
Lost in Translation: The Wrongful Conviction of Kathleen Folbigg Based on Fresh Medical Evidence and Expert Interpretation of Her Diaries

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This article argues that Kathleen Folbigg was wrongly convicted of suffocating her four children and should be immediately released from prison where she has been incarcerated since 2003. The basis for this contention is the fresh and compelling evidence that Ms Folbigg has the CALM2 mutation which she passed on to two of her four children and precipitated lethal cardiac arrests. The current medical and scientific expert opinion is that all four children died from natural causes. In addition, recent expert opinion from psychologists and linguists on Ms Folbigg's diaries, which the Crown argued amounted to virtual admissions of guilt, concluded that there was no evidence Ms Folbigg harmed her children and her purpose in writing the entries was to try and make sense of the deaths of her children.

I. INTRODUCTION

In 2003, Kathleen Folbigg was convicted of the homicide of all four of her infant children. Importantly, these deaths did not take place at the same time. This was not a case of a mother deciding to end the lives of all her children in one fatal moment of despair, but on the Crown case four separate killings spread out over a period of 10 years between 1989 and 1999. The age of the children at the time of death ranged from 19 days (Caleb, the first child) to 18 months (Laura, the fourth child). There was a six-year gap between the death of the third child (Sarah) in 1993 and the fourth child (Laura) in 1999. It was not until the death of the fourth child that any concerns were raised with the previous three deaths, which had all been thoroughly investigated and attributed by medical experts to natural causes. As will be seen, the trigger for the police investigation was the decision of Kathleen Folbigg's husband, Craig Folbigg, to take her diaries to the police. Craig Folbigg was a key prosecution witness against his then wife at her trial in 2003, and it was Craig's evidence as to Kathleen's character that the Crown relied upon to cement their case against Kathleen. The Crown prosecutor was Mark Tedeschi, KC, and Barr J was the trial judge.

The jury found Ms Folbigg guilty of the manslaughter of her first child, Caleb, and the murder of her other three children, Patrick, Sarah and Laura. The Crown case at trial was that there were no known cases of four natural deaths in one family, which was buttressed by the prosecutor's interpretation of certain entries in Ms Folbigg's diaries as amounting to an admission of guilt. Ms Folbigg's appeal failed, with the leading judgment labelling the diaries as "damning".¹ However, from 2015 fresh medical evidence began to emerge which pointed to an increasing likelihood that the four children died from natural causes associated with genetic mutation and underlying medical conditions.² These medical developments led

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¹ *R v Folbigg* (2005) 152 A Crim R 35, [132] (Sully J); [2005] NSWCCA 23.

² Report of Professor Stephen Cordner dated 2015, 7, and Report of Professor Michael Pollanen dated 1 June 2015, cited in Robert Cavanagh and Neil Schultz, "Request to the NSW State Coroner for a Coronial Inquest into the Deaths of Caleb, Patrick, Sarah and Laura Folbigg" (11 March 2022) 7, giving the reference in n 7 as Annexure 1, which in turn is Exhibit C - Report of Stephen Cordner undated and report of Michael Pollanen dated 1 June 2015 from Inquiry into the convictions of Kathleen Megan Folbigg <<https://www.folbigginquiry.justice.nsw.gov.au/Pages/exhibits.aspx>>.



to a Commission of Inquiry which reported in 2019,³ but which concluded the guilty verdicts should stand, and in particular that Ms Folbigg's explanations before the Commission of her diary entries were "simply unbelievable".⁴

Two years later, in 2021, fresh genetic evidence became available that the CALM2 G114R mutation identified in Ms Folbigg is pathogenic and there is a greater than 99% certainty that the mutation was responsible for the deaths of Sarah and Laura.⁵ Consequently, in March 2021, a petition was sent to the Governor of New South Wales (NSW) seeking a pardon for Ms Folbigg.⁶ Then, a further year later, in March 2022, a request was sent to the NSW State Coroner for a coronial inquest into the deaths of the four Folbigg children.⁷ It would appear that this request for a coronial inquest finally forced the hand of the NSW Attorney-General in May 2022 to respond to the petition to the Governor by setting up a further Inquiry.⁸

This article is divided into three parts. Part II will deal with the trial and sentencing⁹ in 2003 conducted by Barr J, and the subsequent appeal in 2005 where the leading judgment was given by Sully J. Part III will cover the developments from 2005 to 2019 when the Commission of Inquiry under Commissioner Blanch handed down its Report. Part IV will deal with events between 2021 and 2022, which include the CALM2 mutation study published in the prestigious Oxford University journal, *EP Europace*,¹⁰ the petition to the Governor, the request for a coronial inquiry into the deaths of the four Folbigg children, and the establishment of a second Inquiry under Mr Bathurst, KC, the recently retired Chief Justice of the Supreme Court of New South Wales.

As the title of the article suggests, the common theme linking each of the three Parts is the proposition that the significance of the evidence was lost in translation. For example, in Part II it will be argued that at trial the medical evidence that led to Ms Folbigg's convictions was guided by the now discredited "Meadow's Law".¹¹ Similarly, in Part III it will be contended that Commissioner Blanch completely misinterpreted the nature and purpose of Ms Folbigg's diaries, and that the entries did not have the "plain meaning"¹² the Commissioner ascribed to them, falling into the same error as Sully J in the Court of Appeal in 2005. Finally, in Part IV, the proposition will be put that there is no need for a further Inquiry as a combination of the new medical evidence and a properly understood reading of Ms Folbigg's diaries, leads to the conclusion that at a minimum the four Folbigg children died of natural causes on the balance of probabilities.

II. TRIAL AND SENTENCING OF KATHLEEN FOLBIGG IN 2003

Kathleen Folbigg was convicted in 2003 of killing her four young children by smothering. The case against Kathleen Folbigg was entirely circumstantial. It was based on the proposition that the likelihood of four children from one family dying of natural causes is so unlikely as to be virtually impossible. The medical evidence was equivocal in the sense that the expert evidence admitted at trial was unable

³ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg* (State of New South Wales, 2019) <<https://www.folbigginquiry.justice.nsw.gov.au/Documents/Report%20of%20the%20Inquiry%20into%20the%20convictions%20of%20Kathleen%20Megan%20Folbigg.pdf>>.

⁴ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 477 [65].

⁵ Malene Brohus et al, "Infanticide vs. Inherited Cardiac Arrhythmias" (2021) 23(3) *EP Europace* 44.

⁶ Robert Cavanagh and Rhanee Rego, "Petition to Governor of New South Wales for Pardon of Kathleen Folbigg" (2 March 2021).

⁷ Cavanagh and Schultz, n 2.

⁸ Mark Speakman, NSW Attorney-General, "Kathleen Megan Folbigg" (Statement, 18 May 2022) <<https://www.dcj.nsw.gov.au/news-and-media/media-statements/2022/kathleen-megan-folbigg--statement-by-attorney-general-mark-speak.html>>.

⁹ *R v Folbigg* [2003] NSWSC 895.

¹⁰ Brohus et al, n 5.

¹¹ Essentially, the Crown based its case on the now discredited "Meadow's Law" that "one infant death is a tragedy, two is suspicious and a third is murder until proven otherwise".

