



# “Miscarriages of Justice: What have we Learned (or not Learned!) 30 Years on from Chamberlain?”

Barbara Etter APM

Criminal Lawyers Association of the NT (CLANT)

Bali 20-26 June 2015

# OBJECTIVES



- Discuss the Sue Neill-Fraser murder case in Tasmania
- Relate SNF case to the theme of the conference of “Curing Injustice”
- Outline what has and has **NOT** been learned since Chamberlain over 30 years ago
- Discuss the need for mandatory standards re certification, accreditation and practice and procedure in forensic science
- Stress the need for proper mechanisms of redress when standards are not complied with or systemic error occurs
- Discuss the further right to appeal issue & other initiatives

# SUE NEILL-FRASER (TAS)



# SUE NEILL-FRASER (TAS)

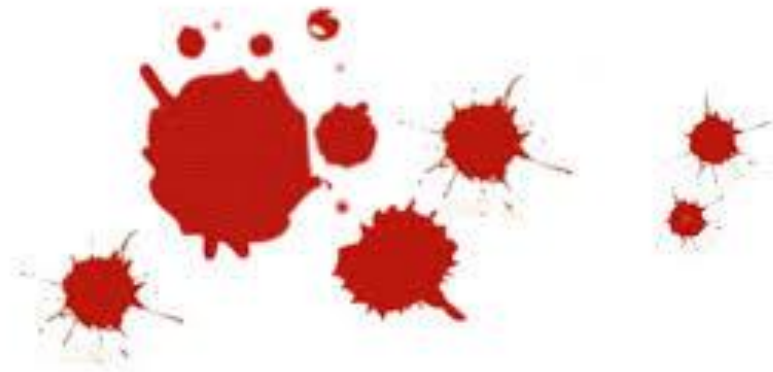
- Background – Australia Day 26 Jan 2009 – not a proven MoJ yet – claim of factual innocence
- Highly circumstantial case – no body, no weapon, no direct eyewitnesses, no forensic science directly linking to crime, no admissions or confessions
- Multi-faceted strategy being used to get the matter back before the courts
- Parallels with Lindy Chamberlain case in NT

# SUE NEILL-FRASER- TAS

- Sentenced originally to 26 years in prison – reduced to 23 yrs
- Appealed to the TAS CCA and made application for special leave to appeal to the High Court on one legal issue which was refused in September 2012
- Will reach **6 years** in gaol on 20 August 2015 – bail refused
- Legal team led by eminent barrister Robert Richter QC. Other supporters/commentators include Malcolm McCusker SC, Felicity Gerry QC, Stuart Tipple, Chester Porter QC, Dr Bob Moles, Eve Ash, Andrew Wilkie, Civil Liberties Australia. Others helping behind the scenes.

# SUE NEILL-FRASER (TAS)

- Like Chamberlain, key forensic science will be challenged and it will be argued that much of the forensic science (or its presentation) was flawed



# SUE NEILL-FRASER

- We will be arguing that there is no **mechanism of murder** and no **mechanism of body disposal** when one considers the CCA decision (where it was found that there was no evidence that a wrench was used) and the new independent expert reports concerning Bloodstain Pattern Analysis, the luminol testing of the dinghy and the winching reconstruction
- **There are other reasonable alternative hypotheses as to what occurred to Bob Chappell on Australia Day 2009**

# EXAMPLE OF TUNNEL VISION

The “weatherbeaten” man seen by Witness A between 7.45 pm and 8.30 pm on AD 2009 in a dinghy with an outboard & similar to that of Four Winds in the vicinity of the yacht. Described as:

It had an outboard motor propelling it and the rear of it was sitting well into the water. There was only one person on the Zodiac, a male, stocky/solid build, late 40's to early 50's, **weatherbeaten** sailor type look, short reddish brown hair, but not close shaven. The hair was possibly a bit wavy and was fairly thick.

Police timeline acquired under RTI post trial and appeal stated:

Person fits description of Sue Neill-Fraser – witness was some distance from dinghy and presumed it was a male due to the way the dinghy was sitting low in the water at the rear.

