disposition at all: the coroner, in both cases, has failed to complete and fulfil the function with which he has been charged. Where a coroner fails to give proper findings or to properly record those findings, the coroner has not rendered a decision, leaving nothing to be completed: quite the contrary. For that reason the coroner can not be functus officio.

Another way of looking at the matter is to treat the purported final decision as a nullity, ie as amounting to no disposition at all in law. Under those circumstances a coroner, not necessarily the same one, is permitted to reconsider the matter afresh and render a valid decision (See Chandler et al v Alberta Association of Architects et all 98962 DLR (4th) 577 at 597.

Apart from substantive matters, a coroner may have cast upon him a duty either by the common law or by statute to observe certain procedures in performing his coronial function. A failure to observe mandatory procedures

may taint the inquest to such an extent that the proceedings, including the coroners findings, are a nullity. Under those circumstances a coroner is permitted to conduct a new inquest and render a valid decision. (See Chandler et al v Alberta Association of Architects el al supra at 597).

- The application of Section 37 (1) and the doctrine of functus officio to the second inquest.

When Mr Galvin CM committed the Chamberlains for trial he stated that he did not propose to make public his findings at that stage. He indicated that his findings on the evidence would be made available privately to the parties, and his findings would not be published until after any trial.

The findings which Mr Galvin CM sent to Mr Tiffin, and presumably also to Mr and Mrs Chamberlain, were headed “Findings of Fact in relation to the Inquest into Azaria Chamberlain”, and were in the terms as reproduced above.

Those findings do not amount to a full discharge of his duty and function as a coroner under the former Coroners Act. Mr Galvin CM did not make findings, or alternatively adequate findings, in relation to the manner of Azaria’s death; nor in relation to the particulars required by Section 10 (4) of the Act to be ascertained. More importantly, despite his intention to do so, the coroner

never announced what verdict or finding he was recording, nor did he publish his findings.

Under the former Coroners Act the practice of a coroner in selecting one of a number of categories to describe the manner of death in a particular case largely followed the English practice. The list of possible coroners verdicts or findings included:

- unlawful homicide
- lawful homicide
- suicide
- misadventure
- accident
- natural causes
- open finding

Mr Galvin's statement that "the death of Azaria Chamberlain was a homicide" cannot be regarded as a proper finding as to the manner of death.

There is no express statement as to whether the homicide was lawful or unlawful. The unlawfulness of the homicide may be inferred from the Coroners decision to commit the Chamberlains for trial. However, it would be unsafe to do so for *two* reasons. The first is that a coroner would be entitled to commit a person for trial for murder in cases where the homicide was ultimately found to be lawful. The second is that the standard of proof for justifying a committal for trial is not the same standard of proof which must be satisfied to support a

coroner's finding of unlawful homicide. The committal test is basically one of whether a reasonable jury properly instructed could on the evidence be satisfied beyond reasonable doubt. The standard of proof which must be satisfied to support a coroners finding of unlawful homicide is arguably higher (See Briginshaw v Briginshaw (1938) 60 CLR 336 and Anderson v Blashki (1993) 2 VR 89) than the committal test. Mr Galvin's reference to the death as being a homicide must be viewed in the context of a decision on his part to commit the Chamberlains for trial.

For other reasons, the mere designation of Azaria's death as a homicide falls far short of a proper coroners finding as to manner of death. There is no express statement as to the time and place of the homicide, nor as to the identity of the person or persons responsible. The involvement of the Chamberlains was only addressed tangentially in the context of committal proceedings, and did not find its way into a coroners finding as to manner of death, as generally understood.

In any event, it will be shown later that once Mr Galvin CM had decided to commit Mr and Mrs Chamberlain for trial, he was, as a matter of procedure, precluded from at that stage returning any finding as to cause and manner of death. Any findings should have been postponed until after any trial,

Finally, the "findings of fact" do not adequately address the particulars required by Section 10 (4) of the Act to be ascertained, although presumably these were

either within the knowledge of the coroner or within his power to ascertain. The requisite particulars include inter alia the deceased's date and place of birth, and usual place of residence. (See Section 25 (2) of the Registration of Births, Deaths and Marriages Act and Regulation 3 of the Registration of Births, Deaths and Marriages Regulations.)

There is no record of the coroner having reconvened the inquest after the trial and exhaustion of the appellate process to announce his findings in accordance with the requirements of Section 37 (1). Nor is there any evidence showing that the "findings of fact" were ever published.

In my opinion, Mr Galvin CM did not complete and fulfil either his common law or statutory function when he prepared his "findings of fact" and sent then privately to the parties. Because his findings of fact do not amount to proper findings and, in any event, were never announced or published, Mr Galvin CM has not completed and fulfilled his duty or function under the Coroners Act. That duty or function remains to be performed. Therefore, Mr Calvin CM is not functus officio.

However, there are even more cogent grounds for holding that Mr Calvin CM is not functus officio. The effect of Section 37(1) is that an inquest is not completed until a coroner records his findings in accordance with the subsection. Therefore a coroner is not functus officio until such time as the findings are recorded.

The Form of Inquisition signed by Mr Calvin CM on 10th July 1984 purports to record the coroner's findings in relation ti the death of Azaria Chamberlain. Although the Form of Inquisition identifies the deceased, the date and place of death and the cause of death, it fails to record any finding, or proper finding, in relation to the manner of death.

In "Coronial Law and Practice in New South Wales" (3rd ed at 67) Waller gives the following explanation of the phrase "manner of death":

"'Manner' is defined in the Shorter Oxford Dictionary 3rd ed as, inter alia, "the way in which something is done or takes place"; the same authority defines "cause" as "that which produces an effect". The effect under consideration is death, so the inquest must find, if it can on the evidence, what has produced the death, and how the death took place. For example, if one is inquiring into a death following a fall from a height, the cause of death would probably be the injuries sustained in the fall. The manner of death would be how that fall came about. Did the deceased jump, was he pushed, or did he fall accidentally?"

The third and fourth paragraphs of the Form of Inquisition are in the form of a narrative of the fact that Alice Lynne Chamberlain and Michael Leigh Chamberlain respectively were charged with the offence of murder and accessory after the fact respectively. Those historical statements of fact do not amount to a finding (or proper finding) as to the

manner of death. Paragraphs (3) and (4) merely recorded facts which would support a finding of unlawful homicide.

At the time Mr Calvin CM signed the Form of Inquisition the evidence clearly supported a finding of unlawful homicide. The Coroners Act did not preclude a finding indicating or suggesting the commission of a criminal offence, nor did the Act forbid the naming of the person or persons responsible. Mr Calvin CM should have recorded the manner of death in the following terms: “On 17th day of August 1980 at Ayers Rock Alice Lynne Chamberlain unlawfully killed Azaria Chantel Loren Chamberlain.”

Mr Calvin CM was duty bound to record a finding in relation to the manner of death of Azaria Chamberlain viz one of unlawful homicide. That duty not having been properly discharged, Mr Calvin CM was not functus officio.

The Form of Inquisition also failed to record the particulars required by Section 10(4) of the Coroners Act to be ascertained. Many of those particulars were within the power of the Coroner to ascertain. Mr Calvin’s failure to complete and fulfil his function in this regard affords yet a further ground for the conclusion that he was not functus officio when he signed the Form of Inquisition on 4th July 1984.

I anticipate it might be argued that my reading of Section 37 (1) is incorrect, and that a coroner is functus officio the moment he hands down his findings.

The argument may go on to maintain that the Form of Inquisition was the Coroners actual decision, ie his findings, and Mr Calvin CM became functus officio when he signed the Inquisition on 10th July 1984. That argument must fail because (a) the Form of Inquisition did not contain findings, or proper findings, in accordance with Section 37 (1) of the Coroners Act and (b) the contents of the Form of Inquisition were never announced in court or published. Mr Calvin's letter to the Registrar of Births Deaths and Marriages dated 11th July 1984 hardly amounted to a pronouncement and publication of such of the findings as were contained in the Form of Inquisition.

An alternate way of looking at the status of the second inquest is to find that by reason of the failure to make publish and record findings as required by the common law and/or statute, Mr Calvin's findings are a nullity, and on that basis it is permissible for the Territory Coroner to reconsider the matter afresh, and render valid findings.

The provisions of Section 49 (2) of the new Act are not without significance. Any inquest not completed under the old Act (which includes an inquest which is a nullity) is brought under the umbrella of the new Act, not in the guise of a continuation of proceedings under the old Act, but as an investigation which enables the death to be considered afresh in the form of a new inquest. It will be noted that in Chandler et al v Alberta Association of Architects et al (supra) the dissenting judges were particularly concerned with the majority decision that the board should be entitled to continue the original

proceedings to consider disposition of the matter on a proper basis. L' Heireux-Dube J (La Forest J concurring) said: "The suggestion that the board's original proceedings be continued is especially disturbing. It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording and intent of the enabling statute. Furthermore, it would erode the protection of fairness and natural justice which every citizen of this country has a right to expect from administrative tribunals." (supra at 586-587). However, those concerns are largely removed, if not fully, if the revisiting of the matter is treated as a consideration of the whole matter afresh.

As stated above, a procedural defect in relation to the conduct of an inquest may taint the proceedings to such an extent that any findings made by the coroner are treated as a nullity, thereby warranting a consideration of the matter afresh. Were the findings made by Mr Calvin CM vitiated by a serious procedural defect?

Section 37 (3) of the Coroners Act at the time of the second inquest empowered the Coroner to commit a person upon his trial for an indictable offence. The subsection provided as follows:

"If the Coroner is of opinion that the evidence given at an inquest or inquiry is sufficient to put any person upon his trial for an indictable offence, the Coroner shall -

(a) if the person is present in Court before him, proceed in the manner as a Justice proceeds under Part V of the Justices Act, when the Justice is of the opinion that the evidence is sufficient to put a defendant upon his trial for an indictable offence; or
(b) if the person is not present in Court before him, issue a warrant for the arrest of the person."

Subsection 3 follows subsections (1) and (IA) which deal respectively with the recording of the Coroners findings at the conclusion of an inquest, and the forwarding of a copy of those findings to the Registrar of Births, Deaths and Marriages within 14 days after the conclusion of the inquest.

It was the practice of the majority of magistrates sitting as coroners under the old Act, including myself, that where there was evidence given at an inquest sufficient to put any person upon his trial for an indictable offence, to commit the person for trial, and to then adjourn the inquest until the criminal proceedings were disposed of. The procedure followed was much the same as that required by Section 38 where after the commencement of an inquest, the Commissioner informs the Coroner in writing that a person has been charged before a Court of Summary Jurisdiction with an indictable offence. For the sake of completeness the provisions of Section 38 at the time of the second inquest are set out below:
"Subject to this section, if after the commencement of an inquest or an inquiry, the Commissioner of the Police Force by writing under his hand,

informs the Coroner that a person has been charged before a Court of summary Jurisdiction with an indictable offence in which the question -

(a) whether the person charged caused the death of the deceased person; or

(b) whether the person charged caused the fire,

as the case may be, is in issue, the Coroner shall not proceed further with the inquest or inquiry until -

(c) if the person is committed for trial for the offence before the Supreme Court - after the date on which the guilt or innocence of that person is finally determined or, if the Attorney-General or the person appointed by the Attorney-General under section 13(2) of the Criminal Law and Procedures Act declines to proceed further in the prosecution, the date on which the Attorney-General or that person appointed by him so declined; or

(d) if the person is not so committed - after the date on which the person is discharged.

(2) The Coroner may, if he thinks fit, continue the inquest or inquiry after whichever date mentioned in subsection (1) (c) or (d) occurs in the particular case, but he shall not make a finding which is inconsistent with the judgement or verdict, if any, of a Court of Summary Jurisdiction or the Supreme Court.