¹² *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 477 [65], 478 [68].

to distinguish between Sudden Infant Death Syndrome (SIDS) and smothering. Thus, the fact in issue at trial was the contest between SIDS versus smothering. The Crown sought to buttress its case by adducing Ms Folbigg's diaries which the Crown argued contained evidence of inculpatory statements.

A. Coincidence Evidence

A crucial early ruling in the trial of Ms Folbigg was the decision of Wood CJ at CL to deny Ms Folbigg's application for separate trials on the charges that she murdered her four children.¹³ The Crown opposed the application because it sought to rely on the evidence relating to the deaths of each child as being admissible in relation to each count, and consequently had served tendency and coincidence notices under ss 97 and 98 of the *Evidence Act 1995* (NSW).

Under s 98, the Crown relied on some 19 points of similarity in the circumstances concerning the death of each child.¹⁴ The most important of these similarities were: (1) only the accused was awake or present at the time when each child was found dead or not breathing; (2) there were no signs of any injury found on any child; (3) no major illness preceded the death in any of the cases; (4) the tests for any inherited and/or biochemical disorder or metabolic abnormality were negative in each case; (5) the death in each case arose from an hypoxic (insufficient oxygen) event; and (6) the accused had shown acute irritation in relation to each child, or appeared to have been in a condition of stress, before the death.

As Cavanagh has pointed out,¹⁵ each of the above points of similarity has either a commonsense explanation or is incorrect or is outdated. In relation to (1) above, Ms Folbigg was the primary caregiver and it was unremarkable she found the children dead. As to (2), lack of injury is both consistent with Ms Folbigg's innocence and inconsistent with the Crown's claim of tendency that she lost her temper and control when killing her children. The claim under (3) is factually incorrect as each child had medical conditions prior to death, and as for (4) the claim of no inherited abnormalities is now outdated and inaccurate. As regards (5), when someone dies, he or she suffers a hypoxic event, which is both unremarkable and linked to "asphyxia", an unhelpful word in forensic pathology. Finally, (6) is related to (2) in that the Crown case was that Ms Folbigg killed her children while angry and stressed. The only evidence for this claim was put forward by Mr Folbigg, a key Crown witness.

Cavanagh concludes his submission on coincidence evidence to the 2019 Inquiry in these terms:

The whole purpose of the coincidence evidence as affirmed by Sully J [in the Court of Appeal] was to show that Kathleen Folbigg intentionally murdered her children. Not one of the particulars, individually or taken together, could remotely support that contention. Therefore, the particulars above do not have significant probative value and could not have met the threshold requirement contained in s 98(1)(b) of the Act.¹⁶

Commissioner Blanche disagreed with this line of argument presented at the Inquiry:

None of the evidence in the Inquiry has materially changed these points so as to affect the similarity between them. I do not consider that the evidence in the Inquiry undermines the validity of the coincidence evidence.¹⁷

It would appear that Commissioner Blanche adopted the position taken by Barr J at trial and Sully J on appeal, in contrast to the more demanding approach to the admissibility of coincidence evidence undertaken by Coldrey J in *R v Matthey*.¹⁸ Carol Matthey's case has striking similarities with Ms Folbigg's situation in that both were accused of smothering their four children, while the alleged supporting evidence against Ms Matthey was her alleged motivation to sustain her relationship with her partner as

¹³ *R v Folbigg* [2002] NSWSC 1127.

¹⁴ *R v Folbigg* [2002] NSWSC 1127, [62] (Wood CJ at CL).

¹⁵ Robert Cavanagh, "Folbigg Submission on Coincidence Evidence" (19 August 2021) <<http://www.injustice.law/2021/08/19/folbigg-submission-on-coincidence/>>; see Part E of the *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3.

¹⁶ Cavanagh, n 15.

¹⁷ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 472.

¹⁸ *R v Matthey* (2007) 17 VR 222.

opposed to Ms Folbigg's diary entries. However, unlike Ms Folbigg, the case against Ms Matthey was dropped after Coldrey J found a number of pieces of evidence gathered against her were inadmissible.¹⁹

B. Expert Evidence

At Ms Folbigg's trial the defence objected to evidence of the recurrence of sudden unexplained infant deaths being adduced from expert witnesses.²⁰ The objection was based on a statement the expert witness was "unaware that there had ever been three or more thoroughly investigated infant deaths in one family from sudden infant death syndrome" amounted to non-expert opinion as defined in s 79(1) of the *Evidence Act 1995* (NSW).²¹ The trial judge disagreed with the objection, holding the witness could make that statement from his own experience and knowledge of the literature.²² The Court of Appeal upheld the trial judge's ruling the "evidence of experts' knowledge of other similar cases was relevant to the Crown case that there was no reasonably possible natural cause of death and to infer that the deaths were caused in some unnatural way, namely, by deliberate suffocation".²³

The authors respectfully disagree with the trial judge, Barr J, and Sully J on appeal, because the opinion was not "wholly or substantially based on that [specialised] knowledge", as being "unaware" of multiple deaths from natural causes in one family does not constitute specialised knowledge. In any event, in 2003 the expert witnesses were heavily influenced by the now discredited "Meadow's Law". As will be seen in the next section, *C Medical Evidence*, it was necessary for Sully J on appeal to distinguish Ms Folbigg's case from *R v Cannings*,²⁴ an English case which continued the process of discrediting "Meadow's Law" commenced in *R v Sally Clark*.²⁵

Furthermore, the basis for the admission of the recurrence evidence was that all four deaths were either caused by SIDS or suffocation, when there is now cogent evidence that at least two of the deaths were caused by the CALM2 genetic mutation not SIDS. In other words, the factual basis upon which the expert evidence was admitted under s 79(1) was wrong.

C. Medical Evidence

It is therefore now necessary to turn to the medical evidence presented at trial, which is well summarised in Ms Folbigg's appeal case,²⁶ where Sully J (with whom Dunford and Hidden JJ agreed) gave the leading judgment. Sully J approached the task of evaluating the strength of the medical evidence by way of a process of reasoning summed up in the following extract:

[143] In the present case there was, in my opinion, ample evidence at trial to justify these findings, reached beyond reasonable doubt:

[1] None of the four deaths, or Patrick's ALTE [apparent life-threatening event], was caused by an identified natural cause.

¹⁹ *R v Matthey* (2007) 17 VR 222, [301] (Coldrey J).

²⁰ *R v Folbigg* (2005) 152 A Crim R 35, [51] (Sully J); [2005] NSWCCA 23.

²¹ Section 79(1) states: "If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

²² *R v Folbigg* (2005) 152 A Crim R 35, [58] (Sully J); [2005] NSWCCA 23.

²³ *R v Folbigg* (2005) 152 A Crim R 35, [81] (Sully J); [2005] NSWCCA 23.

²⁴ *R v Cannings* [2004] 1 WLR 2067.

