Inquiry into the convictions of Kathleen Megan Folbigg

PART 5

CHAPTER 11: CONCLUDING SUBMISSIONS

Introduction

1. We set out in Chapter 1 of our submissions the Judicial Officer's task. In summary, it is to consider the evidence at and the conduct of the trial, in light of further evidence and submissions received in the Inquiry in order to determine whether, overall, there is a reasonable doubt as to Ms Folbigg's guilt.

2. In addition to an evidentiary basis for a reasonable doubt of guilt in fact, a reasonable doubt may be had as to guilt as established by the relevant conviction, referring to matters of procedure upon which the finding of guilt was dependent.

3. The Crown case at trial relied wholly on circumstantial evidence. It consisted of three categories of circumstantial evidence: evidence of the circumstances of each child's death and Patrick's ALTE; medical evidence from doctors and medical experts; and Ms Folbigg's diaries.

4. The circumstantial evidence was:

    a. the infrequent incidence of SIDS;

    b. the rarity of repeat incidents of SIDS and of unexplained infant deaths or ALTE's within one family;

    c. the absence of any metabolic abnormality in any of the children, let alone a common abnormality;

    d. the fact that each was a healthy child and that such physical or medical conditions, as were observed post mortem, were unlikely causes of death;

e. the absence of any sleeping abnormality in the three children who were tested and/or monitored;

f. the fact that sleep monitoring was provided but then ceased in relation to Sarah and Laura – a matter of some importance in view of the diary entry of 25 August 1997;

g. the fact that two of the children were found by the mother within the very brief window between a child being found moribund and dead;

h. the fact that all children were found by the mother while they were still warm, even though in three of the five relevant instances this occurred at night;

i. the unexplained absence of Sarah and Ms Folbigg from their bedroom at about 1 am, shortly before she was found dead;

j. the unusual behaviour of Ms Folbigg in getting up from bed, leaving the room, returning, and then getting up again only to discover, in the case of some of the children, that they were moribund or lifeless;

k. the fact that Ms Folbigg claimed to have observed, in the dark and from some distance away, that some of them were not breathing;

l. the stress and anger which Ms Folbigg had expressed towards the children; and

m. the fact that Ms Folbigg did not nurse or endeavour to resuscitate the children when they were found.[1]

5. The Crown case also comprised a fourth category of evidence described as "coincidence evidence". This referred to similarities in the evidence of the circumstances of each child's death and Patrick's ALTE relied on by the Crown to disprove, by way of coincidence reasoning permitted under s 98 of the *Evidence Act 1995*, that the five events were merely coincidental.

6. In this regard, the Crown case relied on 10 particular features which were common across the five events, to disprove coincidence. Those features, as described during the prosecutor's closing address, were:

[1] *R v Folbigg* [2002] NSWSC 1127, [107].

a. all five events occurred suddenly: the events were over in a matter of minutes;

b. all five events occurred unexpectedly: no child had any health problem that preceded the sudden deaths or ALTE or gave any sort of warning sign or previous symptom;

c. all five events occurred at home, in circumstances where the children spent a proportion of their time away from the home;

d. all five events occurred during the child's sleep period, rather than whilst playing at home, watching television, in the bath, or in the garden for example;

e. all five events occurred when the child was in a bed, cot or a bassinet, rather than whilst asleep on the floor, or sitting, standing, running, jumping, skipping, eating or watching television;

f. all five events occurred when the only person effectively at home or awake was Ms Folbigg, noting that Mr Folbigg was a deep sleeper, which gave her the opportunity to have done the children harm;

g. each child was discovered dead or moribund by Ms Folbigg;

h. each child was discovered by Ms Folbigg during what she claimed was a normal check on their well-being during the course of their sleep period, including on three occasions when she said she was on her way to the toilet;

i. each child was discovered dead or moribund at around or shortly after death when they were still warm to the touch, and two of them still had a heartbeat, so they were found literally minutes after the cessation of breathing; and

j. in relation to four of the five events, Ms Folbigg failed to render any assistance at all to the children after discovering them dead or moribund, to the extent that she did not even lift them up out of their beds.[2]

[2] 13 May 2003 T1362-1364.