(3) If the Coroner is of the opinion that the inquest or inquiry should not be so continued, he shall dispense with further holding of the inquest or inquiry."

In my opinion, the general practice of coroners outlined above was a correct interpretation of Section 37 of the former Coroners Act, which had to be read in the context of the Act as a whole, and in particular with the provisions of Section 38.

There are, of course, very sound reasons for a coroner adjourning an inquest, and postponing his findings where he has formed the opinion that there is sufficient evidence to put a person upon his trial for an indictable offence, and commits that person for trial.

Where during the course of an inquest it becomes apparent that there might be sufficient evidence to put a person upon his trial for an indictable offence the nature of the coronial proceedings changes, and the proceedings assume the character of committal proceedings. The transformation becomes necessary because although hearsay evidence can be received at an inquest, such evidence is inadmissible at committal proceedings, and plays no part in determining the sufficiency of evidence to put any person on trial.

Different evidentiary standards apply to a decision to commit a person for trial on the one hand, and a coroner's finding, particularly one of unlawful

homicide, on the other hand. The test at committal proceedings in the Northern Territory is one of sufficiency of evidence ie is the evidence capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence? In other words could the accused be lawfully convicted on the evidence. It is not the function of the committing magistrate to from a view as to what a jury would do or not do. Nor is he required to make up as his own mind as to the guilt of the person concerned. By way of contrast, when a coroner gives findings as to the manner and cause of death he, is by definition, required to make up his own mind. The appropriate standard of proof is the civil standard (See Briginshaw v Briginshaw (1938)60 CLR 336 and Anderson v Blaski (1993)2 VR.)]

It would make little sense if a coroner were compelled to discontinue an inquest where he is informed of criminal charges (Section 38) and yet be able to complete an inquest and hand down findings where he commits a person for trial. In both cases, criminal proceedings are on foot, and the person's guilt remains a live issue.

Furthermore, the very mischief which Section 38 seeks to prevent is the possibility of a coroner making findings at the conclusion of an inquest which are inconsistent with the outcome of criminal proceedings. That very same mischief would not be avoided if in the context of Section 37 a coroner were able to record his findings at the same time he committed a person for trial. It is quite significant that neither in Section 37 or elsewhere under the Act is a

coroner precluded from making a finding which indicates or suggests the commission of an offence. Nor he is precluded from naming any person having caused or contributed to the death. Had the Act contained such provisions that might have provided sufficient safe guard against the risk of inconsistent outcomes, but in the absence of such safeguards the risk of a coroner's finding being inconsistent with the verdict in criminal proceedings is a substantial one. Therefore, where a coroner commits a person for trial pursuant to the provisions of Section 37(3), the inquest should then be adjourned and either resumed or dispensed with following the conclusion of any criminal proceedings.

It is, of course, in the interests of the administration of justice that an accused person receive a fair trial. That no doubt forms part of the rationale behind Section 38, and underpins the need for a coroner to adjourn an inquest, and to postpone his findings where during the course of an inquest he commits a person for trial. Mr Calvin CM was fully aware of the entitlement of Mr and Mrs Chamberlain to a fair trial, and for that reason did not announce and publish his findings at the time he committed Mr and Mrs Chamberlain for trial. However, rather than adjourn the inquest, he purported to conclude the inquest, whilst deferring the publication of his findings until after the trial. But those findings were never published.

In my opinion, the second inquest was not properly conducted in accordance with either common law requirements, or the provisions of the Coroners Act.

When Mr Galvin CM committed the Chamberlains for trial he should have (a) adjourned the inquest, (b) following the conclusion of the criminal processes either resumed the inquest or dispensed with further holding of the inquest and, (c) in either case announced, published and recorded findings in accordance with the requirements of Section 37. The failure to do any one of those things was sufficient to the render the inquest incomplete either because the Coroner was not functus officio or because the inquest (including his findings) was a nullity.

THE FORM OF THE FURTHER INVESTIGATION

As the second inquest into the death of Azaria Chamberlain has never been completed, the inquiry into the death of Azaria Chamberlain, which began in 1981, is caught by the provisions of Section 49 of the Coroners Act 1993 which provides:

"(1) In this section the "former Act" means the Coroners Act as in force immediately before the commencement of this Act.

(2) An inquest or inquiry commenced under the former Act and not completed before the commencement of this Act shall, on that commencement, be deemed to be an investigation under this Act and the coroner conducting the investigation has the jurisdiction powers and functions vested under this Act."

In Section 3 of the Act "investigation" is defined as including an inquest.

Like Section 37 (1) of the old Act, Section 34 of the new Act imposes upon a coroner a statutory duty to record certain findings in relation to the death.

Section 34 reads as follows:

"(1) A coroner investigating -

(a) a death shall, if possible, find -

(i) the identity of the deceased person;

(ii) the time and place of death;

(iii) the cause of death;

(iv) the particulars needed to register the death under the Registration of Births Deaths and Marriages Act; and

(v) any relevant circumstances concerning the death."

The second inquest having not been completed, and therefore falling under the provisions of Section 49 (2) of the present Act, a coroner is now required to finalise the inquiry under that Act, and to record the requisite findings. In addition to the requirements of the Act, the inquiry needs to be finalised to enable proper registration of the death under the Registration of Births, Deaths and Marriages Act.

Section 15 (1) of the present Act provides as follows:

"(1) A coroner who has jurisdiction to investigate a death shall hold an inquest if the body of a deceased person is in the Territory or it appears to the coroner that the death, or the cause of death, occurred in the Territory and -

(a) the coroner suspects unlawful killing;

(b) the deceased was, immediately before death, a person held in care or custody;

(c) was caused or contributed to by injuries sustained while the deceased was held in custody; or

(d) the identity of the deceased is not known."

In each of the above four circumstances it is mandatory for the coroner to hold an inquest. In all other cases the coroner has a discretion whether or not to hold an inquest (Section 15 (2) and 16 (1) of the Act).

Although the convictions against Mr and Mrs Chamberlain have been quashed, technically Section 15 1 (a) of the Act applies to the present inquiry and requires an inquest to be held. By definition suspicion is a state of mind involving a mere impression of the existence or presence of a particular state

of affairs without there being adequate proof of the state of affairs. The entertaining of a suspicion as to unlawful killing is entirely consistent with the Morling Report and the decision of the Court of Criminal Appeal of the Northern Territory in Re Conviction of Chamberlain (1988) 93 FLR 239. It is not, however, necessary to link any suspicion to Mr and Mrs Chamberlain to invoke the operation of section 15 (1) (a). The possibility of human intervention (other than by the Chamberlains) is enough to arouse the suspicion and trigger the operation of the Section.

However, even if it were not mandatory to hold an inquest under the new Act, there are a number of considerations which reasonably support the exercise of the Coroner's discretion (under Section 15 (2) and Section 16 (1)) in favour of holding an inquest; and which, regardless of the provisions of Section 15 (1), would have led me to hold a third inquest into the death of Azaria Chamberlain.

The need for finality in relation to the inquiry into the death of Azaria Chamberlain supports the holding of a further inquest. Finality cannot be accomplished by dispensing with an inquest. Dispensation with an inquest is a purely administrative act; it is not a judicial (or quasi-judicial) act. Where an inquest has been dispensed with the decision not to hold an inquest may always be reviewed pursuant to the provisions of Section 16 (2) of the Act. Indeed, a coroner can himself subsequently decide to hold an inquest. The reviewability by a coroner of a decision not to hold an inquest is consistent with the principle that a coroner is not functus officio until an inquest is completed. (See Jervis 11th ed at 75; see also Wailer "Coronial Law and Practice" 3rd ed at 35). Subject to the appellate provisions of Section 44 of the Act, finality can only be achieved if a further inquest is held, culminating in appropriate findings which are consistent with the voluminous body of evidence accumulated over the preceding years.

All the available evidence is conveniently contained in the Morling Report. That Report along with the decision of the Court of Criminal Appeal of the Northern Territory thoroughly considered all the evidence in relation to the circumstances surrounding the death of Azaria Chamberlain. The evidence contained in those two documents and the conclusions drawn therein more than adequately fulfils the requirements of an investigation into the death of Azaria Chamberlain. It is imperative that the contents of those two documents be properly before the Coroner, and be accorded the recognition which they demand. It would not be appropriate for the Coroner to merely read and rely upon the contents of the two documents as a basis for deciding not to hold an inquest. The two documents should be formally before the Coroner in the context of curial proceedings i.e. tendered during the course of an inquest.

Mr and Mrs Chamberlain have an absolute right to be heard in relation to any findings that the coroner may make and record in relation to the cause and manner of Azaria's death. The coroner has, in fact, previously received written submissions in that regard from Mr and Mrs Chamberlain's solicitor, Mr Tipple. The most appropriate way to receive and consider those submissions is in the context of curial proceedings ie during the course of an inquest.

THE FORM OF THE INQUEST

Section 39 of the Act empowers a coroner to conduct an inquest in a manner the coroner reasonably thinks fit.

Due to the voluminous body of evidence gathered over the years, passage of time, and the unlikelihood of getting any closer to the truth than that gleaned by the Morling Inquiry, no useful purpose would be served by holding a full

inquest, involving as it would the calling of further evidence. Mr and Mrs Chamberlain concur.

It should be said that since the re-opening of the Chamberlain matter the Coroners Office has received a great volume of correspondence, purporting to offer new evidence concerning the death of Azaria Chamberlain. Most of the correspondence is from eccentrics, lobbyists or people wishing to convey a partisan message. The balance of the correspondence breaks no new ground. In my opinion, none of the material received adds anything to the large body of evidence made available to various courts and administrative tribunals over the years. It would be futile, and indeed counter-productive, to call as witnesses those persons who have recently come forward claiming to be able to throw light on the cause and manner of Azaria's death.

In light of the above, but at the same time acknowledging the need for a third inquest, the appropriate procedure to be adopted is to hold a "paper' inquest, confined to the tender of the Morling Report, the decision of the Court of Criminal Appeal of the Northern Territory, and the written submissions made on behalf of Mr and Mrs Chamberlain.

Accordingly, a "paper inquest" was held on 29th November 1995. The purpose of that inquest was to finalise the second inquest into the death of Azaria Chamberlain by making formal findings as to the cause and manner of Azaria's death. The scope of the inquest was to consider and record appropriate findings in light of the findings of the Royal Commission of Inquiry into Chamberlain Convictions (The Morling Report) and the decision of the Court of Criminal Appeal in Re Conviction of Chamberlain (1988) 93 FLR 289 together with the Chamberlain's written submissions.

THE EVIDENCE TENDERED AT THE INQUEST

- The Royal Commission of Inquiry into Chamberlain Convictions and the Morling Report. (Exhibit 1)

The Royal Commission into the Chamberlain convictions enquired into the correctness of the convictions against Alice Lynne Chamberlain and Michael Leigh Chamberlain.

The Commissioner, the Hon. Mr Justice T.R. Morling, who constituted the Commission, was required to report on the conclusions to be drawn from the evidence and material information received by him on the following matters:

"(1) On 29th October 1982 in the Supreme Court of the Northern Territory

(a) Alice Lynne Chamberlain was convicted on a charge of murdering her daughter Azaria at Ayers Rock on 17th August 1980.

(b) Michael Leigh Chamberlain was convicted of being an accessory after the fact to that murder.

(2) Doubts or questions have arisen as to their guilt or as to evidence in the trial leading to their conviction."

Regarding the nature and scope of the inquiry, the Commissioner was of the view that in order to resolve the question whether there is a doubt or a question as to Mr and Mrs Chamberlain's guilt, or as to the evidence at their trial, he must ask himself whether the evidence persuades him beyond reasonable doubt that they are guilty or that the evidence at their trial is free from doubt (at page 8 of the Report).