(Witness A did not give evidence in court)



# COMMENT BY DPP RE WRENCH AT CT 1393-1394

Closing address:

“Anger, bang. Maybe once, maybe twice...

She’s walking backwards and forwards and delivers blow – a blow or blows, or maybe stabs him with a screwdriver, I don’t know, he doesn’t look round, and so the body doesn’t have any marks of what you’d expect if someone had come down there, a stranger, intent on doing him harm, the body I suggest would have marks consistent only with being delivered by someone who he knew to be there, who he knew and expected to be behind him.”

# SUE NEILL-FRASER (TAS)

A significant factor leading to a wrongful conviction in the case:

- Forensic science issues – presumptive or screening tests; poor crime scene preservation/processing and reporting (re “state of the ropes”); incomplete evidence; lack of clear and proper expert reports including basis for opinions and assumptions and limitations etc.; issues with controls; a misleading winching “reconstruction”



# SUE NEILL-FRASER

- Flawed expert evidence? – screening tests and failure to explain to court the negative confirmatory tests re blood of RC in the Four Winds dinghy (Ouchterlony and HemaTrace). Same mistake as in Chamberlain where there was reliance on a presumptive test re supposed blood under the dash of the car



# EXPERT BPA REPORT 2014

An independent expert BPA report (2014) found that the positive luminol result in the Four Winds dinghy was most likely the result of luminescence due to possible overtreatment with luminol and/or false positives



# LUMINOL IN THE DINGHY

Independent expert report at page 11 (2014):

“During the examination of the Quicksilver inflatable Zodiac tender, at least sixteen (16) swabs from seven (7) different locations were tested with two different confirmatory tests for human blood. In every instance test results were negative.”

Ibid at page 14:

“No attempt should ever be made to align the visual colour, duration and/or intensity of any luminol reaction to the presence of human blood without confirmatory scientific support. Where no such testing is undertaken, or the results to those tests are negative the presence of blood should not be reported or opined. To do so, essentially amounts to a “guess” and is scientifically misleading.”

# EXPERT EVIDENCE – P.640 CT

“Yes. And when you look at those do you – are there particular strengths of the reaction that you can take note of?.....Yes, what we – well we take note of several things when we spray luminol. We take note of the strength of the reaction and how long lived it is, the actual colour of the glow that you see and just the manner of the reaction itself, so whether it’s a constant glow, whether it might be sparkling or you get a bright flash which then dies down, **because with experience you can distinguish sometimes between false positive reactions with luminol and true positive reactions with luminol and how it reacts, the colour, the longevity is all an indication of that.**” (emphasis added)

(Note, the whole of the expert witness’ evidence needs to be read. Trial judge relied on the positive luminol test in the dinghy, inter alia, in dealing with no case to answer submissions (CT p.1084)).

# OPENING ADDRESS DPP

CT p.71

“[T]he tender itself was also subjected to a **screening test for blood** called luminol, and what happens with luminol is you put it – you put it on objects where there might have been blood and turn off the lights and it gets lum – **it goes luminous in the presence of blood**, and so **that reacted quite strongly**, the **tender and the inside of the tender for the presence of blood**, and swabs taken from the tender were found to match, with a high degree of probability, Mr Chappell’s DNA. But on the other hand another screening agent for blood taken on that tender showed negative and one of the forensic scientists looked under the microscope to try and find some – what they look for is red/brown indications of blood and couldn’t find any, **so some indications of blood**, his DNA, but – others, no.” (emphasis added)

# CASE LAW RE LUMINOL - VIC

Victorian case of *R v Smart* [2008] VSC 79 per Lasry J:

“Thus, although I would admit the evidence in relation to the blood stains which are confirmed to be blood by scientific analysis and which produce relevant DNA profiles, I would not admit the evidence in relation to the luminol positive areas where there is no confirmatory testing”

(Dealt with admissibility of expert opinion as to footprints and blood spatter enhanced by luminol – whether speculation)