²⁵ *R v Sally Clark* [2003] EWCA Crim 1020, where the appellant was convicted of killing her first and second baby sons. At trial, the expert evidence given by Professor Sir Roy Meadow indicated that the chances of two sudden infant deaths occurring in the same family from natural causes was one in 73 million. After the trial, the results of microbiological tests suggested that the appellant's second baby might have died of natural causes. The evidence of microbiological reports was not disclosed during the trial. The Court of Appeal allowed the appeal and found the conviction unsafe. Sally Clark's successful appeal was in part due to Meadow's evidence being shown to be incorrect by Professor Dawid, an eminent statistician, who concluded the one in 73 million figure was "highly misleading and prejudicial" because it did not take into account possible familial factors and the extreme improbability of two babies in the same family dying of any cause whatsoever.

²⁶ *R v Folbigg* (2005) 152 A Crim R 35; [2005] NSWCCA 23.

- [2] It was possible that each of the five events had been caused by an unidentified natural cause, but only in the sense of a debating point possibility and not in the sense of a reasonable possibility. The evidence of the appellant's episodes of temper and ill-treatment, coupled with the very powerful evidence provided by the diary entries, was overwhelmingly to the contrary of any reasonable possibility of unidentified natural causes. So were the striking similarities of the four deaths.
- [3] There remained reasonably open, therefore, only the conclusion that somebody had killed the children, and that smothering was the obvious method.
- [4] In that event, the evidence pointed to nobody other than the appellant as being the person who had killed the children; and who, by reasonable parity of reasoning, had caused Patrick's ALTE by the same method.²⁷

As can be seen from the above passage, the process of Sully J's reasoning was as follows: (1) none of the deaths had an identifiable natural cause; (2) there was no reasonable possibility of the deaths being caused by an unidentifiable natural cause; (3) therefore the children must have been killed; (4) the appellant was the only possible killer. Importantly, under [143][2] above, Sully J accepted the evidence of prosecution witness Craig Folbigg and the Crown case that Kathleen Folbigg had killed her children when angry, which actions would have likely left forensic evidence of smothering of which there was none.

The Crown case on this point was summed up by the Crown prosecutor in his final address: "What we suggest is that she became enraged, she became consumed with stress hatred, resentment, anger and suddenly smothered her children to death."²⁸ Professor Cordner pointed out that "[t]hese actions, taken while enraged, could be expected to leave some injuries when replicated five times in four children, let alone the general signs of mechanical obstruction of the external airways".²⁹

In coming to the conclusion that Kathleen Folbigg was the only possible killer, given the written submissions by the defence on appeal, it was necessary for Sully J to distinguish Ms Folbigg's case from that of *R v Cannings*,³⁰ an English case which continued the process of discrediting "Meadow's Law" commenced in *R v Sally Clark*.³¹ In *R v Cannings*,³² the defendant was the mother of four children, three of whom died in infancy. She was charged with the murder of both her sons, J and M. The charge of murder of her first child, G, a daughter did not proceed. The defendant was convicted of murdering both her sons. Sully J cited the headnote of the case,³³ the salient parts of which are extracted below:

Held, allowing the appeal and quashing the convictions, that where there were one, two or even three infant deaths in the same family, the exclusion of currently known natural causes of infant death did not lead to the inexorable conclusion that the death or deaths resulted from the deliberate infliction of harm ... where a full investigation into two or more sudden unexplained infant deaths in the same family was followed by a serious disagreement between reputable experts as to the cause of death, so that natural causes could not be excluded as a reasonable possibility, the prosecution of a parent or parents for murder should not be started, or continued, unless there were additional cogent evidence, extraneous to the expert evidence, which tended to support the conclusion that the infant or infants had been deliberately harmed.

²⁷ *R v Folbigg* (2005) 152 A Crim R 35, [143] (Sully J); [2005] NSWCCA 23.

²⁸ Cavanagh and Schultz, n 2, 36.

²⁹ Cavanagh and Schultz, n 2, 37, citing Report of Professor Stephen Cordner, 1 March 2022, 4 (Annexure 7).

³⁰ *R v Cannings* [2004] 1 WLR 2067.

³¹ *R v Sally Clark* [2003] EWCA Crim 1020, where the appellant was convicted of killing her first and second baby sons. At trial, the expert evidence given by Professor Sir Roy Meadow indicated that the chances of two sudden infant deaths occurring in the same family from natural causes was one in 73 million. After the trial, the results of microbiological tests suggested that the appellant's second baby might have died of natural causes. The evidence of microbiological reports was not disclosed during the trial. The Court of Appeal allowed the appeal and found the conviction unsafe. Sally Clark's successful appeal was in part due to Meadow's evidence being shown to be incorrect by Professor Dawid, an eminent statistician, who concluded the one in 73 million figure was "highly misleading and prejudicial" because it did not take into account possible familial factors and the extreme improbability of two babies in the same family dying of any cause whatsoever.

³² *R v Cannings* [2004] 1 WLR 2067.

³³ *R v Folbigg* (2005) 152 A Crim R 35, [134] (Sully J); [2005] NSWCCA 23.

Sully J distinguished Ms Folbigg's case from that of Ms Cannings on four grounds. First, the English Court of Appeal was concerned that Meadow's evidence had been seriously flawed and would likely impact on the verdict. Sully J made the surprising observation "there is no such situation present in the expert evidence given for the Crown at the appellant's trial".³⁴ It is difficult to understand this comment given the Crown's witnesses were heavily influenced by "Meadow's Law" and that by the time of the appeal in 2005 there were two leading English cases that discredited "Meadow's Law".

Second, there was no "fresh post-trial evidence before this Court".³⁵ This comment ignores the undermining of "Meadow's Law", but in any event certainly does not apply post 2015. Third, the post-trial evidence in the case of Ms Cannings related to a possible genetic cause, which Sully J identified as having "no comparable situation in the present case".³⁶ This statement was valid at the time but not after 2021.

Fourthly, Sully J distinguished between the lack of evidence of ill-temper and ill treatment applying to Ms Cannings: "In the appellant's case, there is a body of such evidence, and it was not shown to be inherently incredible. That evidence was, rather, bolstered by the diary entries, for which there was no parallel in the *Cannings* case."³⁷ Parents exhibit frustration and ill-temper with their children, but this does not translate into four separate murders. "Not shown to be inherently incredible" does not meet the criminal standard of proof, and as will be seen the diary entries are open to interpretation.

Sully J was fortified in his conclusion on the medical evidence by his assessment of the "damning" significance of Ms Folbigg's diary entries:

[132] These entries make chilling reading in the light of the known history of Caleb, Patrick, Sarah and Laura. The entries were clearly admissible in the Crown case. Assuming that they were authentic, which was not disputed; and that they were serious diary reflections, which was not disputed; then the probative value of the material was, in my opinion, damning. The picture painted by the diaries was one which gave terrible credibility and persuasion to the inference, suggested by the overwhelming weight of the medical evidence, that the five incidents had been anything but extraordinary coincidences unrelated to acts done by the appellant.³⁸

Thus, Sully J, like Barr J at sentencing, held that the medical evidence in combination with the diary entries led to the irresistible conclusion that the Crown had fully discharged the burden of proof and consequently dismissed Ms Folbigg's appeal.