At page 6 of his Report the Commissioner observed:
“Searching enquiries and investigations were made by those assisting me in an effort to ascertain any evidence which might bear upon the circumstances surrounding Azaria’s disappearance and the guilt or innocence of her parents. As a consequence of these enquiries the evidence before the Commission was much more extensive than the evidence at the trial.”

The Morling Report systematically dealt with an enormous body of evidence which was grouped under the following headings:

- The evidence at the trial
- The case put to the jury by the prosecution
- blood in the car - lay evidence
- blood tests - nature and difficulties
- blood in the car - scientific findings
- blood in the tent
- staining on Azaria’s clothing
- the damage to Azaria’s clothing
- soil and vegetable matter on the clothing
- further matters affecting the clothing
- other significant evidence, including inter alia the dingo theory
- evidence of Mr and Mrs Chamberlain
- scientific evidence standards

The Commissioner identified two strands in the Crown case. The first strand related to evidence from which the jury were invited to conclude that Mrs Chamberlain murdered her daughter. The second strand in the Crown case comprised the evidence from which the jury were invited to reject the dingo theory. The Commissioner accepted that much of the evidence was relevant to both strands in the Crown case , and acknowledged that the jury had to consider the whole of the evidence in reaching their verdict.

In answer to the question, “Are there any doubts as to the Chamberlain’s guilt?, the Commissioner stated as follows:
“In my opinion this question must be answered in the affirmative. I do not think any jury could properly convict them on the evidence as it now appears.

I have referred in earlier chapters to the evidence at the trial and to the significant new evidence that is before the Commission. It is apparent from what I have already written in this chapter that the effect of the new evidence is to greatly weaken the case presented against the Chamberlains at the trial.

The jury must have disbelieved Mrs Chamberlain’s story about the dingo. No doubt, in concluding that her story was a fabrication they had regard to all the evidence in the case, as they were entitled to do. Some of the most damaging of that evidence has been shown to be either wrong or highly suspect. Other important parts of it have been shown to be open to serious questions. The effect on her credit of her inability to explain the presence of blood in the car and how the alleged spray of blood came to be on the plate under the dash cannot be known with certainty, but was probably disastrous. If the jury accepted imprint of a hand in blood on the jumpsuit it must have regarded her story as unbelievable and not worthy of consideration.

I have referred elsewhere to the unsatisfactory features in Mrs Chamberlain’s account of having seen a dingo at the tent and I do not underestimate their importance. It can fairly be said that there are inconsistencies and improbabilities in her story and in the various versions she has given of it. However, as I point out in Chapter 15, there are possible explanations for many of the apparently unsatisfactory features of her evidence.

On the other hand, the obstacles to the acceptance of the Crown's case are both numerous and formidable. Almost every facet of its case is beset by serious difficulties. Some of these must now be mentioned.

The Crown is unable to suggest a motive or explanation for the alleged murder. The undisputed evidence is that Mrs Chamberlain was an exemplary mother and was delighted at Azaria's birth. She did not suffer from any form of mental illness nor had she ever been violent to any of her children. She had spent the day with her family on 17 August and had not exhibited any sign of abnormal behaviour or of irritation with Azaria. She was not stressed when she took Azaria to the tent for her expressed purpose of putting her to bed.

If Mrs Chamberlain left the barbecue with the intention of killing Azaria it is astonishing that she took Aidan with her. It would have been easy for her to have left him at the barbecue with his father. Having taken Aidan with her, it is even more astonishing that she would have murdered Azaria, on the Crown case, a few feet from where he was awaiting her return to the tent. It was a great coincidence that Mrs Lowe not only thought she heard Azaria cry, but also thought she heard Mr Chamberlain or Aidan say that he had heard the same cry. It is surprising that Mrs Chamberlain did not attempt to bolster her story by saying that she also heard the cry.

If Mrs Chamberlain did not intend to murder Azaria when she left the barbecue, it is difficult to understand why, for no apparent reason, she should have formed that intention almost immediately after she left it. There is nothing in the evidence which could account for the formation of such a sudden intention.

It seems improbable that Mrs Chamberlain, having murdered Azaria in the car or elsewhere, would have returned to the tent with so much blood on her person or clothing that some of it dripped on to the articles upon which it was found in the tent. Unless she did, there is no explanation, except the dingo story, for the blood found in the tent. Such conduct on her part seems inconsistent with her donning the tracksuit pants (as the Crown alleges) so as to avoid tell-tale signs of blood.

It is extraordinary that the persons present at the barbecue area at the time of and immediately after Azaria's disappearance accepted Mrs Chamberlain's story and noticed nothing about her appearance or conduct suggesting that she had suddenly killed her daughter, and nothing about Mr Chamberlain's conduct suggesting that he knew that she had done so. She must have been a consummate actress if, having killed her daughter, she was able to appear calm and unconcerned when she returned to the barbecue a few minutes after the murder.

The short period during which Mrs Chamberlain was absent from the barbecue made it only barely possible that she could have committed the crime alleged against her. On the Crown case, in the 5-10 minutes she was proved to have been absent from the barbecue she must have -

- returned to the tent;
- done whatever was necessary to ensure that Aidan did not follow her;
- donned her tracksuit pants;
- taken Azaria to the car;
- possessed herself of a murder weapon;
- cut Azaria's throat;
- allowed sufficient time for Azaria to die;
- secreted the body
- done at least some cleaning-up of blood in the car;
- removed her tracksuit pants;

- obtained a can of baked beans for Aidan;
- returned to the tent;
- entered the tent and done whatever was necessary for several articles in it to be spotted with blood;
- collected Aidan; and
- returned to the barbecue.

The length of time which, on the Crown case, must have elapsed between Azaria's throat being cut and her death is of some importance. It seems probable that if Mrs Chamberlain murdered the child she would not have returned to the tent before she was satisfied the child was dead. If both Azaria's carotid arteries were severed it probably would have taken about 2-3 minutes for her to have died. The minimum time would have been half a minute. It would have taken much longer, up to 20 minutes, for her to have died if her jugular vein, and not her carotid arteries, were severed. The blood staining on the jumpsuit indicates, according to all the experts, an absence of arterial bleeding.

Young though he was, it is very difficult to accept that Aidan did not notice that his mother took Azaria away from the tent and returned without her and did not comment on that fact when his sister was found to be missing.

It was indeed fortuitous that a dog or dingo should have been heard to growl and a dingo should have been seen not far from the tent very shortly before Azaria disappeared, and that on the night 0117 August canine tracks should have been found hard up against the tent.

It is surprising that, if Mrs Chamberlain had blood on her clothing, nobody noticed it in the hours after Azaria's disappearance. If Azaria's body was left in the car after the alleged murder, it was foolhardy for Mrs Chamberlain, in

the presence of the Demaines and their dog, to open the car door and give the dog the scent of Azaria's clothing. The risks involved in the Chamberlains burying and disinterring Azaria when there were so many people who might have observed them were enormous. It is difficult to explain how the variety of plant material found on Azaria's clothing could have got there if she had been murdered, It seems improbable that, the murder having been so cleverly accomplished and concealed, the clothing would have been so left as to invite suspicion.

If Mrs Chamberlain told her husband that she had killed Azaria, it was extraordinary conduct on his part to leave his two sons, the younger of whom was aged only 3 years, in her sole custody on 18 August.

Mr and Mrs Chamberlain's conduct at Ayers Rock on 18 August was strange whether or not Azaria had been murdered. Their conduct upon their return to Mount Isa is inexplicable if she had murdered Azaria. For instance, it is almost incredible that she should have told people there was blood on her shoes if she had murdered her daughter. Further, it was bravado of a high order for Mr Chamberlain to tell the police at Cooranbong that they had taken possession of the wrong camera bag if Azaria's body had been secreted in the one which he then produced.

The Crown has no direct evidence of the Chamberlains' guilt to overcome the cumulative effect of all these formidable obstacles. Even so, their guilt would be established if, in spite of so many considerations pointing to their innocence, the conclusion was reached that it had been proved beyond reasonable doubt that a dingo did not take the baby. In the light of all the evidence before the Commission, I am of the opinion that such a conclusion cannot be reached.

I shall state in summary form the effect of the evidence that leads me to hold this opinion. In doing so, it will be necessary to recapitulate some of the matters to which I have already referred in order to give a complete picture of the material (save for the Chamberlains' own testimony) which is directly relevant to this part of the Crown's case. It is also necessary to keep in mind that, under ordinary circumstance, it would be highly unlikely that a dingo would enter a tent, take a baby from it, carry it several kilometres to a den and there consume the body leaving the clothing in a position similar to that in which Azaria's clothing was found. But the question of Mrs Chamberlain's guilt or innocence is to be determined on the evidence and against the background of the circumstances as they existed at Ayers Rock in August 1980. It is not to be determined on the basis of preconceptions as to the likelihood of unusual animal behaviour.

Before August 1980 dingoes in the Ayers Rock area frequented the camping area. At that time there were many dingoes in the area, some 18-25 of which were known to visit the camping area. A number of attacks were made by dingoes on children in the months preceding Azaria's disappearance. In none of these did any child suffer serious injury.

About twenty minutes before Azaria disappeared Mr Haby saw and photographed a dingo which walked towards the Chamberlains' tent. A few minutes before the alarm was raised the Wests heard a dog growl.

On the night of 17 August dog tracks were observed on the southern side of and very close to the Chamberlains' tent. The same night Mr Roff and Mr Minyintiri, both experienced trackers and familiar with dingo behaviour, saw tracks of a dog carrying a load which they believed to be Azaria. It was within the bounds of reasonable possibility that a dingo might have attacked a baby and carried it away for consumption as food. A dingo would have been

capable of carrying Azaria's body to the place where the clothing was found. If a dingo had taken Azaria it is likely that, on occasions, it would have put the load down and dragged it.

Hairs, which were either dog or dingo hairs, were found in the tent and on Azaria's jumpsuit. The Chamberlains had not owned a dog for some years prior to August 1980.

The quantity and distribution of the sand found on Azaria's clothing might have been the result of it being dragged through sand. The sand could have come from many places in the Ayers Rock region. The sand and plant fragments on the clothing are consistent with Azaria's body being carried and dragged by a dingo from the tent to the place where it was found. It is unlikely that, if the clothing had been taken from the Chamberlains' car, buried, disinterred, and later placed where it was found it would have collected the quantity and variety of plant material found upon it.

It would have been very difficult for a dingo to have removed Azaria from her clothing without causing more damage than was observed on it. However, it would have been possible for it to have done so. Mr Roff, the chief ranger at Ayers Rock and a man of great experience, thought that the arrangement of the clothing when discovered was consistent with dingo activity. Other dingo experts disagreed. I think it is likely that a dingo would have left the clothing more scattered, but it might not have done.

The blood found in the tent was at least as consistent with dingo involvement in Azaria's disappearance as it was with her murder in the car. The pattern of blood staining on the clothing does not establish that the child's throat was cut with a blade.

The absence of saliva on Azaria's jumpsuit which was not conclusively proved at the trial is made more explicable by the finding of the matinee jacket which would have partially covered it. The fact that no debris from the baby's body was found on the jumpsuit is also made more explicable by the finding of the jacket.

There is a great conflict of expert opinion as to whether the damage to the clothing could have been caused by a dingo. It has not been shown beyond reasonable doubt that it could not have *been.* There were marks on plastic fragments of the nappy similar to marks made by a dingo on another nappy used for testing purposes. However, there was no blood on the nappy.

There was a dingo's den about thirty metres from the place where the clothing was found. There is no evidence that the existence of the den was known to the Chamberlains or, for that mailer, to anybody else and in fact it was unknown to the chief ranger and his deputy.