# OTHER CASE LAW

Regard should also be had to numerous cases in the UK re presumptive testing, including the IRA bombing cases. See Dr Bob Moles, Bibi Sangha and Kent Roach in *Forensic Investigations and Miscarriages of Justice* (2010) Irwin Law



# SUE NEILL-FRASER - DNA

- A large volume sample of DNA of a young homeless person found on the yacht without explanation – deposited in the usual way or transference? - “big red herring” at trial – basis of a HC application for special leave to appeal (re test used to refuse recall of witness) which was refused on 7 September 2012 – personally attended the hearing in Canberra. High Court told that the “core evidence” was that the girl was not on the boat



# SUE NEILL-FRASER - DNA

- HC considered the nature of the test which the SC used to not allow the recall of the homeless girl when information came to hand from a police witness during the trial after the girl had already given evidence. (HC unable to receive new or fresh evidence)
- HC held “In our view, this application does not give rise to a question suitable to a grant of special leave as the applicant has not shown that she was denied an opportunity to produce evidence on **a point of substance** which can be shown to have had a significant possibility of affecting the jury’s verdict.” (emphasis added)

# But now – New DNA expert evidence re Crown theory

- Expert evidence that the sample is more than likely primary in nature rather than secondary based on an examination of the relevant electropherogram and other material – expert report from VPFSD 2014
- More importantly, given the Crown theory that the DNA may well have come in on the bottom of someone's shoe, there is the statement in the recent expert report that:

**“[T]here is no evidence to support the hypothesis that the DNA detected in sample 20 was the result of a *secondary transfer* event caused through foot traffic on the deck of ‘four Winds’.” (sic)**



# Winching “Reconstruction”

Trial Judge in sentencing comments (2010):

**I am satisfied beyond reasonable doubt** that Ms Neill-Fraser used the ropes and winches on the yacht to lift Mr Chappell’s body onto the deck; that she manoeuvred his body into the yacht’s tender; that she attached an old-fashioned fire extinguisher weighing about 14 kilograms to his body; that she travelled away from the Four Winds in the tender with the body for some distance; and that she dumped the body in deep water somewhere in the river.

Referred to as a “reconstruction” by police Forensic officer (CT p.98) and Judge (CT p.1537). Refer to Gordon Wood case.

# Complaints

Sought a collaborative approach from FSST and Crown given what appears to be a critical error in the forensic science in relation to the luminol testing of the Four Winds dinghy (which is backed up by a 2014 independent expert report from a leading expert in BPA and Dr Bob Moles, a legal expert on forensic science and MoJ cases). However, Tasmania has declined to investigate matter.

A letter written to Director FSST re a serious complaint was responded to by an Assistant Commissioner of Police indicating that no further correspondence would be entered into.  
Operational independence of FSST?

Further action contemplated – ANZFSS, NIFS, NATA?

# Further Right to Appeal Laws

Tasmanian A-G announced on **9 September 2014** that she would move to introduce further right to appeal laws similar to those introduced in SA. (See SA cases of *Keogh* and *Drummond*)

A positive development for Tasmania, particularly for others who may have been wrongfully convicted and who have failed in appeals.

Current Bill requires “fresh and compelling” evidence similar to SA legislation but TAS legislation appears far more restrictive particularly if greater latitude is not available re “fresh” under the common law and the whole of the case and other evidence cannot be considered. No grounds re legal error.

# Difficulties with Strictly “Fresh” Evidence

- See the 1988 NT Court of Criminal Appeal decision – Asche CJ, Nader J and Kearney J
- Importance of s.433A of the *NT Criminal Code* to the reception of the Morling Inquiry findings/evidence – Court also given special inquisitory powers
- Disturbing to think that Chamberlain may not have been rectified in the absence of legislative intervention if Court had had to turn its mind to whether such evidence was strictly “fresh”
- Unlike SA, TAS legislation requires “fresh and compelling” evidence as defined by the legislation on the substantive appeal



# UK Developments – Move Away from Fresh Evidence

The House of Commons Justice Committee report on the Criminal Cases Review Commission HC 850, 25 March 2015 recommended (pp.15-16):