7. It was the Crown case that these features were incapable of being explained except by the common feature of Ms Folbigg, because she was responsible for all the events.

8. The Crown case relied in this regard on evidence from doctors that:

   a. there had never been recorded a family such as this where four children died of natural causes, either from the same natural cause or from different natural causes; and

   b. there had never been three or more deaths in one family recorded from SIDS.[3]

9. The Inquiry received evidence about and inquired into some of these matters, consistent with its scope and purpose. Most of the circumstances relied on by the Crown were not the subject of investigation or examination as there was no new or fresh evidence available to the Inquiry or brought to its attention by Ms Folbigg as warranting further review.

10. Those matters which have been scrutinised by the Inquiry, by reference to the evidence at trial, primarily concern medical expert evidence and are as follows:

   a. the infrequent incidence of SIDS;

   b. the rarity of repeat incidents of SIDS within one family;

   c. the absence of any metabolic abnormality in any of the children, let alone a common abnormality;

   d. the fact that each was a healthy child and that such physical or medical conditions, as were observed post mortem, were unlikely causes of death;

   e. the stress and anger which Ms Folbigg had expressed toward the children (by reference to the diaries only); and

   f. all five events occurred unexpectedly: no child had any health problem that preceded the sudden deaths or ALTE or gave any sort of warning sign or previous symptom.[4]

[3] 13 May 2003 T1364.30-35.
[4] *R v Folbigg* [2002] NSWSC 1127, [107].

11. Medical evidence to the effect that there had never been recorded a family such as this where four children died of natural causes, either from the same natural cause or from different natural causes, and that there had never been three or more deaths in one family recorded from SIDS, has also been examined.

12. The final area the subject of inquiry was Ms Folbigg's diaries and her evidence about her entries and her possession and disposal of the diaries.

13. The Inquiry heard fresh evidence by way of expert opinion as to SIDS, the causes of death of the children, their health and that of Ms Folbigg generally and also specifically in relation to the presence of any genetic variants that made them susceptible to a disease process, and sworn evidence from Ms Folbigg about her diary entries.

14. Finally, after the conclusion of the oral evidence, the Inquiry received a report by a forensic psychiatrist, Dr Michael Diamond who had recently examined Ms Folbigg. That necessitated the Inquiry receiving into evidence reports from forensic psychiatrists who examined and opined about Ms Folbigg following her conviction in 2003 and obtaining a report from one of those forensic psychiatrists in response to Dr Diamond's report.

15. Hence, fresh evidence was received concerning Ms Folbigg's present mental state and her mental state during the times of the children's lives and deaths.

16. These submissions bring together the main submissions made in each chapter as well as overarching submissions as to the conduct of the trial and judgments, directions and rulings given before, during and after the convictions were obtained.

Change in law

17. The first matter for consideration, in our submission, is whether there has been any material change to relevant legal principles since the trial. We submit that the relevant law, in particular in relation to the admissibility of coincidence and tendency evidence insofar as such evidence and reasoning was relied upon in the Crown case at trial, has not changed since the verdicts in 2003 nor indeed since the subsequent conviction appeals which concluded in 2007.[5]

[5] The recent line of cases in the High Court (*Hughes v The Queen* (2017) 92 ALJR 52; *R v Bauer (a pseudonym)* (2018) 92 ALJR 846 and *McPhillamy v The Queen* [2018] HCA 52) concerning the admissibility of tendency evidence, including the test of significant probative value as also applies to coincidence evidence, have focussed on the assessment of tendency evidence in single and