It is impossible in the above summary to capture the whole effect of the voluminous evidence given on the matters which bear upon the dingo hypothesis but, taken in its entirety, it falls far short of proving that Azaria was not taken by a dingo. Indeed, the evidence affords considerable support for the view that a dingo may have taken her. To examine the evidence to see whether it has been proved that a dingo took Azaria would be to make the fundamental error of reversing the onus of proof and requiring Mrs Chamberlain to prove her innocence.

I am far from being persuaded that Mrs Chamberlain's account of having seen a dingo near the tent was false or that Mr Chamberlain falsely denied that he knew his wife had murdered his daughter. That is not to say that I accept that all their evidence is accurate. Some of it plainly is not, since

parts of it are inconsistent with other parts. But if a dingo took her child, the events of the night of 17 August must have been emotionally devastating to Mrs Chamberlain. Her ability to give a reliable account of the tragedy may have been badly affected by her distress. The inconsistencies in her evidence may have been caused by her confusion of mind. Where her evidence conflicts with the Lowes' account of what she said and did in the few seconds after she commenced to run back to the tent, it may be the Lowes' recollection, not her, that is at fault. The belief that people might unjustly accuse her of making up the dingo story might have led her, even subconsciously, to embellish her account of what happened, and this may explain some of its improbabilities. Her failure to see Azaria in the dingo's mouth is explicable if, as is quite possible, there were two dingoes, not one. These considerations afford at least as convincing an explanation for the apparently unsatisfactory parts of her evidence as does the Crown's claim that she was lying to conceal her part in the alleged murder. Having seen Mr and Mrs Chamberlain in the witness box, I am not convinced that either of them was lying.

In reaching the conclusion that there is a reasonable doubt as to the Chamberlains' guilt I have found it unnecessary to consider the possibility of human intervention (other than by the Chamberlains) in the time between Azaria's disappearance and the finding of her clothes. It is difficult, but not impossible, to imagine circumstances in which such intervention could have occurred. It is not inconceivable that an owner of a domestic dog intervened to cover-up its involvement in the tragedy or that some tourist, acting irrationally, interfered with the clothes before they were later discovered by others. There is not the slightest evidence to support either of these hypotheses but the possibility of human intervention is another factor which must be taken into account in considering whether the evidence establishes the Chamberlains' guilt beyond reasonable doubt. It was so recognised in some of the judgments given on the appeal to the High Court."

- The decision of the Court of Criminal Appeal of the Northern Territory - Re Conviction of Chamberlain (1988) 93 FLR 239. (Exhibit 2).

On a reference under Section 433A(1) of the Criminal Code(NT) the Court of Criminal Appeal of the Northern Territory quashed the convictions against Mr and Mrs Chamberlain, having found in the light of fresh evidence that there had been a miscarriage of justice in former proceedings.

Part of the judgement of Nader J appears below:

“In my opinion, upon a consideration of the adopted findings,(ie the findings of the Morling Inquiry) there is a real possibility that Mrs Chamberlain did not murder Azaria and, therefore, the convictions of the Chamberlains ought to be quashed and verdicts and judgements of acquittal entered. Not to do so would be unsafe and would allow an unacceptable risk of perpetuating a miscarriage of justice.

Having said so much, I would like to touch on a matter peripheral to this Reference. It may be thought that the mere acknowledgment of a doubt about the guilt of Alice Lynne Chamberlain is a half-hearted way for the matter to end. I would like to examine that sentiment for a moment. It is rarely that a criminal trial positively establishes the innocence of an accused person. If it does so, it does so by accident. The task of a criminal court is to ask and answer the question whether it is satisfied beyond reasonable doubt that the accused is guilty of the crime charged. If it is not so satisfied, the verdict should be one of “not guilty”: that is a verdict of acquittal. From the point of view of a criminal court, a verdict of “not guilty signifies that the jury is not satisfied beyond reasonable doubt of the guilt of the accused; it does not formally signify a positive jury finding upon the evidence that the accused is innocent. Such a positive finding is not the role of a criminal court, nor of this

Court. That is because under the criminal law a person is presumed innocent until the contrary is proved. It is not the court's function to establish innocence because, in the absence of a conviction, innocence is presumed:
no finding is required. If the accused is not found guilty the presumption of innocence continues. So it is here. I have expressed the opinion that doubt exists as to the guilt of Mrs Chamberlain. I would categorise that doubt as a grave doubt. The doubt has arisen as a result of considering fresh evidence, in particular, the findings of the Commission. It is the existence of that doubt that demands the quashing of the convictions and the verdicts and judgments I propose. The convictions having been wiped away, the law of the land holds the Chamberlains to be innocent." (at pages 253-254)

SUBMISSIONS MADE ON BEHALF OF THE CHAMBERLAINS

Mr Tipple, the solicitor for Mr and Mrs Chamberlain, made the following submissions:

"It is submitted by the parents of Azaria Chamberlain that the appropriate finding, in the event that the Coroner is prepared to adopt the procedure referred to above, is that Azaria Chamberlain died as the result of accident having been removed by a dingo from the family tent in the camping ground at Ayers Rock where she was sleeping. This was effectively the finding of the first Coronial Inquest held in 1980 and 1981 at Alice Springs. In the circumstances that have occurred, the return of "an open finding" would, in our submission, be inappropriate because it would do less than justice to the findings of the Morling Report and would lead to speculation that the death was due to causes other than accidental causes. The history of the Chamberlain "saga" reveals that there have only been two alternative propounded causes of Azaria's death; namely, that she died as the result of accident through being taken by a dingo or, alternatively, that she died at the hands of her parents. It is submitted that now that the innocence of the Chamberlains has been authoritatively restored and proclaimed, it would lead

to great mischief if their right to the status of innocence was undermined by the formal recording of “an open finding” in relation to the death.

It is our submission that if the Coroner is prepared to accept the findings of the Morling Commission (as we submit he should be), there is ample justification to be found in those findings for the recording by the Coroner of a finding as to the manner and cause of the death of Azaria in the way in which we have submitted it ought to be.

The substance of Mr. Justice Morling’s findings upon which we submit the Coroner is entitled to act and ought so to act, is to be found at pages 333-342 of his Report. We annex a copy of these pages to these Submissions as Annexure “A”. It was these findings upon which the Court of Criminal Appeal of the Northern Territory was prepared to act in quashing the convictions of the Chamberlains (op.cit. Pages 243-253). It should be noted that the Court, having adopted and acted upon those findings, concluded as follows (Page 254)

“Having said so much, I would like to touch on a matter peripheral to this Reference. It may be thought the mere acknowledgment of a doubt about the guilt of Alice Lynne Chamberlain is a half hearted way for the matter to end. I would like to examine that sentiment for a moment. It is rarely that a criminal trial positively establishes the innocence of an accused person. If it does so, it does so by accident. The task of a criminal court is to ask and answer the question whether it is satisfied beyond reasonable doubt that the accused is guilty of the crime charged. If it is not so satisfied the verdict should be one of “not guilty” : that is a verdict of acquittal. From the point of view of a criminal court, a verdict of “not guilty” signifies that the Jury is not satisfied beyond reasonable doubt of the guilt of the accused; it does not formally signify a positive jury finding upon the evidence that the accused is innocent. Such a positive finding is not the role of the criminal court, nor of this court. That is because under the criminal law a person is <u>presumed</u>

innocent until the contrary is proved. It is not the court's function to establish innocence because, in the absence of a conviction, innocence is presumed and no finding is required. If the accused is not found guilty the presumption of innocence continues. So it is here. I have expressed the opinion that doubt exists as to the guilt of Mrs Chamberlain. I would categorise that doubt as a grave doubt. The doubt has arisen as the result of considering fresh evidence, in particular, the findings of the Commission. It is the existence of that doubt that demands the quashing of the convictions and the verdicts and judgements I propose. The convictions having been wiped away, the law of the land holds the Chamberlains to be innocent."

It is our submission that this passage accurately states the law and the status of the Chamberlains. It has never been suggested otherwise than that, if the Chamberlains are innocent of any involvement in the disappearance of their daughter, then their daughter died in accidental circumstances. It is submitted that to record a coronial finding which is not consistent with that approach would be inappropriate. Indeed it is further our submission that the findings of the Morling Commission (which we have attached as Annexure "A") confirm that approach when (at Page 388 of his report) His Honour Mr. Justice Morling says

"It is impossible in the above summary to capture the whole of the effect of the voluminous evidence given on the matters which bear upon the dingo hypothesis but, taken in its entirety, it falls far short of proving that Azaria was not taken by a dingo. Indeed the evidence affords considerable support for the view that a dingo may have taken her. To examine that evidence to see whether it has been proved that a dingo took Azaria, would be to make the fundamental error of reversing the onus of proof and requiring Mrs. Chamberlain to prove her innocence."

“In my opinion if the evidence given before the Commission had been given at the trial, the trial judge would have been obliged to direct the jury to acquit the Chamberlains on the grounds that the evidence could not justify their conviction.”

It is clear from the findings of Morling J. that there was no reliable evidence to support the allegation that the Chamberlains were in any way responsible for the disappearance of Azaria. Furthermore, although it was not incumbent upon the Chamberlains to prove it, the evidence before the Inquiry went a long way towards suggesting that Azaria had been taken by a dingo.

After examining “the dingo evidence” Mr. Justice Morling concluded
“It is impossible in the above summary to capture the whole effect of the voluminous evidence given on the matters which bear upon the dingo hypothesis but, taken in its entirety, it falls for short of proving that Azaria was not taken by a dingo. Indeed, the evidence affords considerable support for the view that a dingo may have taken her.”

This finding was adopted by the Court of Criminal Appeal of the Northern Territory (page 251). If these findings are translated into a Coronial Inquiry, it is respectfully submitted that they provide adequate foundation for formally recording that Azaria Chamberlain died accidentally as a result of being taken from her tent at the camp site at Ayers Rock, by a dingo. Having regard to the wide publicity given to the findings of the second Coronial Inquiry in 1981/2, it is submitted that it should also be formally recorded that Azaria’s parents were in no way involved in her disappearance.”

THE OFFICE OF CORONER

The Office of Coroner is over eight hundred years old. In recent times it has evolved into a modern and effective investigative agency and watchdog into the circumstances of avoidable loss of life. It is also a basic function of the coronial investigative process to reassure the public that homicides are not going undetected.

Not only are today's coronial investigations carried out thoroughly, but they are truly independent. The coronial system is the perfect embodiment of the priceless tradition of judicial independence. Its hallmarks are independence, impartiality, fairness and efficacy.

The role of the modern coroner was perhaps best summed up by the former Attorney-General for New South Wales, the Honourable J.A.R. Dowd MP in a paper entitled "The Role of the Coroner", delivered at a public seminar entitled "Coronial Inquiries", convened by the Institute of Criminology at Sydney University Law School on the 10th of October 1990:

"Coroners are required to act in the public interest, difficult though it may often be to determine what the public interest requires. They are not the mouthpieces for particular pressure groups or lobbyists, nor should coronial inquiries be used as a means of conveying a partisan message to the public via the publicity often given to coronial hearings."

THE PURPOSE OF AN INQUEST

An inquest is a fact-finding inquiry, the purpose of which is to establish the identity of the deceased and how, when and where the deceased died. One of the underlying purposes of an inquest is the satisfaction of the legitimate concern of next of kin and relatives as to the cause and manner of death.

Under Section 34 of the Coroners Act, a coroner investigating a death is required to find if possible,

(i) the identity of the deceased person;

(ii) the time and place of death;

(iii) the cause of death;

(iv) the particulars needed to register the death under the Registration of Births Deaths and Marriages Act; and

(v) any relevant circumstances concerning the death."