- 28. We recommend that the Law Commission review the Court of Appeal's grounds for allowing appeals. This review should include consideration of the benefits and dangers of a statutory change to allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, **even without fresh evidence or fresh legal argument.** (emphasis added)

# Further Right to Appeal

- Some of the fresh and compelling evidence in the Sue Neill-Fraser case will involve forensic evidence such as BPA, DNA, reconstructive evidence and luminol testing, and alternative suspects/theories
- A question arises re the treatment of DNA evidence given its objectivity and compelling nature. In the face of exculpatory DNA evidence should the Crown be able to argue that it could have been acquired earlier through the use of “reasonable diligence”?
- Isn't the primary purpose of such legislation the identification and rectification of miscarriages of justice?

# Forensic Science Standards

Need to understand the relationship between the forensic process (the application of scientific methodology within a laboratory) and quality assurance processes such as:

- **Accreditation;**
- **Certification;** and
- **Standardisation.**

(See “The Future of Forensic Science Standards” by Linzi Wilson-Wilde, James Brandt & Stephen Gutowski, Poster paper presented at the 24<sup>th</sup> ISFG Congress Vienna 2011)

# NAS Report 2009: S -10 (US)

National Academy of Science (NAS) Report was critical of the level of developed standards and quality management programs:

Too often [forensic science facilities] have inadequate educational programs, and they typically lack mandatory and enforceable standards founded on rigorous research and testing, certification requirements and accreditation programs.

Consider also more recent developments in US re bitemark and hair evidence – FBI admissions re errors

# Australian Standards – Forensic Analysis

- Australian Standard AS 5388.1 – 2012 Forensic Analysis Part 1: Recognition, Recording, Recovery, Transport and Storage of Material
- Australian Standard AS 5388.2 -2012 Forensic Analysis Part 2: Analysis and Examination of Material
- Australian Standard AS 5388.3 - 2013 Forensic Analysis Part 3: Interpretation
- Australian Standard AS 5388.4 - 2013 Forensic Analysis Part 4: Reporting

Australia taking a leading international role but none of these are compulsory (also a standard on DNA contamination)

# NATA ACCREDITATION

- National Association of Testing Authorities. This is also not compulsory.
- Facility/laboratory needs to comply with ISO/IEC 17025
- Tasmania Police forensic facility appears to be the only police forensic facility not accredited in Australia – responsible for crime scene processing, photography, fingerprints, ballistics, toolmarks, document examination etc.



# What Have We Not Learned from Chamberlain?

- Presumptive testing cannot be relied upon in the absence of appropriate confirmatory testing
- Expert witnesses can get it wrong! CSI effect?
- Importance of established and enforced standards and protocols
- Importance of proper scientific methodology (including controls) – issue with controls in SNF
- Criticality of crime scene preservation, processing and recording



# What Have We Not Learned from Chamberlain?

- Critical need for an independent central overseeing body to identify issues and implement reform across forensic science and the broader criminal justice system
- The need for a truly independent and objective forensic service – operational independence essential!
- The need for flexibility or latitude in our law particularly in relation to Miscarriages of Justice – *Ratten* approach to fresh evidence should be permissible on a substantive appeal as in SA case of Henry Keogh – see Tas draft further right to appeal Bill
- We have not recognised the **systemic** nature of some of the causes of Miscarriage of Justice – “rotten apple theory” in police corruption



# What Have we Not Learned from Chamberlain?

- The court system, the adversarial approach and our system of appeals can be ineffective in addressing miscarriages of justice – Lindy failed in her appeals to the Federal Court and the Full Court of the High Court. Why? Others have been similarly unsuccessful – consider Andrew Mallard in WA
- **We have not made a multi-sectoral, cross-jurisdictional strategic investment in preventing Miscarriages of Justice and learning from proven cases**
- The National Institute of Forensic Science (NIFS) was established in 1991 as a direct result of Chamberlain and the Morling Inquiry. It has not grown appropriately with the increased need for greater scrutiny of the forensic “sciences”

# WHAT NEXT?



- How were Farah Jama, Gordon Wood, and the Sue Neill-Fraser cases allowed to happen after the many hard lessons learnt from cases like Splatt and Chamberlain?
- And what of comments made by the National Research Council of the US National Academy of Sciences which published a report in 2009 that was highly critical of many established areas of forensic science and the role of the criminal courts in regulating them?
- Surely deficiencies in forensic science and other areas need to be addressed as **a matter of urgency** to prevent further MoJ?