Rulings and directions

18. Prior to the commencement of the trial Ms Folbigg applied to the Supreme Court to separate the counts on the indictment into separate trials. She sought that the counts of murder relating to Caleb, Sarah and Laura each be heard individually, and separately, from the counts relating to Patrick. Ms Folbigg did not oppose the counts relating to Patrick being tried together. On 29 November 2002 Wood CJ at CL dismissed the separate trials application.[6] In ruling the evidence admissible as coincidence evidence and dismissing Ms Folbigg's separate trials application, his Honour concluded:

    a. the evidence relied upon by the Crown as coincidence evidence carried "considerable probative force" in relation to all counts, when considered in combination with the other circumstantial evidence (for the purposes of ss 98(1)(b) and 101(2) *Evidence Act 1995*);[7]

    b. that suitable directions to the jury could be framed so as to ensure the jury did not use the evidence in some illogical way or give to it a weight which it did not deserve (for the purpose of s 101(2) *Evidence Act 1995*), meaning the Crown should be allowed to call the evidence concerning each death or ALTE as evidence admissible in respect of each and every count;[8] and

    c. the probative value of the evidence was not outweighed by any danger or unfair prejudice to the accused (for the purposes of sections ss 135 or 137 *Evidence Act 1995*).[9]

19. Ms Folbigg applied for leave to appeal against Wood CJ at CL's decision to refuse the separate trials application.[10] On 6 February 2003 the Court of Criminal Appeal heard the application.[11] On 13 February 2003 the Court dismissed the application for leave.[12]

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multiple complainant sexual assault matters and have not altered the manner of application of ss 97, 98 and 101 of the *Evidence Act* to the evidence against Ms Folbigg.

[6] *R v Folbigg* [2002] NSWSC 1127.
[7] *R v Folbigg* [2002] NSWSC 1127, [106]-[112].
[8] *R v Folbigg* [2002] NSWSC 1127, [113]-[122].
[9] *R v Folbigg* [2002] NSWSC 1127, [123]-[129].
[10] *R v Folbigg* [2003] NSWCCA.
[11] *R v Folbigg* [2003] NSWCCA, [35]-[37].
[12] *R v Folbigg* [2003] NSWCCA 117 (Hodgson JA at [1]-[35], Sully and Buddin JJ agreeing at [36]-[37]).

20. In addition to that application, a number of evidentiary and procedural matters were dealt with during the course of the trial in the absence of the jury.

21. In particular, and of most present relevance, the parties sought a series of rulings about the admissibility of evidence of individual medical expert witnesses concerning the cause of death (and ALTE) in the individual cases, including opinions based on the fact and circumstances of the death (and ALTE) of the other children.

22. In addition, rulings on evidence of Ms Folbigg's versions of events and rulings of evidence of certain lay witnesses and various other procedural rulings were made.

23. We do not propose to set out in these submissions the applications made, arguments advanced and reasons given for particular rulings and directions. During the course of the Inquiry's hearings no issue has been specifically raised as to a nominated ruling. However, it is anticipated that submissions may be made by those representing Ms Folbigg that one or more ruling, direction or judgment involved an error of law or otherwise caused the trial to miscarry.

24. We submit that the Judicial Officer is not constrained by the well-recognised tests applied in the consideration of criminal appeals, such as in respect of fresh evidence.[13] Similarly, the fact that some issues have previously been the subject of consideration and decision as part of an appellate process is not necessarily conclusive.[14]

25. We submit that in relation to those issues which have been the subject of appeal, in particular:

    a. the admissibility of coincidence evidence;

    b. directions as to the use the jury could make of coincidence and tendency evidence;[15] and

    c. leading of evidence to the effect that witnesses were unaware of any previous case in medical history where one or more infants in the one family died suddenly as a result of disease processes,[16]

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[13] *Anderson Inquiry*, pp 67-68.
[14] *Anderson Inquiry*, p 68.
[15] *R v Folbigg* [2005] NSWCCA 23, [93].
[16] *R v Folbigg* [2005] NSWCCA 23, [49].

there is no reasonable basis for the Judicial Officer to take a view contrary to views expressed and findings made on appeal. This submission is not made on the basis that those decisions should be considered conclusive, but rather that those decisions were correct.