It is important to keep in mind that a coronial inquiry is not concerned with the determination of any question of criminal or civil liability or with the apportionment of guilt or the allocation of blame: R v HM Coroner fro North Humberside and Scunthorpe; Ex parte Jamieson (1994)3 WLR 82 at 100.

THE STANDARD OF PROOF IN CORONIAL PROCEEDINGS.

Surprisingly little has been said or written about the evidentiary standard in coronial proceedings.

Jervis (11th ed, at 249 and 252) states that the standard of proof in unlawful killing and suicide cases is the criminal one ie beyond all reasonable doubt. (See R v West London Coroner. ex **p** Gray (1988) OB 467 at 477; R v North Northumberland Coroner, ex p Armstrong (1987) 151 JP 773, 785, R v Wolverhampton Coroner. ex p McCurbin (1990) IWLR, 719, 728; R v Newbury Coroner, ex p John (1991) 156 JP 456, 457, and R *v* Hampshire Coroner. Ex p Att-Gen (1990)155 JP 190).

According to Jervis (11th ed at 249) the standard of proof in all other cases (for example natural causes, accident and misadventure) is the civil standard, ie balance of probabilities.

Kevin Waller in "Coronial Law Practice in NSW' (3rd ed) addresses the standard of proof in coronial cases. At page 64 he says:
"It is suggested that, because of the importance of the matter, the standard of proof appropriate to a finding that death has occurred should be the higher degree of probability referred to in Briginshaw v Briginshaw (1938) 60 CLR 336."

At pages 69-71 the following commentary appears:
As was pointed out in … … in the case of Southhall (1912) 5 BW CC 251, that suicide is never to be presumed and that there should be a presumption against suicide" (Croom-Johnson in R V Huntbach; ex parte Lockley (1944) 3 ALL ER 453).

Suicide is not to be presumed. It must be affirmatively proved to justify the finding "(Sellers U in RE Davis, ibid, and see ex parte Barber, (1975) 3 ALL ER 538).

The fact that a body is found at the foot of a cliff; or in a gas filled room; or to contain an overdose of drugs, does not of itself justify a finding of suicide. There must be further evidence showing an intention on the part of the deceased to take his own life. The standard of proof required will not be the criminal standard (note the extensive use of the word "probable" in re Davis, ibid), but, could well be the higher civil standard, applied in Briginshaw v Briginshaw (1938)60 CLR 336 at 361).

If the coroner is not satisfied that suicide has been proved, but remains a possibility, an open verdict should be returned.

In the United Kingdom case of R v West London Coroner: Ex parte Gray (1988) QB 467 the Divisional Court broke new ground by holding that a finding of suicide had to be established beyond reasonable doubt. The subsequent decision of R v Wolverhampton Coroner; Ex parte McCurbin

(1990) 1 WLR 719 conceded that there was a “technical distinction” between the standard of proof in criminal proceedings and that in coronial proceedings, but said that so far as a verdict of unlawful killing was concerned, the gravity of the issue was so high that the result would be the same whichever standard was applied.

There is no case in Australia which suggests that the standard of proof in a coroner’s court is other than the civil standard.”

However, there is now clear authority in Australia which holds that the standard of proof to be applied by a coroner in investigating a death is the civil standard ie. the balance of probabilities as explained in Briginshaw v Briginshaw (See Anderson v Blashki (1993) 2 V R 89). Anderson v Blashki represents a clear departure from the standard of proof applied in coronial proceedings in England in cases of unlawful killing and suicide.

The facts in Anderson v Blashki were that the Coroner after having held an inquest into the death of an elderly lady at a private hospital, found that a nurse employed at the hospital had contributed to the death of the deceased by assaulting her. The nurse applied for an order, pursuant to 5 59 of the Coroners Act 1985 (Victoria), that certain of the coroners findings be declared void.

The presiding judge on appeal, Gobbo J, held that there was insufficient evidence to sustain a finding that the applicant had assaulted the deceased and injured her, thereby contributing to the death of the deceased. His Honour dealt with the appropriate standard of proof in the following manner (at 95-96):
“The Coroners Act 1985 does not specify what standard of proof a coroner is required to apply. Section 19 of the Act and the scheme of the Act splits the traditional dual function of the coroner, both to investigate and to commit for trial if appropriate. The procedure now is one of investigation without power

to commit for trial. There is no precise case law to assist in the question of what is the appropriate standard of proof to be used in relation to the 1985 legislation and Parliament has provided no assistance either in the debates or by way of explanatory notes.

Counsel for the plaintiff submitted that, in an inquiry where the possible finding is that a serious assault was committed which occasioned the death of the deceased, a criminal standard of proof was appropriate. Counsel for the coroner submitted that the more appropriate standard was that of the lower civil standard.

In Briginshaw v Briginshaw (1938) 60 CLR 336, at pp 362-3 Dixon J, as he then was, provided a classic statement as to the appropriate standard of proof to be used in civil cases: ". ..reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences... When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues... But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected."

In applying Dixon J's decision, Blackburn C J in the Supreme Court of the Australian Capital Territory decision of Barten v Williams (1978) 20 ACTR 10 held that the balance of probability standard is not to be applied merely mechanically on a serious issue such as a decision which could lead to the cancellation of the builders licence and determine his capacity to earn his

livelihood as a builder. The civil standard is qualified so that the court can regard a fact as established only if it can entertain a reasonable satisfaction of its truth.

These being civil proceedings, the assault allegation is required to be proved on the lesser standard on the balance of probabilities despite the criminal nature of the allegation. But, because of the gravity of the allegation, proof of the criminal act must be "clear cogent and exact and when considering such proof, weight must be given to the presumption of innocence". See Cuming Smith & Co Ltd v Western Farmers Co-operative Ltd (1979) VR 129 at p 147.

Brennan J in Annetts v McCann, referred to the standard of proof issue but only in an oblique fashion. Unlike Victorian law, the Western Australian Coroners Act 1920 provides explicitly that a coroner has the power to commit a person to trial for murder if the coroner is satisfied "beyond reasonable doubt": s 12A (1)(a). The legislation does not specify what the standard is for all other cases but Brennan J referred in his judgement to the necessity for decision makers to consider personal reputation with sensitivity in fulfilling their statutory duty.

Brennan J referred to Lord Diplock's judgement in the Privy Council decision of Mahon *v* Air Zealand Ltd (1984) AC 808, at p 820, where Lord Diplock said that he who contemplates making an unfavourable finding "must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it..."

In applying the Briginshaw test to the facts in this case and keeping in mind the words of Lord Diplock in Mahon's Case, the nature of the allegation here demands a high standard of proof. The allegation involves a deliberate assault by way of kicking with a shod foot of some force when the patient was

lying on the floor. There is no question of accident or negligence. The extremely deleterious effect the finding has upon the plaintiffs character, reputation and employment prospects demand a weight of evidence that is commensurate with the gravity of the allegation."

The Briginshaw principle was elaborated upon by Mason CJ, Brennan, Dean and Gaudron JJ in Neat Holdings Pty Ltd v Karaian Holdings Pty Ltd (1992) 67 MLJR 170. Their Honours (at 170-1 71) said:

"The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."

In a recent article entitled "The Scales of Justice: Probability and Proof in Legal Fact Finding.." (Australian Law Journal - Vol 69- Sept 1995 731 at 739) the Honourable Mr Justice D H Hodgson, said this about the Briginshaw principle:

"...Neat Holdings confirms that the circumstance that criminal conduct is alleged is important in two distinct ways: first it is a factor which may itself be relevant to probabilities, in that one does not expect that people will ordinarily engage in criminal conduct; and secondly, it is a factor relevant to what material concerning the particular circumstances is to be considered

adequate, so that the court can then reasonably act on the balance of probabilities."

Although Briginshaw approaches the civil standard of proof on the balance of probabilities as requiring a belief amounting to reasonable satisfaction about the fact in question, clearly the nature and cogency of the evidence necessary to enable a fact finder to be reasonably satisfied about a particular fact or facts will depend upon and vary according to the nature of what is to sought to prove.

Hence, where an allegation of suicide is made, the standard of proof to be applied is on the balance of probabilities to the reasonable satisfaction of a tribunal; it is not to be made lightly but nor is it so inherently unlikely or grave as to bring it toward the top of the range of the Briginshaw test (See Clark v NZ1 Life Insurance 1991 2 Gd R 11).

The recent decision of the High Court in E v H (1993-4) 181 CLR 387) provides a further demonstration of the Briginshaw principle that whilst the affirmative of an allegation must be made out to the reasonable satisfaction of tribunal there are in fact different degrees of reasonable satisfaction. The Court held that where the evidence established that a particular person could be the father of a child, the question of actual paternity should be approached free of restraints in the view that that question involved a grave or serious allegation.

Whilst it is generally accepted that an allegation of accident, misadventure or negligence is not as serious or as grave as an allegation of criminal conduct. (See Anderson v Blashki at 96), the inherent unlikelihood of an occurrence of a given description may dictate the nature and cogency of the evidence necessary to enable the fact finder to be reasonably satisfied in relation to the particular allegation. (See Briginshaw v Briginshaw supra).

THE CONSIDERATION OF ALTERNATE VERDICTS AT INQUEST

In some coronial jurisdictions it is permissible for a coroner to describe the manner of death in a particular case by recording a verdict of unlawful homicide.

In other jurisdictions, for example the Northern Territory, unlawful homicide as such is not an available finding because of statutory constraints on including in a finding a statement that a person is or may be guilty of an offence. (See Section 34 (3) of the Coroners Act 1993.)

Where death has been found to have occurred by violent means due to human intervention, the finding as to cause and manner of death should not indicate or in any way suggest that an offence has been committed. As Waller says in "Coronial Law and Practice in New South Wales" (3rd ed at 94) that may require "a delicacy and precision of language which is probably beyond the capability of mortal man." All that a coroner can do is to exclude words like "murder", "manslaughter", "assault", their adjectival or verbal equivalents and adverbs like "feloniously", "maliciously", "wilfully", "intentionally", "deliberately" and the like. A suggested finding in relation to a death occurring by violent means would be as follows: "Died from the effects of injuries, namely (description of injuries) inflicted upon (the name of the deceased) on (date) at (place) by (a named person)."

Often at an inquest a coroner has to consider alternate verdicts or findings, for example unlawful killing (or in those jurisdictions not permitting a finding of unlawful homicide, a finding of death by violent means due to human intervention) and accidental death.

The coroner's task is not made easy where the alternate verdicts (or findings) attract different standards of proof (as in England) or different degrees of

reasonable satisfaction (as in Australia). How should a coroner go about his task?

At the outset it should be made clear that in terms of either the standard of proof or the degree of reasonable satisfaction no real distinction should be drawn between a finding of unlawful homicide and a finding of death by violent means due to human intervention, because no matter how the verdict is expressed it is predicated upon a very serious allegation: an allegation of criminal conduct (or at least potentially criminal conduct). The two types of findings should be treated as equivalents.

The leading English case is R v Wolverhampton Coroner. ex parte McCurbin (1990) I WLR 719. There the coroner had directed the jury to apply the criminal standard when they considered the possibility of a conclusion of unlawful killing. The conclusion of the jury that death occurred by misadventure was challenged. On appeal Woolf LJ said:

"I can see that there may be force in Mr Macdonald's submission that perhaps in the case of a coroner's inquest, theoretically speaking, *the appropriate* standard might be said to be a very high standard indeed on the basis of the civil standard of proof. However, whether that be right or not, what I am absolutely satisfied about is that the practical guidance which is given by Watkins U in Reg V West London Coroner, ex parte Gray (1988) GB 467 is correct, bearing in mind that it is given in relation to the coroner's role in respect of his duty to direct a coroner's jury as to how that jury is to perform its task.