# NIFS

- The current budget for NIFS for 2014/2015 is \$805,374 down from \$966,450 in 2013/14
- The Commonwealth AGD withdrew its funding share of \$161,076 and is no longer on the Board
- The Board now consists solely of Police Commissioners
- NIFS is a business unit of ANZPAA in Melbourne
- The staffing FTE for NIFS is 4 persons
- NIFS is currently trying to get buy-in (including funding) from other obvious stakeholders
- NIFS has developed invaluable networks and co-operation and goodwill over the years. But is this enough????

# NIFS

- The NT contribution to NIFS in 2014/15 is \$14,650
- This is equivalent to 6 cents per person in the NT!!
- Australia-wide, this is equivalent to less than 4 cents per person!!
- Do you really think that this is in any way a meaningful contribution to the future of forensic science in this country and an effective safeguard in relation to miscarriages of justice?

# NIFS REVIEW BY VINCENT J

The Hon Frank Vincent AO QC conducted independent review of NIFS and reported findings to ANZPAA Board 4 July 2014. Review identified two key points:

- The importance of a forensic sciences institution at a national level to establish and maintain standards and quality management, education and training, research and information exchange; and
- That the current governance and funding arrangements are not sustainable if NIFS is to continue to meet the needs of all forensic science stakeholders.

Referred to National Justice and Policing Senior Officials' Group (NJPSOG) who endorsed recommendations 29 Aug 2014. NIFS Forum 30 Oct 2014 – developing draft proposals. See

<https://www.anzpaa.org.au/forensic-science/10636>

# FURTHER STRATEGIES



- A greater role and resourcing for NIFS? Who is actually identifying and collating the many emerging issues of concern in relation to forensic science, nationally and internationally?
- Who is actually driving procedural, cultural and legislative reform required to prevent miscarriages of justice? Can we collaborate productively, identify international best practice and achieve some national uniformity here in Australia?

# FURTHER STRATEGIES

- **Compulsory** accreditation of all forensic laboratories, including police facilities – Tasmania Police facilities not accredited
- **Corrective actions** for failing to comply with standards and for not addressing/rectifying serious mistake or systemic error when drawn to the expert's/authority's attention
- A change in the nature of the Australian and NZ Forensic Science Society towards a **different model/professional association** such as the Australian Medical Association (AMA)?

# Accountability of Experts

Ian Freckelton SC and Hugh Selby *Expert Evidence: Law, Practice, Procedure and Advocacy* 5<sup>th</sup> Ed LawBook Co 2013, p. 559:

In Australia there have been a number of decisions on the amenability of forensic experts to regulatory sanctions. They have confirmed the emerging practice of regulatory bodies to discipline professionals for unacceptable discharge of the forensic role.

and

It is now apparent that a form of accountability outside the courts and collegiate censure exists in respect of professional regulation ... Decided cases make it apparent that a wide variety of forms of conduct by experts in their reports or their evidence may be regarded as constituting unprofessional conduct within the regulatory environment (ibid p.562).



# Code of Ethics/Practice

The ANZFSS has just replaced its Code of Ethics with a Code of Professional Practice. All members undertake to comply with these ethical/professional standards.

See <http://anzfss.org/wp-content/uploads/2012/05/ANZFSS-Code-of-Professional-Practice-Final.pdf>

The Morling Inquiry expressed concern that various expert witnesses had failed to exhibit appropriate professional detachment in their work (Freckelton and Selby 2013, p.308).

# Accountability of Experts

*Re Watson-Munro* [2000] PRBD (Vic) referring to Dixon CJ:

The role of the forensic expert carries the privilege, not extended to lay witnesses, entitling the expression of opinions. However, along with privilege go especial obligations in relation to integrity, professionalism and the exercise of responsible judgment.