26. In so far as forensic decisions and rulings were made and directions given, which were not the subject of consideration and decision as part of an appellate process, we submit that no error was made by the decision maker in each instance and the Judicial Officer should not take a contrary view.

The health of the children and their parents

27. Chapters 3 and 4 set out the evidence available at trial and that elicited by the Inquiry concerning the health of Caleb, Patrick, Sarah, Laura prior to their death and ALTE and of Ms Folbigg.

28. It is submitted, for the reasons given in those chapters, that at the time of the trial, it was uncontroversial that each child, before their death or ALTE, was a healthy, well grown, normally developing child who was normal in appearance.[17]

29. Significant advances have been made in the field of genetics since Ms Folbigg's trial. Those advances have permitted a much broader scope of investigation than was possible in 2003.[18]

30. It is submitted that genetic testing on each child and Kathleen Folbigg by the Inquiry revealed no pathogenic or likely pathogenic, that is disease causing, variant related to:

    a. cardiac/non-cardiac genes which had been published in relation to sudden death in infancy/childhood;

    b. genes associated with childhood neurological disorders;

    c. genes associated with immunology;

    d. genes associated with metabolics; or

[17] Transcript of the Inquiry, 15 April 2019 T382.14-21; Exhibit Z, Joint report of Sydney genetics team (29 March 2019) p 5.
[18] Exhibit AA, Report of Dr Alison Colley (26 November 2018); Exhibit AB, Report of Dr Michael Buckley (25 February 2019).

e. likely pathogenicity in any phenotype not restricted to sudden death in infancy/childhood.[19]

31. From medical records available for Ms Folbigg from 1989 to 2019 and testing carried out as recently as April 2019, it has been opined by medical experts in the Inquiry that Ms Folbigg does not have any cardiac-related conditions.

32. It is submitted that the Judicial Officer should be satisfied that there is no medical cause identified based on a genetic predisposition to a disease process or a pre-existing identified condition, for the deaths of Caleb, Patrick, Sarah and Laura.

SIDS

33. Chapter 5 details the evidence available at the trial and before the Inquiry concerning SIDS. Since 2003, there have been advances by way of further research which has resulted in changes to the categorising of sudden unexplained deaths in children including infants and greater knowledge of the risk factors associated with SIDS.

34. For the reasons set out in that chapter, we submit that changes in the definition of SIDS made since 2003 do not materially add to an understanding of the cause of the children's deaths. The sub categories or classifications of SIDS introduced in 2004 permit Caleb and Sarah's deaths to be attributed to SIDS 2, rather than falling outside the then-recognised definition at the time of their deaths. However, that categorisation does not alter the circumstances of their death. Those circumstances remain the same. Caleb's and Sarah's deaths were both outside the age at which SIDS usually occurs, that is two to four months, with a peak of six months. Each had a mild condition, and there is no basis in the expert evidence to realistically contend that either condition caused death in this case.

35. All of the children's risk factors for SIDS, as defined in 2003, were low. Recent research emphasises further the significance of sleep position and maternal smoking to increasing the risk of SIDS. Each child was found in a safe sleeping position and their mother did not smoke. In light of evidence of current understanding of risk factors and SIDS, the children's risk factors may now be regarded as even lower than how they may have been viewed in 2003.

[19] Exhibit Z, Joint report of Sydney genetics team (29 March 2019).

36. Neither the current categories of SIDS, nor those that applied in 2003, exclude deaths from unnatural causes. The expert medical evidence given in 2003 that SIDS is virtually indistinguishable from smothering was echoed during this Inquiry.

37. Accordingly, it is submitted that the evidence about SIDS now available, whether considered alone or in light of the evidence given at trial, does not give rise to a reasonable doubt as to guilt.

Recurrence

38. It is clear from the work of the Inquiry that before 2003, as set out in Chapter 6, there had been reported cases involving the deaths of three or more infants in the same family attributed to unidentified natural causes, or at least not established as attributable to unnatural causes. To the extent that the Crown case as left to the jury asserted or invited otherwise, that was incorrect.