I am quite satisfied that, in a case where it is open to a jury, as a result of a coroner's inquest, to come to a verdict of unlawful killing, the appropriate direction which the coroner should give to the jury is the simple one that they should be satisfied beyond all reasonable doubt or, as sometimes said, satisfied so that they are sure. That provides clear guidance to the coroner's jury which they will be able to follow, and it is not necessary for them to be

involved with sliding scales which are more appropriate for a judge than a jury."

It would appear that the criminal standard of proof must also be applied by coroners sitting alone. (See R v Newbury Coroner. ex p John (1991)156 JP 456 at 457 where the self-direction of the coroner, sitting without a jury, to apply the criminal standard was seemingly approved by the Divisional Court).

In Ex p McCurbin (supra) Woolf LJ adverted to the problem of alternative verdicts on different standards of proof, but failed to provide a solution. At page 728 of his judgement Woolf LJ stated:
"It is true that, in many cases where it is open to a coroner's jury to find a verdict of unlawful killing, they may also have to consider the question of death by misadventure. However, in my view, this does not and should not give rise to problems. The coroner should indicate to the jury that they should approach, initially, the question as to whether or not they are satisfied so that they are sure that this is unlawful killing. If they come to the conclusion that it is unlawful killing, there is no need for them to go on to consider death by misadventure. But, if they come to the conclusion that it is not satisfied so that they are sure that that verdict is appropriate, then they will consider the question of misadventure and, in so doing, they do not need to bear in mind the heavy standard of proof which is required for unlawful killing. They can approach the matter on the basis of the balance of probabilities. The situation is that, just as it is important that a jury should not bring in a verdict of suicide unless they are sure, likewise they should not bring in a verdict of unlawful killing unless they are sure."

It is not entirely clear whether Woolf LJ is suggesting that if the jury have rejected unlawful killing they must exclude it from their minds and find misadventure/accident as the only viable alternative.

Jervis (11th edat 253) appears to reject such an approach: “Where a jury has to consider the twin possibilities of unlawful killing and accident/misadventure, they should first consider unlawful killing. If they are satisfied beyond reasonable doubt that the death was the result of unlawful killing, that is the end of the matter. If they are not so satisfied, then they must go on to consider whether, on the balance of probabilities, the death was the result of accident/misadventure (R v Wolverhampton Coroner. ex p McCurbin (1990) 1 WLR 719, 728). This means that if they are not satisfied on the balance of probabilities that it was accident/misadventure, the only conclusion which they can return is on “open verdict” (R v City of London Coroner, ex p Barber (1975)1 WLR 1310, 1313).

What should a coroner do when faced with a choice between different verdicts carrying different standards of proof (the English position) or the same standard of proof with varying degrees of reasonable satisfaction (the Australian position)?

The choice seems to be between a one-step and a two-step approach. The first approach would involve the coroner considering the alternate verdicts simultaneously. Some support for this approach might be found in Ex r Barber (supra) where it was held that if the coroner is satisfied on the balance of probabilities that it was suicide, (as opposed to accidental death) but is not satisfied beyond reasonable doubt, the conclusion must be an open verdict. The two-step approach is the one favoured by McCurbin and by Jervis. It is submitted that the two-step approach is the correct one, although in practice there may be little difference between the two approaches as both require the alternate verdicts to be considered in light of the whole of the evidence, and are equally capable of resulting in an open verdict.

Following the two-step approach, a coroner should proceed as follows:
(1) The coroner first considers whether on all the evidence he can be satisfied beyond all reasonable doubt (the English test) or reasonably

satisfied according to the Briginshaw test (the Australian test) that death was the result of unlawful killing. If an English coroner is satisfied beyond reasonable doubt or in the case of Australian coroner, reasonably satisfied, that death was the result of unlawful killing, that is the end of the matter.

(2) If the coroner is unable to conclude that death was the result of unlawful killing, then he must go on to consider whether on the balance of probabilities death was due to accident/misadventure. Although unlawful killing can no longer be considered a possible verdict (even if the coroner, could be satisfied on a lesser standard of proof or a lesser degree of reasonable satisfaction that the deceased was unlawfully killed), the coroner in considering a finding of accident/misadventure must examine and consider all the evidence, including that supporting unlawful killing. In order for an Australian coroner to be satisfied on the balance of probabilities that death was due to accident/misadventure he must be reasonably satisfied in that regard. It is for the coroner to decide to what extent, if any, the state of reasonable satisfaction which he must reach is dictated by the considerations or restraints referred to in Briginshaw ie the seriousness of the allegation, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding.

(3) If the coroner is not satisfied on the balance of probabilities that death was due to accident/misadventure, he is bound to return an “open finding”. A failure on the part of the coroner to be reasonably satisfied that death was the result of accident/misadventure does not translate into a finding of unlawful killing, such a finding having been earlier excluded. The only appropriate finding is an “open finding”.

The reference to “unlawful killing” and its verbal equivalent in the above analysis should be read as including the equivalent finding of death by violent means due to human intervention.

Thus far, the standard of proof in coronial proceedings has been approached on the basis that the civil standard of proof ie “the balance of probabilities” requires a belief amounting to reasonable satisfaction about the fact in question. However, there is line of authority which supports an alternate approach to the civil standard of proof, viz, the objective probability approach, requiring a probability in excess of 50 per cent (See Davies v Taylor (1974) AC 207; Malec v JC Hutton Ptv Ltd (1990) 169 CLR 638; Rose v Abbey Orchard Property Investments Ptv Ltd (1987) Aust Torts Reports 80-121; (Tenax Steamship Co Ltd b The Brimes (owners) (1975) QB 929.

In his article “The Scales of Justice: Probability and Proof in Legal Fact-Finding” (supra), the Honourable Mr Justice DH Hodgson, attempts to reconcile the two approaches, pointing to the need for adequate material on which to base probabilities, and to the limited role of mathematics in most fact-finding. The learned author goes on to discuss some areas in which mathematical probabilities may be important.

I agree with the attempt to reconcile the two approaches to the civil standard of proof undertaken by His Honour at pages 732-733 of his article:

“The proposition which I will support can be expressed this way: if, on the basis of adequate material concerning circumstances of a particular case, the tribunal believes that an event occurred, with the strength of that belief being at least such as would be indicated by a probability in excess of 50 per cent, then the civil onus is discharged. It will be seen that there are essentially three elements involved:

1. There must be adequate material concerning the circumstances of the particular case. I will be elaborating on this, but the thought behind it is that mathematical probabilities can be based on most general and scanty material, so that it may be unreasonable to act upon such probabilities, and, in particular, in our adversarial system, it may be unreasonable to act upon

them where the party bearing the onus of proof does not make a reasonable attempt to lead evidence concerning the particular facts.

2. There should be a belief in the occurrence in question, not, of course, as a matter of certainty, but a least as a matter of probability. Again, I will elaborate on this, but the point of this requirement is that, in most cases, it is not possible to act on purely objective probabilities; and also that, even where this is possible, there needs to be an assessment of the reasonableness of acting on objective probabilities before one does so.

3. However, the belief in question is merely a belief in something as a matter of probability. Since certainty is unattainable, judges have to deal in probabilities; and, subject to the first two requirements, it will be sufficient as a last resort if the tribunal ends up with a belief in the occurrence in question which is to some (any) degree stronger than a belief (say) that the result of the next toss of a fair coin will be “heads”. Furthermore, there may be some interdependence between this requirement and the first one; and if the numerical probability is substantially higher than this, that may be a factor in favour of deciding that the tribunal does have adequate material.”

His Honour also notes (at 733,743-746) cases in which something less than a 50 per cent probability will suffice.

Therefore, in evaluating the evidence presented at this inquest, and considering appropriate findings, I have applied the “belier approach to the civil standard of proof, and accommodated the “objective probability” approach to the extent suggested by His Honour.

THE NATURE OF AN OPEN FINDING

The following account is given of an “open finding” in Jervis (11th ed, 1993 at 253):

"If there is insufficient evidence to record any of the other suggested conclusions, an "open verdict" may be recorded. This includes the case where there is evidence but it fails to reach the required standard of proof. It should be noted that an open verdict is thus only to be used in the last resort if there is insufficient evidence to enable the coroner or the jury to reach one of the other conclusions. The fact that there may be uncertainty as to other parts of the inquisition, for example as to the precise cause, time or place of death, does not authorise recording an open verdict if there is sufficient evidence to record how the deceased came by his death. In other words, the coroner or jury should not fail to reach a positive conclusion merely because there is some doubt on some minor point."

Kevin Wailer in "Coronial Law and Practice in NSW" (3rd ed at 92) says that the term "open finding" is applied to those cases where the evidence is insufficient to determine the manner or cause of death. He goes on to say that "an open verdict may be returned where a person dies of the effects of injuries received in an unknown manner or where the cause of death is unascertainable."

Waller says that the principle that suicide must be affirmatively proved means that in cases where suicide is indicated but not proved, an open finding is the only recourse of the coroner.

Wailer gives the following caution (at page 92) in relation to an open finding:
"The coroner should make every endeavour to obtain evidence which will allow him to come to a positive verdict. An open finding is satisfactory to no one. Relatives look to the learning and experience of a coroner to solve what is a puzzle to them, and the coroner should not shrink from bringing in a definite verdict out of mere timidity or excessive concern for their feelings; but where the evidence is of uncertain character, or unreliable or insufficient, an open verdict must be found. Jervis, 9th ed. P. 181, states:

‘It is wrong, therefore, if there is evidence that the deceased committed suicide to return an open verdict on the ground that it is uncertain whether the balance of his mind was disturbed. A coroner should not abnegate his duty of reaching a positive verdict merely because there is some doubt on some minor point.”

FINDINGS PURSUANT TO SECTION 34 OF THE CORONERS ACT

Section 34 of the Coroners Act requires a coroner investigating a death to make findings, where possible, in relation to

(a) identity of the deceased person,
(b) certain of his or her personal particulars to enable registration of the death,
(c) the time and place of death
(d) the cause of death and
(e) any relevant circumstances concerning the death.

I propose to deal first with the cause of death which is generally referred to in the context of the medical cause of death. The cause of death is the real or actual cause of death (not the terminal cause of death); namely the disease injury of complication, not the mode of dying”. “(See Ex p Minister of Justice. Re Malcolm, Re Ingles (1965) NSWR 1598, at 1604 (McClemens J).

Since the first inquest before Mr Barritt SM, it was thought that the quantity of blood on the jumpsuit and singlet indicated that Azaria Chamberlain had died. During the criminal trial, experts offered opinions as to the cause and manner of Azaria’s death based on the distribution and apparent flow pattern of the blood staining upon the clothing. Further opinion evidence in that regard was given before the Royal Commission.

It was common ground between the experts that most of the blood staining on the jump suit originated from the outside of the fabric, that most of the blood

staining to the back of the collar was consistent with Azaria's body having been supine for a period while her blood was shed and that the blood stains on the left shoulder were consistent with her torso being in an upright position while her blood flowed. As noted by the Commissioner (at 187 of his Report) it was therefore accepted that most of the blood staining originated from injury to the neck or head of the baby, with the blood flowing down the outside of the collar and neck area and soaking through to the singlet beneath."

After examining all the evidence relating to the cause of the blood staining on the clothing and the location of the injuries on Azaria's body Commissioner Morling said (at 189) that he was unable to conclude whether the blood staining on Azaria's clothing originated from injury to her head, neck or both.

The Commissioner was also unable to conclude with certainty whether or not the bleeding which caused the blooding staining occurred before or after Azaria's death. (at 190). Commissioner Morling went on to say (at 190-191):
"In this situation .... the evidence does not indicate what the cause of death was or how the baby died".