# Accountability of Experts

Expert Codes of Conduct – in NSW this is found in Schedule 7 to the NSW Uniform Civil Procedure Rules 2005 and applies to expert evidence in criminal proceedings by virtue of Pt 75 r 3(j) of the Supreme Court Rules 1970 (NSW). See also Federal Court of Australia Practice Note CM7; Part 15.5 Family Law Rules and Order 44.03 of the VIC Supreme Court (General Civil Procedure) Rules 2005

– new Supreme Court of Victoria Practice Note No.2 “Expert Evidence in Criminal Trials” (1 July 2014)

See *Wood v The Queen* [2012] NSWCCA 21 at [725] per McClellan CJ at CL in relation to discussion on this point.

# STRATEGIES (CONT'D)



- **Compulsory** Australian Forensic Analysis standards?
- **Compulsory** certification for practitioners in particular disciplines?
- A Forensic Science Regulator as in the UK? (currently a broader role than NIFS - eg. hears complaints in relation to quality standards)
- Re-consideration of legal approaches to the admission and use of expert evidence in adversarial criminal proceedings – requirement for reliability, proper reports, better advocacy training
- Expert Code of Conduct for expert witnesses in all jurisdictions and training in the ethics of giving expert evidence – new Code of Professional Practice has recently replaced ANZFSS Code of Ethics – complaint and enforcement mechanisms?

# A Forensic Science Regulator?

The UK FSR ensures that the provision of forensic science services across the criminal justice system is subject to an appropriate regime of scientific quality standards.

FSR works with the UK Home Office. See

<https://www.gov.uk/government/organisations/forensic-science-regulator>

Responsibilities involve:

- identifying the requirement for new or improved quality standards
- leading on the development of new standards
- where necessary, providing advice and guidance so that providers of forensic science services can demonstrate compliance with common standards

# UK FSR Priorities

The priorities and aims are to see that:

- forensic science services are delivered to appropriate standards (usually an international standard) tailored to meet the needs of the criminal justice system and subject to independent and effective assessments of quality
- high quality advice and guidance is provided to forensic science providers, ministers and others on the forensic science requirements of the criminal justice system
- there are effective means to investigate quality failures and to address any issues
- there is effective collaboration with the authorities in Scotland and Northern Ireland to achieve UK-wide quality standards
- the UK is a strong voice at the table on projects to develop European or international standards for forensic science

# CONCLUSION



- An effective and properly resourced **central coordinating body** reflective of the nature and importance of the role of forensic science – a proper commitment by all Governments and the forensic science community
- **Compulsory** standards in relation to practice and procedure by forensic scientists, certification of practitioners and accreditation of all facilities/laboratories in Australia?
- Mechanisms for implementation and enforcement and a responsive and **effective complaint system** coupled with timely and effective remedies for those impacted

# CONCLUSION (CONT'D)

- Proper documented **standards** in all relevant areas - major crime investigation, jurisdictional barristers rules, disclosure of evidence by the Crown etc.
- Enhanced mechanisms for independent and timely review such as new appeal rights (involving a fair and workable model), Innocence Projects (based in Universities) and a CCRC as in the UK and other countries
- **Accountability** for all involved including police, forensic scientists, lawyers, prosecutors and judges including timely and appropriate compensation for those wrongfully convicted



# A FINAL THOUGHT

Please reflect on the following, as suggested by Professor Derrick Pounder (in *A State of Injustice* by Dr Moles 2004):

**“If I were an innocent person accused of murder would I be confident of not being wrongly convicted?”**

**Have we really moved on from Chamberlain?**



# THANK YOU



# CONTACT DETAILS

Barbara Etter APM  
BEtter Consulting  
Barrister and Solicitor  
Hobart, Tasmania  
Adjunct Professor, School of Law and Justice  
Edith Cowan University  
University Fellow Charles Darwin University  
Email: [barbara@betterconsult.com.au](mailto:barbara@betterconsult.com.au)  
[www.betterconsult.com.au](http://www.betterconsult.com.au)