D. Crown Prosecutor's Modus Operandi on the Diaries

As regards the diary entries, the Crown prosecutor's modus operandi was to read out an extract from one of Ms Folbigg's diaries and then give the Crown's inculpatory interpretation. No expert evidence was called under s 79 of the *Evidence Act 1995* (NSW) as the Crown prosecutor relied on the "plain meaning" of the diary extracts being within the jury's common knowledge. The following is a typical example of the Crown prosecutor's technique:

Diary Entry

"Kaz [Ms Folbigg's sister-in-law] sent a beautiful angel and teddy for Laura [the fourth child]. Both her and Craig [Ms Folbigg's husband] are convinced that Laura's soul is not her own. By the looks of it. Me, well, I'm sure she met everyone and they've told her "don't be a bad or sickly kid. Mum may, you know, crack it". They've warned her. Good. But she is still her own little person and will always be. Must stop calling her Sarah. She's most definitely not her."

Crown Interpretation

³⁴ *R v Folbigg* (2005) 152 A Crim R 35, [138] (Sully J); [2005] NSWCCA 23.

³⁵ *R v Folbigg* (2005) 152 A Crim R 35, [139] (Sully J); [2005] NSWCCA 23.

³⁶ *R v Folbigg* (2005) 152 A Crim R 35, [140] (Sully J); [2005] NSWCCA 23.

³⁷ *R v Folbigg* (2005) 152 A Crim R 35, [141] (Sully J); [2005] NSWCCA 23.

³⁸ *R v Folbigg* (2005) 152 A Crim R 35, [132] (Sully J); [2005] NSWCCA 23.

The Crown case about that entry is that when she wrote “I’m sure she’s met everyone”, what she was referring to is that Laura, before she was born, had had communication in the other world with the three previous children. Then she goes on, “They’ve told her ‘don’t be a bad or sickly kid’”. In other words, the three previous children had warned Laura not to be a bad or sickly kid because otherwise “mum may, you know, crack it”. Then she continues, “They’ve warned her. Good”.

So the Crown case is that she believed that the reason why Laura was such a good child was because the previous three children who had been killed by her had warned Laura to be a good child so that the same fate would not befall her.³⁹

As will be discussed in Part IV, which deals with developments since the Commission of Inquiry reported in 2019, expert opinion provided for the Cavanagh and Schultz authored request in 2022 for a coronial inquiry into the deaths of the four Folbigg children rejected the Crown’s view on the diaries as being misleading and unsupported. The Crown prosecutor when considering motive suggested Ms Folbigg’s reason for killing her four children was “because she couldn’t stand their crying and the demands that they made on her life”.⁴⁰ The Crown prosecutor in his closing address to the jury put forward the view that “[t]hese diaries are the strongest evidence that you could possibly have for this accused having murdered her four children”.⁴¹

E. Defence Counsel’s Modus Operandi on the Diaries

By contrast, Mr Zahra SC, counsel for Ms Folbigg, stressed the need for the jury to take into account the context in which the diaries were written “of experiencing the deaths of the children, as going through some fairly normal human reactions – not only of grief, maybe feelings of shame, feelings of guilt, feelings of responsibility, asking the what if questions”.⁴² Mr Zahra portrayed the diary entries as expressing feelings of blame and guilt that she should have done more by asking herself “what if” questions. Two examples will suffice to convey the tenor of the defence interpretation of the diary entries:

But it is important, obviously, to read these answers and reflect that really what the accused is feeling blame and guilt about is that she could have done other things and one might expect this as being part of the expected range of human emotion.⁴³

We could have done more, may be we relaxed too much. That is the blame, not that we murdered, that she murdered this child. We were complacent.⁴⁴

Thus, the jury was presented with two different interpretations of the meaning of the diaries. On the one hand, the Crown took a dark, almost satanic view of the diary entries as a window into the malicious mind of a Sarah Makin⁴⁵ type personality. On the other hand, the defence sought to explain the diary entries in a more benign and natural light as the troubled, anxious thoughts of a mother wracked with guilt. The authors find Mr Zahra’s reference to “complacent” troubling, as the evidence suggests Ms Folbigg was obsessed with monitoring her children’s health and maintaining healthy sleeping patterns,

³⁹ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, Amended Exhibit F – Complete Set of Transcripts of Evidence Given at 2003 Trial, 64, lines 5–29.

⁴⁰ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, Amended Exhibit F – Complete Set of Transcripts of Evidence Given at 2003 Trial, 67, lines 45–47.

⁴¹ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, Amended Exhibit F – Complete Set of Transcripts of Evidence Given at 2003 Trial, 1372, lines 54–56.

⁴² *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, Amended Exhibit F – Complete Set of Transcripts of Evidence Given at 2003 Trial, 86, lines 35–39.

⁴³ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, Amended Exhibit F – Complete Set of Transcripts of Evidence Given at 2003 Trial, 1514, lines 38–42.

⁴⁴ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, Amended Exhibit F – Complete Set of Transcripts of Evidence Given at 2003 Trial, 1514–1515, lines 58; 1–3.

⁴⁵ John and Sarah Makin were convicted of murdering a one-month-old child and burying the child in their backyard. During their trial evidence of 12 other babies found buried in the backyards of their previous residences was offered as evidence: *Makin v Attorney-General for New South Wales* [1894] AC 57.

the more so with each successive death. Be that as it may, the diaries mirrored the differences in the view taken of the medical science, namely, murder by smothering versus natural causes.

F. Sentencing and the Diaries

It is revealing to consider the sentencing judgment of Barr J which set great store by the diary entries.⁴⁶ The thrust of Barr J's approach is contained in the extracts below which portray Ms Folbigg as a disturbed child (she had witnessed her mother being murdered by her father when she was 18 months old and had difficulty adjusting to foster placements) who as an adult struggled to connect with other people including her husband, and was constantly at war with herself when she became a mother:

[35] It is necessary to try to understand why the offender lost her temper and assaulted her children ...

[52] It is well established that children who are neglected and suffer serious physical and sexual trauma may suffer a profound disturbance of personality development. The evidence for such a disturbance in the offender is strong, as her diaries reveal ...

[66] I accept the opinion of Dr Giuffrida that the overall theme of the diaries is of a woman always coping at the margins of her capacity to bond, relate to, provide for and care for her children, a woman easily roused to panic and readily defeated by any perception on her part that she might fail to provide for her children ...

[75] ... [Dr Westmore] thought that the offender had a vulnerability which led her to become depressed and have trouble dealing with emotion, such as anger and frustration. He thought that a lot of the anger she experienced was generated from Mr Folbigg, occurring in the relationship of their marriage, and was displaced onto the children. He suspected that while the children may have made her angry at times the real source of her anger was problems in her marriage.

Importantly, Barr J accepted Craig Folbigg's evidence that Kathleen Folbigg had "lost her temper and assaulted her children" when had that been the case it was probable there would have been evidence of smothering.

The later importance of the diaries will be further examined in Part III when considering the Inquiry into the convictions of Kathleen Megan Folbigg conducted in 2019 by Commissioner Blanch, a former Director of Public Prosecutions and Chief Judge of the NSW District Court.⁴⁷ However, at this point it is worth noting that the emphasis at sentencing had moved from the extreme unlikelihood of four children from the same family dying from natural causes to the mental instability of the offender who was assessed as not being psychotic, although "the majority of women who kill children suffer from psychotic illnesses".⁴⁸ Dr Westmore's diagnosis was one of depression which at times found expression in anger and aggression.⁴⁹ Thus, the sentencing stage was being set for a deeply disturbed woman, but still someone who knew what she was doing when she killed her four children.