However, it must be borne in mind that the Morling inquiry was not intent on discovering the cause of death as such. Therefore, I now turn to consider the evidence bearing upon the cause of death in light of the civil standard of proof.

The evidence in relation to the bloodstained jumpsuit is equivocal in terms of establishing the cause of death:
(1) Although the bleeding that caused the bloodstaining was due to an injury of some kind, it is not possible to determine the site of the injury, ie. whether the injury was sustained to the head, neck or both areas. Nor can the means by which any such injury was inflicted be ascertained.

(2) It is not possible on the evidence to determine whether the injury which produced the bleeding, which in turn resulted in the blood stained clothing, occurred before or after Azaria's death. In other words it is not possible to conclude that Azaria in fact died from the injury (whatever that might have been) which caused the bleeding which in turn produced the blood stains on the clothing.

It will be recalled that Mr Galvin CM concluded that the cause of death was "extensive wounding to the child's neck." Although that conclusion may have been open on the evidence which was then before the Coroner, a diversity of opinions as to the cause and manner of Azaria's death based on the distribution and apparent flow pattern of the bloodstaining on the clothing was presented both at the trial and at the Royal Commission. It was that further evidence, which was not before Mr Galvin CM, which led the Royal Commissioner, and indeed also leads this inquiry, to being unable to conclude whether the blood staining on Azaria's clothing originated from an injury to her head, neck or both. That very same body of evidence also leads this inquiry to being unable to conclude on the balance of probabilities that that injury (whatever it might have been) caused death.

The bloodstaining on the clothing formed, of course, only one small part of a great volume of evidence adduced with a view to establishing the cause and manner of Azaria's death. However, the bloodstained clothing probably provided the strongest evidence indicating what the cause of death was and how the baby died. There is no other evidence, or sufficiently cogent evidence, either viewed alone, or taken in conjunction with the evidence relating to the bloodstained clothing which is capable of reasonably satisfying me as to the cause of Azaria's death.

Finally, it should be noted that the absence of a body, and the consequential absence of a post-mortem examination and the results thereof, means that potentially vital evidence as to the cause and manner of death is not available

to the coroner. One need go no further than the recent statements made by David Ranson in his article "The Coroner and the Rights of the Terminally Ill Act 1995 (NT)" (Journal of Law and Medicine at Vol 3 November 1995 at 169) as to the importance of a post-mortem examination: "In carrying out their investigations into deaths, coroners rely heavily upon the medical information provided by pathologists and in particular on the results of autopsy examinations. Indeed, the forensic autopsy is the mainstay of the information provided to a coroner for the purposes of investigating a death and determining the cause of death the coronial system relies on autopsies to provided the best evidence of the cause, mode and circumstances of death." (at 173).

As stated above, the standard of proof in a coroners court is the civil standard ie. the balance of probabilities. On the basis that that standard requires a belief amounting to reasonable satisfaction, the cause of death of Azaria Chamberlain is indeterminable, and must remain undetermined. Azaria Chamberlain died of cause or causes unknown.

Even if one were to apply the standard purely as a matter of objective probability (which it is submitted is not the appropriate approach), the appropriate finding as to the cause of death must remain an open finding.

Although Section 34 of the Coroner Act, unlike Section 37 (1) of the former Act, does not, expressly require a coroner to ascertain the manner of death, subsection (v) of Section 34 (ie "any relevant circumstances concerning the death") has a very wide ambit, and certainly includes the manner of death.

There have ever been only two theories as to the manner in which Azaria Chamberlain died. The first is that Mrs Chamberlain murdered her daughter. The second is that Azaria had been taken by a dingo.

In terms of a coroner's verdict or findings, the first theory, if substantiated to the reasonable satisfaction of a coroner, would translate into a finding of death by violent means due to human intervention viz that Azaria Chamberlain died at the hands of Alice Lynne Chamberlain (without there being any ascription of criminal responsibility); the second theory, if substantiated, would result in a finding of accident or accidental death.

"Accident" in this context has been described as an unforeseen misfortune or mishap causing injury or harm which bears a casual connection with the death (See Wailer, "Coronial Law and Practice in New South Wales" at 23; and David McCann's article "Range of Findings open to the Coroner" in "The Aftermath of Death" (Editor High Selby at 16.). Jervis (9th ed at 86) refers to "accident" as meaning on "unlooked - for mishap or an untoward event which was not expected or designed."

Although the Royal Commission of Inquiry into Chamberlain Convictions had to consider the two competing theories, its line of inquiry must be kept in context. The purpose of the Royal Commission was to enquire into and report on the correctness of the Chamberlain convictions.

In reaching the conclusion that there was a reasonable doubt as to the Chamberlain's guilt, Commissioner Morling concluded that the hypothesis that Mrs Chamberlain murdered Azaria had not been proved beyond reasonable doubt.

Although the Commissioner was of the opinion that the evidence afforded considerable support for the dingo hypothesis, His Honour did not examine the evidence to see whether it had been proved that a dingo took the baby. To do so would, in the words of Commissioner Morling, involve "... (a) fundamental error of reversing the onus of proof and requiring Mrs Chamberlain to prove her innocence (at 339 of the Report). In the circumstances His Honour went no further than to say: "it is impossible in the

above summary to capture the whole effect of the voluminous evidence given on the matters which bear upon the dingo hypothesis but, taken in its entirety, it falls far short of proving that Azaria was not taken by a dingo.“ (at 338 of the Report).

In reaching the conclusion that there was a reasonable doubt as to the Chamberlain’s guilt, Commissioner Morling found it unnecessary to consider the possibility of human intervention (other than by the Chamberlains) in the time between Azaria’s disappearance and the finding of her clothes. However, he said that it was not impossible to imagine circumstances in which such intervention could have occurred. He said: “It was not inconceivable that an owner of a domestic dog intervened to cover up its involvement in the tragedy or that some tourist, acting irrationally, interfered with the clothes before they were later discovered by others” (at 340 of the Report). Although there was not the slightest evidence to support either of those hypothesis, Commissioner Morling considered that the possibility of human intervention (other then by the Chamberlains) was another factor which must be taken into account in considering whether the evidence established the Chamberlain’s guilt beyond reasonable doubt.

However, it must not be forgotten that Commissioner Morling was not commissioned to inquire into and determine the cause and manner of death of Azaria Chamberlain for the purposes of the Coroners Act, in respect of which a different standard of proof, viz, the civil standard applies. Against that background it would be open to the present inquiry, applying a civil standard of proof, to record a coroners finding of death by violent means due to human intervention (without ascribing criminal responsibility to any person), despite the fact that the convictions against the Chamberlains were quashed. Such an outcome would not be illogical given the different objectives pursued by the criminal process and the coronial one, and the divergent standards of proof. However, for the reasons which follow, even

applying the civil standard of proof, the evidence does not reasonably support a coroners finding of death by violent means due to human intervention.

In R v Wolverhampton Coroner; ex parte McCurbin (1990) 1WLR 719 at 727 Woolf U conceded that although there was a “technical distinction” between the standard of proof in criminal proceedings and that in coronial proceedings, when a coroner had to consider a finding of unlawful killing, the gravity of the crime was so high the result would be the same whichever standard was applied. I do not agree that the distinction is purely technical, and it does not necessarily follow that in so far as a coroners finding of unlawful killing is concerned, the matter is so serious that the result would be the same, whatever standard of proof was applied.

The standard of proof in a Coroners Court in Australia is the civil standard as governed by the Briginshaw principle. According to that principle the seriousness of an allegation, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding “are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal “(1938 60 CLR 336 at 361 - 362). It follows that clear, cogent or strict proof is necessary where criminal conduct is alleged in civil proceedings, for example a coronial inquest. It is however, wrong to read such a statement as being directed to the standard of proof, and as indicating the need for an elevated standard of proof in cases where criminal conduct is alleged. Rather, as The Honourable Mr Justice D H Hodgson says in his article.” The Scales of Justice: Probability and Proof in Legal Fact - Finding” (supra at 739-740), the circumstances that criminal conduct is alleged is a factor relevant to what material concerning the particular circumstances is to be considered adequate, so that the court can then reasonably act on the balance of probabilities. This approach does not ignore the mathematical probability of a particular event having occurred. It simply requires the fact -finder to not only look at the probabilities based on the available evidence of

a particular event having occurred, but to determine whether the nature and quality of the evidence, is sufficient to reasonably satisfy the fact - finder that the particular event occurred.

After examining all the evidence I am unable to be satisfied on the balance of probabilities that Azaria Chamberlain died at the hands of Alice Lynne Chamberlain. It automatically follows that I am also unable to be satisfied on the balance of probabilities that Michael Leigh Chamberlain had any involvement in the death.

I have reached those conclusions after having regard to the considerations referred to in Briginshaw and Briginshaw (supra). I do not consider that the evidence is sufficiently dear or cogent, or that material facts have been strictly proved to such an extent, as to lead me to be reasonably satisfied that Azaria died at the hands of her mother. In reaching that conclusion I have had regard to the whole of the evidence, that is to say, all the evidence pointing to the involvement of the Chamberlains, and all the evidence given on the matters which bear upon the dingo hypothesis. In relation to the involvement of the Chamberlains in the death of Azaria Chamberlain, I have reached the same conclusion as Commissioner Morling: the only difference is that the Commissioner was applying the criminal standard of proof whereas I have applied the civil standard of proof on the balance of probabilities.

I would add that if one were to reject the “belier approach to the civil standard of proof, and apply to the evidence in the present case the “objective probability” approach, which merely requires a probability greater than 50 percent of the event in question having occurred, the same result would obtain: I would still be unable to conclude that Azaria died at the hands of Alice Lynne Chamberlain.

Unlike the Morling Inquiry, the present inquiry, which is charged with the duty of ascertaining the cause and manner of Azaria’s death, must go on to

consider alternate findings. It was not part of Commissioner Morling's commission to determine whether the dingo hypothesis had been proved.

Applying once again the "belier approach to the civil standard of proof to the evidence, I am unable to be reasonably satisfied that Azaria Chamberlain died accidentally as a result of being taken by a dingo from her tent at the camp site at Ayers Rock.

I have approached the matter in the following way:

(1) One of the factors referred to in Briginshaw and Briginshaw (supra) as affecting the answer to the question whether the fact (or facts) sought to be proved has been established to the reasonable satisfaction of the fact-finder is ".... the inherent unlikelihood of an occurrence of a given description" having taken place.

At page 310 of his Report, Commissioner Morling stated: "The defence asserted that Azaria had been taken by a dingo, an event for which there was no known precedent. it was therefore a novel case". Of course, one does not expect that human beings, in particular young babies, will ordinarily be taken and killed by a dingo. First, that circumstance is a factor which may itself be relevant to the question of probabilities. Secondly, it is a factor, to use the words of The Honourable Mr Justice Hodgson (supra at 739-740), "relevant to what material concerning the particular circumstances is to be considered adequate so that the court can then reasonably act on the balance of probabilities.

(2) In light of the factors referred to above, I have closely examined all the evidence given on matters which bear upon the dingo hypothesis and which was before the Royal Commission. That evidence is conveniently summarised in the Morling Report at pages 328-340.

(3) Although a finding that Azaria died at the hands of her mother has been discounted at an earlier stage, the evidence supporting that hypothesis can not be ignored when considering a finding of accidental death. That body of evidence, as much as the evidence which supports the dingo hypothesis, is relevant to whether or not I can be reasonably satisfied that Azaria Chamberlain died accidentally as a result of being taken by a dingo.

(4) Although I agree with Commissioner Morling that the evidence affords considerable support for the view that a dingo may have taken Azaria, the evidence is not sufficiently clear, cogent or exact to reasonably support such a finding on the balance of probabilities.