Arguably, the emphasis by Barr J at the time of sentencing on the diaries and Ms Folbigg's mental state may have been in part the result of some unease as to whether the medical evidence alone satisfied the burden on the Crown of satisfying the criminal standard of proof of beyond reasonable doubt. This follows because the expert evidence could not rule out the possibility that each child had died of natural causes. As is well known, the trial judge is required in a circumstantial case to direct the jury that in the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation.⁵⁰ Consequently, as it was possible on the equivocal medical evidence at the time of trial in 2003 that all four children had died of natural causes, it was necessary for the Crown to present further evidence in the form of the diaries to rebut the possibility of any other explanation than smothering.

⁴⁶ *R v Folbigg* [2003] NSWSC 895.

⁴⁷ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3.

⁴⁸ *R v Folbigg* [2003] NSWSC 895, [69] (Barr J).

⁴⁹ *R v Folbigg* [2003] NSWSC 895, [69] (Barr J).

⁵⁰ *Pell v The Queen* (2020) 268 CLR 123, [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

III. DEVELOPMENTS FROM DISMISSED APPEAL IN 2005 TO 2019 COMMISSION OF INQUIRY REPORT

This article will contend that as in the 19 years since Ms Folbigg's trial the medical evidence that convicted her has become increasingly disputed by reputable medical scientists, so the diary evidence has per force taken on a greater weight in order to continue to keep Ms Folbigg in prison.

After Ms Folbigg's failed appeal, her situation was unchanged for 10 years until Professor Stephen Cordner, a world class forensic pathologist,⁵¹ produced a report in 2015 which concluded "[u]ltimately, and simply, there is no forensic pathology support for the contention that any or all of these children have been killed, let alone smothered".⁵² As Cavanagh and Schultz have pointed out, Professor Cordner's conclusions about the causes of death were supported by other eminent pathologists who were in consensus "that in all cases a conclusion of homicide is unsupported by forensic pathology".⁵³

Professor Cordner advanced three significant arguments which challenged the whole basis upon which Ms Folbigg's trial was conducted, and in turn led to the first petition for a pardon in 2015 and thence to the Inquiry in 2019.

The first argument was that the discussion of forensic pathology at the trial was misconceived because it was based on a flawed understanding of asphyxia:

Asphyxia is not a helpful word in forensic pathology, is not understood in a uniform way, is not a diagnosis, and is not diagnosable. Yet the word is at the core of the main question asked repeatedly by the Prosecution: Did this child/these children suffer "an acute catastrophic asphyxiating event"? If this question was intended to be a technical question in forensic pathology, it has no content and is not capable of an answer.⁵⁴

Thus, at the outset, the Crown case was built on a flawed criterion which had no content and was therefore meaningless.

The second argument related to the default diagnosis of murder resulting from an incorrect inference that murder was the only alternative as none of the doctors had knowledge of a family with three or four sudden unexplained infant or childhood deaths. Cordner argued that this default murder position was wrong because the obvious response was to ask how many families were there with multiple surreptitious murders/smotherings of their infants and/or toddlers (Cordner was aware of only one in the United States where the mother, Waneta Hoyt, "confessed"):⁵⁵

The fact that an infant can be smothered without leaving signs, the misunderstanding of asphyxia (in particular that it is a diagnosis and/or that it can be diagnosed), and there being no families in the literature with three or four SIDS, contributed significantly to a homicide hypothesis which in fact has little forensic pathology content.⁵⁶

In effect, the Crown was reversing the onus of proof⁵⁷ by asking about medical knowledge of four infant deaths in a family from natural causes rather than knowledge of four deaths in a family caused by malicious intent. Consequently, the flawed and meaningless criterion of asphyxia was buttressed by a reversal of the onus of proof in the form of the default position of murder.

⁵¹ *R v Matthey* (2007) 17 VR 222, [119] (Coldrey J).

⁵² Professor Stephen Cordner, *Report and Opinion in the Case of Kathleen Folbigg* (Victorian Institute of Forensic Medicine, 2015) 7, cited as Exhibit C in the *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3.

⁵³ Cavanagh and Schultz, n 2, 7.

⁵⁴ Cordner, n 52, 6–7.

⁵⁵ Waneta Hoyt was convicted in 1995 of killing all five of her biological children some 24 years after the death of her fifth child in 1971, based on a confession she later recanted. Hoyt died in prison in 1998 before her appeal was heard.

⁵⁶ Cordner, n 52, 7.

⁵⁷ The Crown prosecutor, Mark Tedeschi, KC, was severely criticised for reversing the onus of proof in *Wood v The Queen* (2012) 84 NSWLR 581, which in turn led to one of the grounds of appeal, namely, the trial miscarried by reason of the prejudice occasioned by the Crown prosecutor, being upheld.

The third argument presented another view of how the Folbigg children might have died, which significantly changed the probability of their being any more than two undiagnosed deaths:

At the very worst, one is actually left with an uncertain number of (in my view, two) infant and childhood deaths of undetermined cause, compatible with SIDS, also compatible with natural causes including cardiac arrhythmias, and an ALTE, in the one family. ... In my view, it is wrong to rely on the forensic pathology evidence provided in this case to support the conclusion that one or more of the Folbigg children are the victims of a homicide.⁵⁸

Arguably, had the trial judge in *R v Folbigg*, Barr J, applied the same rigour to the admissibility of the expert medical evidence as Coldrey J did in *R v Matthey*,⁵⁹ then the Crown's case against Ms Folbigg would not have proceeded. As it has transpired, medical developments since 2015 have validated Cordner's conclusions.

Cordner's report led to a petition in 2015 to the Governor of New South Wales to review Ms Folbigg's convictions.⁶⁰ For three years the State government took no action as regards the petition before eventually establishing an Inquiry into the convictions of Kathleen Megan Folbigg conducted by Commissioner Blanch, which reported in 2019 some 16 years after her convictions.

Commissioner Blanch set out his conclusions in reviewing Ms Folbigg's convictions in Ch 9 of the Report, and the salient conclusions on smothering and the diaries are set out below:

Smothering

[43] I accept the evidence of the forensic pathologists, both those who gave evidence at the Inquiry and those who prepared a report for or gave evidence at trial, that it is very difficult to distinguish smothering from SIDS at autopsy.

[44] In short, the medical evidence received in the Inquiry, when considered in isolation and not in light of any other evidence, neither proves nor disproves that any of the children were smothered.

[45] However, no forensic pathologist has excluded the possibility that each instance of death or ALTE could have been caused by smothering. That is a circumstance which, when forming my conclusions, I take into account.

[46] In a circumstantial case, a finding of guilt should be the only rational conclusion that can be drawn from the circumstances. The question of smothering is the ultimate issue, with an opinion on this to be formed upon all of the circumstantial evidence, to the criminal standard of proof.⁶¹

The expert commentary at [43] above "that it is very difficult to distinguish smothering from SIDS at autopsy" is open to the challenge of acting outside of their professional competence. All a forensic pathologist can say is that there is no evidence of smothering, which is inconsistent with the Crown case that Ms Folbigg lost her temper before smothering her children and therefore would have left traces of smothering:

Non-medical evidence including Ms Folbigg's diaries

[65] I find the answers given by Ms Folbigg in examination and cross-examination before me, in which she gave explanations as to the meaning of various diary entries, to be simply unbelievable. I am satisfied the diary entries were written by a reasonably intelligent woman in plain language, carrying their plain meaning. The attempts by Ms Folbigg to explain away the diary entries as saying one sentence did not follow from another sentence, and that they were just "random thoughts", cannot be accepted ...

[68] None of the extensive non-medical evidence before me, including Ms Folbigg's evidence, causes me to interpret the diary entries other than in accordance with the ordinary English meaning of the words which she wrote. Rather than supporting any existence of a reasonable doubt of her guilt, I am satisfied that the plain meaning interpretation of the diary entries carries the character contended by the Crown at

⁵⁸ Cordner, n 52, 8.

⁵⁹ *R v Matthey* (2007) 17 VR 222.

⁶⁰ Petition to the Governor of New South Wales for a review of the convictions of Kathleen Folbigg (26 May 2015), cited in the *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 22.

⁶¹ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 475 [43]–[46].

the trial of virtual admissions of guilt for the deaths of Caleb, Patrick and Sarah and admissions that she appreciated she was at risk of causing similarly the death of Laura.⁶²

The above passages demonstrate similar reasoning on the part of Commissioner Blanch as that employed by Sully J in the NSW Court of Criminal Appeal. Commissioner Blanch, while accepting it was difficult in isolation to distinguish SIDS from smothering and the medical evidence was neutral on this point, also took into account that smothering could not be excluded and all the circumstantial evidence needed to be considered, which essentially comprised Ms Folbigg's diary entries.

One comment at the end of Commissioner Blanch's Report that has now taken on considerable significance in light of recent events deals with the CALM2 Genetic Variant⁶³ in Sarah, Laura and Kathleen Folbigg. After evidence to the Inquiry closed in May 2019, the Inquiry received material in June 2019 dealing with the CALM2 variant, which suggested that the deaths of Sarah and Laura Folbigg may have been related to the CALM2 gene in Ms Folbigg. Commissioner Blanch considered this possibility and concluded:

In relation to Sarah, taking into account additionally the diary entries made by Ms Folbigg and her lies and obfuscation, the evidence of Mr Folbigg indicating Ms Folbigg's fraught relationship with Sarah, and the tendency and coincidence evidence, I remain of the view that the only conclusion reasonably open is that Ms Folbigg smothered Sarah.

In relation to Laura, taking into account additionally the rarity of myocarditis as a cause of death in children of Laura's age, the non-medical evidence including the diary entries made by Ms Folbigg and her lies and obfuscation, the evidence of Mr Folbigg indicating the difficulties Ms Folbigg was having with Laura, and the tendency and coincidence evidence, I remain of the view that the only conclusion reasonably open is that Ms Folbigg smothered Laura.⁶⁴

Consequently, even though prima facie the new medical evidence provided strong evidence in favour of a natural cause of death for two of the four children (Sarah and Laura), thereby substantially reducing the improbability of four children from the same family dying from natural causes (which was essentially the Crown case), Commissioner Blanch concluded that other evidence (diary entries, lies, fraught relationships, and tendency and coincidence evidence) was sufficiently cogent to leave the verdicts undisturbed. It is this conclusion that has now taken centre stage since 2019 following peer review confirming the significance of the CALM2 variant.

IV. EVENTS FROM CALM2 MUTATION STUDY IN 2021 TO SECOND INQUIRY ANNOUNCED IN 2022

In the three years since the Report of the Inquiry into the convictions of Kathleen Megan Folbigg, there have been four significant developments.

First, in 2021, fresh genetic evidence became available through functional validation of the data presented to the 2019 Inquiry in relation to the mutation identified in Ms Folbigg and her two daughters, Sarah and Laura. "A study conducted by 27 scientists from several countries was published in the prestigious Oxford University journal, *EP Europace*. The study concluded that CALM2 G114R is pathogenic, and thus there is a >99% certainty that the mutation was responsible for the death of both Sarah and Laura."⁶⁵

Second, on 2 March 2021, a petition was sent to the Governor of New South Wales for the pardon of Kathleen Folbigg, which was endorsed by leading scientists and medical practitioners.⁶⁶ The petition set out the current medical explanations for the death of each of the Folbigg children:⁶⁷

Caleb: Sudden Infant Death Syndrome (Category II).

⁶² *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 477–478 [65]–[68].

⁶³ Calmodulinopathies are rare life-threatening arrhythmia syndromes which affect mostly young individuals and are, caused by mutations in any of the three genes (CALM 1–3) that encode identical calmodulin proteins.

⁶⁴ *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 508 [58]–[59].

⁶⁵ Cavanagh and Schultz, n 2, 5.

⁶⁶ Cavanagh and Rego, n 6.

⁶⁷ Cavanagh and Rego, n 6, 3–4.

Patrick: Asphyxia due to airways obstruction caused by epileptic fits, encephalopathic disorder (underlying cause not determined on investigation).

Sarah: Sudden unexpected death caused by calmodulinopathy due to a CALM2 G114R mutation, with the lethal cardiac arrest potentially precipitated by her concurrent infection.

Laura: Sudden unexpected death caused by calmodulinopathy due to a CALM2 G114R mutation, with the lethal cardiac arrest likely precipitated by her myocarditis or exposure to pseudoephedrine (which can be a trigger of cardiac arrest for people with CALM variants).

The grounds for the pardon were twofold: (1) Professor Schwartz, a leading cardiac genetist, had concluded that the CALM2 mutation found in Sarah and Laura Folbigg is “likely pathogenic”; (2) the *EP Europace* study concluded that a fatal cardiac arrhythmia caused by the CALM2 mutation and triggered by intercurrent infections was a reasonable explanation for Sarah and Laura’s death.⁶⁸ It was this evidence the NSW Attorney-General, Mark Speakman, conceded “cannot be ignored” when announcing the Second Inquiry (see below).

Third, on 11 March 2022, a request was sent to the NSW State Coroner for a coronial inquest into the deaths of the four Folbigg children.⁶⁹ Included in that request was a summary of expert opinion from psychologists and linguists as to the meaning of Ms Folbigg’s diary entries. The Crown argued at trial that the diary entries amounted to virtual admissions of guilt, a view endorsed by Sully J in the Court of Criminal Appeal and Commissioner Blanch in the Inquiry. By contrast, the expert opinion concluded that there was no evidence Ms Folbigg harmed her children and her purpose in writing the diary entries was to try and make sense of the deaths of her children.