When I have come to consider the possible findings in this case I have purposely not taken into account further alternate hypotheses involving human intervention (other than by the Chamberlains) or accidental death due to causes other than the one put forward. The reason for that is that there is not the slightest evidence supporting any such hypotheses. Although Commissioner Morling took the view (as did some of the judges in the High Court) that the possibility of human intervention (other than by the Chamberlains) may be a matter relevant to the creation of a reasonable doubt concerning the Chamberlain's guilt, I do not believe it would be proper in the context of a coronial inquest, which is after all concerned with ascertaining the cause and manner of death, to consider hypotheses which are not open on the evidence. If, however, I have erred in the approach which I have taken, and I should have considered further hypotheses not raised on the evidence, their consideration would have, if anything, diminished the cogency of the evidence supporting the two dominant hypotheses, and not altered the conclusions I have reached.

Given that I am unable to be reasonably satisfied on the evidence that Azaria died at the hands of Alice Lynne Chamberlain or alternatively that Azaria died accidentally as a result of being taken by a dingo, the only finding that can be

recorded is an open finding. (See Jervis 11th ed at 253 in relation to an open finding).

An open finding is unavoidable as I am unable, after applying the requisite standard of proof and its inherent degrees of reasonable satisfaction, to choose between the two main competing hypotheses concerning the death of Azaria Chamberlain (the choice between the two being a mere matter of conjecture), and to prefer one hypothesis over the other (See Holloway v McFeeters 1956 94CLR 470). An open finding is tantamount to a statement that on all of the evidence the cause and manner of Azaria's death cannot be determined, and must remain unknown.

Before returning an open finding, I have heeded the warning that an open verdict should only be returned in the last resort where there is insufficient evidence to enable a coroner to reach one of the other positive verdicts.

I have also considered the submission made by Mr Tipple to the effect that "in the circumstances that have occurred, the return of an "open finding" would be inappropriate because it would do less than justice to the findings of the Morling Report and would lead to speculation that the death was due to causes other than "accidental causes". (See page 5 of the written submissions). Mr Tipple also submitted that "... now that the innocence of the Chamberlains has been authoritatively restored and proclaimed, it would lead to great mischief if their right to the status of innocence was undermined by the formal recording of an "open finding" in relation to the death." (Ibid).

With due respect, these submissions are based on a number of fundamental misconceptions concerning the scope of the Morling Report, the relationship of the presumption of incidence to the coronial process, and the nature and function of the coronial process.

As stated above, the purpose of the Royal Commission was to enquire into the correctness of the Chamberlain convictions, and to report accordingly. The Morling Report concluded as follows (at 342):

"It follows from what I have written that there are serious doubts and questions as to the Chamberlain's guilt and as to the evidence in the trial leading to their conviction. In my opinion, if the evidence before the Commission had been given at the trial, the trial judge would have been obliged to direct the jury to acquit the Chamberlains on the ground that the evidence could not justify their conviction."

In Re Conviction of Chamberlain (1988) 93 FLR 239 the Court of Criminal Appeal of the Northern Territory, having found in the light of fresh evidence that there had been a miscarriage of justice in former criminal proceedings, quashed the convictions against Mr and Mrs Chamberlain. The quashing of the Chamberlain convictions must be kept in proper perspective.

It is not the purpose of a criminal trial to establish the innocence of the accused: rather its purpose is to establish the person's guilt, the standard of proof being beyond reasonable doubt. Consistent with this purpose, a criminal trial begins with the assumption that the accused is not guilty. That is reflected in the presumption of innocence which underlies our system of criminal law: a person is presumed innocent until proven guilty.

It is often said that the presumption of innocence requires that the facts necessary to establish criminal liability must be proved beyond reasonable doubt. However, that is a misconception. In "Evidence: Its History and Policies" (Butterworths 1990) Julius Stone (at 21 5) says:

"The rule requiring proof beyond a reasonable doubt in criminal cases has really nothing to do with the law of presumptions, nor, indeed with the proof of any particular fact involved in a criminal trail. It is a special standard of sufficiency of persuasion on all the evidence which must be satisfied before

there can be conviction in criminal cases. It does not come into operation until the process of submitting the evidence is at an end. The law of presumptions, on the other hand, is concerned with the process of submitting evidence. The presumption of innocence will prevail or be destroyed in exactly the same way as any other presumption. In criminal cases, however, there will come into operation, before guilt can be found, the additional requirement of persuasion beyond reasonable doubt on all the evidence."

The quashing of the Chamberlain convictions by the Court of Criminal Appeal of the Northern Territory entitled Mr and Mrs Chamberlain to the presumption of innocence "with which the law clothes all persons unless and until their guilt has been proved beyond reasonable doubt." (See the judgement of Asche CJ at 241). At the trial the presumption of innocence had been destroyed by reason of the prosecution having adduced evidence and proved the Chamberlain's guilt beyond reasonable doubt. However, the existence of a grave doubt as to the guilt of the Chamberlains in light of fresh evidence demanded the quashing of the convictions. The quashing of the convictions signified the continuation (or if you like the prevailing) of the presumption of innocence; because as Nader J rightly observed (at 254): ".... in the absence of a conviction, innocence is presumed." After the quashing of the convictions the Chamberlains were exactly in the same position as an accused found not guilty, in which case the presumption of innocence continues. As it is not the function of a criminal trial to establish the innocence of an accused person, but to ask and answer the question whether the accused is guilty of the crime charged beyond all reasonable doubt, the continuing presumption of innocence in favour of the Chamberlains means that in the eyes of the criminal law Mr and Mrs Chamberlain are innocent.

It is in this sense that Mr Tipple's statements that "the innocence of the Chamberlains has been authoritatively restored and proclaimed," and they have a right to the status of innocence should be understood.

In order for Mr Tipple's submissions as to the deleterious effect of an open finding to succeed it would have to be shown (a) that an open finding would do less then justice to the Morling Report and (b) that such a finding would undermine the Chamberlain's status of innocence and thereby occasion great mischief.

The first point to be made is that the laws of the Northern Territory do not preclude civil proceedings being brought against a person, previously acquitted in criminal proceedings, for compensation, arising out of the same set of facts advanced earlier with a view to establishing criminal guilt. Such proceedings may be brought either at common law or pursuant to statute, for example, the Crimes (Victims Assistance Act) Act. Consequent upon the quashing of their convictions, Mr and Mrs Chamberlain enjoy the same status as an acquitted person. But the continuing presumption of innocence in favour of Mr and Mrs Chamberlain does not theoretically bar the institution of civil proceedings based on the same set of facts which led to their ultimate acquittal (though in practical terms, the particular circumstances of the case do not lend themselves to such subsequent litigation).

Where a person who is acquitted of criminal charges (either at first instance or at a later time) is proceeded against in subsequent civil proceedings on the same set of facts, that person is presumed innocent in relation to any allegations of criminal conduct until the contrary is proved on the balance of probabilities according to the principles enunciated in Briginshaw v Briginshaw (supra; see, in particular, the following part of Dixon J's judgement at pp 362-4: "When in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is,

according to better opinion, the same as upon other civil issues…… But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected"). It follows that the presumption of innocence, rather than being undermined by subsequent civil proceedings, continues, that is to say until the contrary is proved according to the civil standard.

What must be kept firmly in mind is that in the above context criminal and civil courts perform different functions, and in discharging their respective tasks apply different standards of proof, and even where an allegation of criminal conduct is alleged in civil proceedings the presumption of innocence applies, and the defendant in the civil suit is presumed innocent until the allegation is proved.

If the law raises no objection to subsequent civil proceedings for compensation in cases where the person sued has been earlier acquitted of criminal charges, then subsequent coronial proceedings are equally unobjectionable, particularly in light of the purposes of a coronial inquest, which are indeed limited. Unlike in the case of subsequent civil proceedings for compensation arising out of the commission of an offence, which inevitably require the fact finder to decide whether or not the defendant was "guilty" of the offence, it is not the function of a coroner to determine any question of criminal or civil liability, to apportion guilt or attribute blame (R v H M Coroner for North Humberside and Scunthorpe; Ex parte Jamieson (1994) 3 WLR 82). The essential task of a coroners court is to ascertain cause and manner of death. Married to those aspects is the unique consequence of coronial proceedings that the findings of a coroner are not conclusive and binding on any other court (Sewell, "Law of Coroner" (1843) p201); nor do a coroners findings affect rights or liabilities (See Jacobs JA in Ex parte Flock, re Featherstone (1967) 86 WN (Pt 2) (NSW) 349 at 353). "An inquiry before a coroner is merely in the nature of

a preliminary investigation. It is not of any force" (Bird v Keep (1918) 2 KB 692).

Even a positive finding in the present case that Azaria Chamberlain died at the hands of Alice Lynne Chamberlain, provided such a finding was open on the evidence, would not violate the integrity of the Morling Report; nor would it create mischief by undermining the Chamberlain's status of innocence. First, the coroners function is entirely different to that bestowed upon the Morling Inquiry, and a court exercising criminal jurisdiction. A coroners court is not concerned with the determination of criminal liability. Secondly, where a coroners finding of unlawful homicide or a finding of death by violent means due to human intervention is under consideration the presumption of innocence applies until the contrary is proved to the requisite standard of proof. However, even where the presumption of innocence is displaced in coronial proceedings, that is not inconsistent with the continuation of the presumption of innocence arising out of an acquittal in criminal proceedings, given the limited function of coronial proceedings. Thirdly, the criminal standard of proof does not apply to coronial proceedings; the applicable standard of proof is the civil standard on the balance of probabilities. Finally, the findings of a coroner do not affect rights or liabilities, and are of no binding force.

However, we are dealing here with an open finding. An open finding would have even less capacity (substantially less) to undermine or otherwise have a deleterious effect on the Chamberlain's status of innocence. An open finding is still the product of proceedings which are limited in nature and function. Further, an open finding does not disturb the presumption of innocence with which all inquests must begin when considering unlawful homicide or death by violent means due to human intervention as a possible finding. An open finding leaves the presumption completely intact.

Thus far, Mr Tipple's submissions as to the deleterious effect of an open finding on the Chamberlain's status of innocence can not be sustained. However, Mr Tipple also submits that an open finding would lead to speculation that the death was due to causes other than accidental causes, and presumably create mischief. I now deal with that submission.

An open finding will, by its very nature, lead to speculation that Azaria's death was due to non-accidental causes. However, undoubtedly such speculation existed within the community even after the findings of the Morling Report and the subsequent quashing of the Chamberlain convictions. Such speculation continues to this very day. Regardless of the outcome of the present inquest, whether it were to result in a positive finding (one implicating either Mrs Chamberlain or the dingo), or an open finding, speculation over the cause and manner of Azaria's death would remain. 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."

I foresee that many members of the community may disagree with the conclusion I have reached. Two factors may go a long way towards explaining that lack of unanimity. The first is the fact that I have had the advantage of having all the evidence before me. The second is that the mental processes leading up to my decision have been confined and structured by a set of legal principles governing the standard of proof in coronial cases.

Pursuant to the provisions of Section 34 of the Coroners Act I make the following findings:

(1) The name of the deceased was Azaria Chantel Loren Chamberlain, the daughter of Michael Leigh Chamberlain and Alice Lynne Chamberlain.

(2) Azaria Chantel Loren Chamberlain, a female caucasian, was born at Mount Isa Queensland on 11th June 1980. Her usual place of residence was 3 Abel Smith Parade, Sunset, Mount Isa, Queensland.

(3) Azaria Chantel Loren Chamberlain died at Ayers Rock on 17th day of August 1980.

(4) As to the cause of her death and the manner in which she died the evidence adduced does not enable me to say. I therefore return an open finding and record the cause and manner of death as unknown.

Dated this 13th day of December 1995.

Mr John Lowndes
Coroner for the
Northern Territory.