In the request to the coroner, Cavanagh and Schultz point out that Ms Rozalinda Garbutt’s report for the police prepared for the trial stated “[m]y opinion is dependent upon the elimination of natural causes to explain the death of the four Folbigg children”.⁷⁰ In light of the fresh medical evidence this is a critical assumption. Ms Garbutt’s opinion was that Ms Folbigg “became angry and frustrated with her children’s crying and need for constant attention to a point where it overwhelmed her and she lost control and consciously ended the lives of each”.⁷¹

Ms Garbutt’s opinion is contradicted by seven experts whose reports are included as annexures to the request to the coroner.⁷² The format adopted by Cavanagh and Schultz is to set out a key diary entry used by the Crown at trial, then to list in sequence the inculpatory interpretation, Ms Folbigg’s explanations, and the expert comment. One of these entries is extracted below for illustrative purposes:⁷³

“Children thing still isn’t happening. Thinking of forgetting the idea. Nature, fate & the man upstairs have decided I don’t get the 4th chance. And rightly so I suppose. I would like to make all my mistakes & terrible thinking be corrected and mean something though. Plus, I’m ready to continue my family time now. *Obviously, I’m my father’s daughter.* But I think losing my temper stage & being frustrated with everything has passed. I now just let things happen & go with the flow. An attitude I should have had with all my children if given the chance. I’ll have it with the next one” 14 October 1996 [emphasis added].

Inculpatory interpretation: “my mistakes & terrible thinking” has been interpreted as expressing guilt of murder. “Obviously, I’m my father’s daughter” has been interpreted to mean: my father killed my mother and I am like him because I killed my children.

Ms Folbigg’s explanations: “I believed and thought at the time that my father’s actions ruined my life and my life never seemed to go right from there. And it was a thought of, along the lines of sins of the father being on the daughter. Was I paying the price? ... I believed at the time ... writing these diaries in

⁶⁸ Cavanagh and Rego, n 6, 3.

⁶⁹ Cavanagh and Schultz, n 2.

⁷⁰ Cavanagh and Schultz, n 2, 58, citing Report of Rozalinda Garbutt dated 4 February 2000, 1 (Annexure 27).

⁷¹ Cavanagh and Schultz, n 2, 58.

⁷² Cavanagh and Schultz, n 2, 67. The seven experts listed are: Dr Michael Diamond; Dr Sharmila Betts; Professor James Pennebaker; Associate Professor Janine Stevenson; Associate Professor David Butt; Dr Kamal Touma; and Dr Katie Seidler.

⁷³ Cavanagh and Schultz, n 2, 58–59.

preparation for Laura, everything was very dark and every thought was very dark and I blamed my father a lot for most of my life just going wrong.” [*Inquiry Transcript*, 29 April 2019, 672 lines 35–45]

Expert comment: The above entry demonstrates Ms Folbigg’s feelings of inadequacy as a mother [See Ms Folbigg’s evidence at the 2019 Inquiry in relation to her diaries on 29 and 30 April and 1 May 2019, *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg*, n 3, 396] rather than admitting to murder, consistent with the explanations Ms Folbigg gave in evidence at the 2019 Inquiry. The following comments are made by experts:

Dr Kamal Touma (analytical psychotherapist) said Ms Folbigg’s diaries/journals are riddled with self-hatred and she genuinely believed she was a bad mother, even a cruel one. He notes, however, that this is not supported in her writing nor in the conversations he had with Ms Folbigg [Report of Dr Kamal Touma dated 13 September, 8–11 (Annexure 25)].

Dr Sharmila Betts (clinical psychologist) explained “[s]he appears to interpret her feelings of stress, irritability and exhaustion in caring for her infants as evidence of poor mothering and possibly equates her psychological reactions to motherhood as the reason for their deaths” [Report of Dr Sharmila Betts dated 18 April 2021, 15 (Annexure 21)].

Cavanagh and Schultz contend the Crown argument that the plain meaning of the diary entries constitute admissions of guilt for the deaths of the four children is dispelled by the experts. In particular: (1) Dr Michael Diamond found no evidence of a medical condition that would affect Ms Folbigg’s conduct sufficient to carry out homicidal acts; (2) Dr Sharmila Betts considered the Crown’s view on the diaries to be misleading and unsupported; (3) Professor James Pennebaker saw no evidence Ms Folbigg’s language exhibited any signs of deception; (4) Associate Professor Janine Stevenson noted nowhere in the diaries does Ms Folbigg use agency verbs such as “I hurt her”; (5) Associate Professor David Butt was of the view the courts and the Inquiry misinterpreted feelings of responsibility for admissions of agency; (6) Dr Kamal Touma could not see anything in the diaries or from his sessions with Ms Folbigg to indicate she harmed her children; (7) Dr Katie Seidler concluded that Ms Folbigg’s comments were passive and reflect the only way she could make sense of her children dying was to suggest they chose to leave her because she believed she was an inadequate mother.⁷⁴

Fourthly, on 22 May 2022, in response to the petition received some 14 months previously and the growing pressure to review Folbigg’s convictions, the NSW Attorney-General, Mark Speakman, announced a new inquiry to be conducted by the Hon Thomas Bathurst QC, from which selected extracts are set out below:

The deaths of Caleb, Patrick, Sarah and Laura have caused immeasurable and continuing grief to their family and the community. I have written to Ms Folbigg’s legal representatives to advise them of the decision. I have also again spoken with their father Craig Folbigg to inform him about today’s decision; I am deeply sorry that yet again he and his family will have to re-visit their nightmare.

Since the inquiry in 2018-2019 conducted by the Hon Reginald Blanch AM QC, a fresh petition has sought the exercise of the Royal prerogative of mercy to grant Ms Folbigg a pardon.

The petition refers to developments in genetic science in respect of the CALM2 genetic mutation found in Sarah and Laura Folbigg. Among other grounds, the petition argues this has provided an updated cause of death for both Sarah and Laura.

Although the original 2018-2019 inquiry was aware of the mutation, there was no completed study as to the functional effects of that mutation at that time. Such a study has now been completed. Notwithstanding that Ms Folbigg has already had numerous attempts to clear her name, this new evidence, and its widespread endorsement by scientists, cannot be ignored.

However, I declined to recommend to Her Excellency that she pardon Ms Folbigg ... Only a transparent, public and fair inquiry can provide a just resolution of the doubt or question raised by that new evidence.

I thank Mr Tim Game SC, Ms Joanna Davidson and Ms Kathleen Heath for their advice and assistance in this matter.⁷⁵

⁷⁴ Cavanagh and Schultz, n 2, 65–67.

⁷⁵ Mark Speakman, NSW Attorney-General, n 8.

A number of observations can be made in relation to the above statement by the NSW Attorney-General. First, the Attorney-General acknowledged that the new evidence cannot be ignored, but at the same time appears to resent Ms Folbigg's "numerous attempts to clear her name" exhibiting irritation that Ms Folbigg and her supporters should continue to protest her innocence. Second, the Attorney-General declined to recommend a pardon claiming only a transparent public inquiry can provide a just resolution, even though Ms Folbigg has already spent 19 years in prison. Third, it is not clear whether a second public inquiry will resolve the tension between the medical evidence and the damning interpretation placed on Ms Folbigg's diary entries by Sully J and Commissioner Blanch. Fourth, the Attorney-General has refused to release the legal advice received from the three barristers named in the statement or clarify whether he has acted on that advice. Significantly, the Attorney-General only sought the advice of lawyers and elected not to consult any leading forensic scientists. Fifth, the Attorney-General stated he has informed Mr Craig Folbigg of his decision to hold a second inquiry and is "deeply sorry that yet again he and his family will have to re-visit their nightmare". This comment is worthy of further consideration.

There is a clear divide between the treatment of the father and the mother. From the moment Mr Craig Folbigg took his wife's diaries to the police, he has been treated as the wronged party, the innocent, misled parent whose eyes were only opened to the wilful killing of their children when he read her diaries. This paradigm is predicated on the assumption that only Ms Folbigg was in a position to have killed the children and Mr Folbigg was either absent or asleep at the relevant times. Craig Folbigg was portrayed in the media as "just an honest bloke who fell in love with the wrong woman, with tragic consequences for himself and his children".⁷⁶

As Cunliffe has pointed out, "[a] relatively unusual feature of the Folbigg case was that Kathleen Folbigg's ex-husband Craig was convinced that the accused had murdered her children".⁷⁷ Mr Folbigg was a central witness for the prosecution at his former wife's trial and "became the primary definer of Kathleen's personality, motivations and mothering practices".⁷⁸ Mr Folbigg "described Kathleen's parenting style as regimented and authoritarian"⁷⁹ and "who loved her children but had trouble yielding centre stage to them".⁸⁰ Mr Folbigg portrayed his former wife as being upset with her weight during pregnancy, which Cunliffe characterised as being "deeply unsympathetic to Kathleen's physical experience of motherhood and that he probably did not understand the nature of Kathleen's grieving process".⁸¹

Thus, Mr Folbigg is both the first person to "translate" the diaries and the key "translator" of his former wife's persona as it related to their children. Having been instrumental in assisting the Crown to convict his former wife, Mr Folbigg is now confronted with the real possibility she is innocent, and in fact his genetic makeup may translate into a fatal inheritance to his children with his former wife.

Mr Folbigg has consistently refused to provide DNA samples that could help show his former wife was wrongly convicted of killing their four infant children and has withdrawn from the new inquiry that could exonerate his former wife. Professor Barry Boettcher, who was instrumental in giving expert evidence on blood samples that cleared Ms Lindy Chamberlain of killing her daughter Azaria, has said "it was vital Craig Folbigg's DNA be made available to the new inquiry probing fresh scientific evidence in the case".⁸²

⁷⁶ Emma Cunliffe, *Murder, Medicine and Motherhood* (Hart Publishing, 2011) 131.

⁷⁷ Cunliffe, n 76, 117, based on the author's statement that "[i]n every similar case I have investigated, a husband has supported the mother-defendant's claim to innocence".

⁷⁸ Cunliffe, n 76, 117.

⁷⁹ Cunliffe, n 76, 119.

⁸⁰ Cunliffe, n 76, 122.

⁸¹ Cunliffe, n 76, 124.

⁸² Rhiannon Down, "Azaria Expert Pans Folbigg DNA Refusal", *The Australian*, 29 August 2022, 3.

Professor Mette Nyegaard, a leading expert on the CALM2 gene who was involved in the laboratory tests of the Folbigg family mutation, said “the father’s DNA would reveal whether the boys had inherited their mutation from him or whether it was a spontaneous ‘de novo’ mutation”⁸³

Dr Robert Moles of Flinders University has said that were Ms Folbigg to have been tried in the United Kingdom, her “conviction would have been overturned as soon as you could ‘click your fingers’”,⁸⁴ which is a reference to the cases of Sally Clark and Cannings discussed earlier and led to the discrediting of “Meadow’s Law”. Dr Moles goes on to suggest that the NSW Attorney-General, Mark Speakman, has a conflict of interest because his Department is responsible for all the agencies (forensic services, prosecutors and the police) who helped convict Ms Folbigg.⁸⁵ This is perhaps why, under the guise of transparency, the Attorney-General declined to recommend a pardon for Ms Folbigg to the Governor of New South Wales,⁸⁶ and instead opted for a second inquiry which will conveniently report after the upcoming NSW State election in March 2023. It will be interesting to see, in the interests of transparency, whether the second inquiry considers the refusal of Mr Folbigg to provide his DNA to the inquiry is critical to its conclusions. Such a refusal is a powerful argument for the Attorney-General to reconsider recommending a pardon for Ms Folbigg.

V. CONCLUSION

The sad history of the Kathleen Folbigg case is testament to the extreme difficulty anyone imprisoned experiences in overturning a guilty verdict. Ms Folbigg had three children between 1989 and 1993 who all died in infancy. Despite extensive medical investigation, there was no suggestion of foul play and all three deaths were attributed to natural causes. Craig and Kathleen Folbigg separated but reunited and had a fourth child, Laura, who died at 18 months of age in 1999, 10 years after the death of their first child, Caleb. It was only then that Craig Folbigg raised the alarm having read his wife’s diaries and went to the police.

The circumstantial case at trial is based on three strands in a cable: (1) the now discredited “Meadow’s Law”; (2) the sinister interpretation placed on the diary entries by the Crown prosecutor; and (3) the hostile character assessment of Kathleen Folbigg by Craig Folbigg in his evidence at trial. By 2022 these three strands have unravelled.

As was pointed out earlier, had the trial judge in *R v Folbigg*, Barr J, applied the same rigour to the admissibility of the expert medical evidence as Coldrey J did in *R v Matthey*,⁸⁷ then the Crown’s case against Ms Folbigg would not have proceeded. Mrs Matthey was fortunate to have the support of her husband and family, in sharp contrast to Craig Folbigg who was instrumental in putting Kathleen Folbigg in prison and is in a unique position to exonerate his former wife by providing his DNA but has refused to cooperate.

Ms Folbigg’s convictions were upheld by the NSW Court of Criminal Appeal in 2005 despite the English cases of Sally Clark and Cannings having discredited “Meadow’s Law”, because Sully J was confident Ms Folbigg’s case could be distinguished from the two English cases. The authors argue that as early as 2005 there was an opportunity for the NSW Court of Criminal Appeal to rule that the first strand of the cable which convicted Ms Folbigg, “Meadow’s Law”, had snapped and therefore her conviction constituted a miscarriage of justice.

However, with the dismissal of Ms Folbigg’s appeal, there matters rested for 10 years until Professor Cordner’s report in 2015 which ultimately led to an Inquiry in 2019 which endorsed Ms Folbigg’s convictions, despite late warning of the research that culminated in the *EP Europace* study published in

⁸³ Down, n 82, 3.

⁸⁴ Down, n 82, 3.

⁸⁵ Down, n 82, 3.

⁸⁶ Mark Speakman, NSW Attorney-General, n 8.

⁸⁷ *R v Matthey* (2007) 17 VR 222.

2021 and concluded there is a >99% certainty that the CALM2 mutation was responsible for the death of both Sarah and Laura. In the authors opinion this study destroys the Crown case at trial.

The powerful *EP Europace* study combined with a request for a coronial inquest into the deaths of the four Folbigg children, which included expert evidence rebutting the Crown's sinister interpretation of Ms Folbigg's diaries, succeeded in forcing the hand of a reluctant Mark Speakman, the NSW Attorney-General, to set up a Second Inquiry. The authors take the view that a Second Inquiry is not necessary as there already exists enough fresh and compelling evidence to warrant a pardon. Mark Speakman's refusal to recommend a pardon on humanitarian grounds to a woman who has already spent 19 years in prison when there is now powerful medical evidence supporting her innocence is simply unjustified.