39. However, the current descriptions in literature and in evidence by experts emphasise the low nature or rarity of recurrence risk. The weight of evidence is that any increased risk of recurrence in a sibling is affected by genetic and environmental factors. In the Folbigg family, no genetic factor has been identified. Environmental factors which applied in each death of the Folbigg children gave rise to a low risk of sudden unexplained infant death.

40. Thus, the observation by the trial judge that such events are not impossible and that they are rare reflected the knowledge held then, which remains the scientific evidence today. That observation remains correct. We submit that there is no basis to assert error or that any miscarriage of justice was occasioned by directions by the trial judge in relation to the expert evidence.

Causes of death

41. Detailed submissions are made as to the cause of each death and Patrick's ALTE in Chapters 7 and 8. What follows is a brief summary of those submissions.

Caleb

42. The fresh evidence available is that no genetic variant has been identified in Caleb which is or is likely to be disease causing and which contributed to his death. In

other respects, the evidence in 2019 is materially unchanged from 2003 in respect of the cause of Caleb's death.

43. Ultimately, there remains no identified natural (including genetic) cause of Caleb's death and death from unnatural causes including smothering, cannot be excluded.

Patrick's ALTE

44. As with Caleb, the fresh evidence available is that no genetic variant has been identified in Patrick which is or is likely to be disease causing and which contributed to his ALTE.

45. The medical experts gave broadly consistent evidence at the trial that Patrick's ALTE was most likely caused by an asphyxiating event. Before the Inquiry, two paediatric neurologists gave evidence. Associate Professor Fahey expressed the same view as the experts at trial, while Professor Ryan was not "convinced" that that is what occurred. For the reasons set out in chapter 7 we submit the Judicial Officer should prefer the evidence of each of the medical experts at the trial and Associate Professor Fahey to that of Professor Ryan. We submit that the Judicial Officer should be comfortably satisfied on the medical evidence that Patrick sustained a single hypoxic event or asphyxiating event on 18 October 1990 with a cause other than one attributable to a respiratory or a recognised neurological condition. The medical evidence does not exclude that the ALTE was caused by an asphyxial event including smothering.

46. Ultimately, on the medical evidence in 2019 there remains no identifiable natural (including genetic) cause of Patrick's ALTE and that it occurred from unnatural causes cannot be excluded.

Patrick's death

47. Again, the fresh evidence available is that no genetic variant has been identified in Patrick which is or is likely to be disease causing and which contributed to his death.

48. In other respects, the opinions expressed to the Inquiry and those given at the trial remain essentially the same and are consistent with the results of the genetic sequencing.

49. No medical expert has ruled out the possibility of a seizure having caused Patrick's death. Opinions have ranged from this being highly unlikely, or not excluded, or could have, to "would say" that epilepsy caused death.

50. Most medical experts considered that the death could have been the result of an asphyxiating event. No forensic pathologist at trial, or in the Inquiry, has excluded the possibility that his death could have been caused by smothering.

51. There was evidence as to the meaning of Patrick's histology report in 2003 at the trial by forensic pathologists and in the Inquiry by forensic pathologists and immunologists. For the reasons set out in chapter 8, it is submitted that infection did not contribute to Patrick's death.

Sarah

52. The fresh evidence available is that no genetic variant has been identified in Sarah which is or is likely to be disease causing and which contributed to her death. In other respects, the evidence in 2019 is materially unchanged from 2003 in respect of the cause of Sarah's death.

53. The forensic pathology evidence does not establish any natural cause of death of Sarah as a reasonable possibility. In particular, the strongest evidence of the possible role of the uvula was that it "could have" caused death or is "not excluded" as a cause.

54. Ultimately, there remains no identifiable natural (including genetic) cause of Sarah's death and death from unnatural causes, including smothering, cannot be excluded.

55. As with Patrick, there was evidence as to the meaning of her histology report in at the trial by forensic pathologists and in the Inquiry by forensic pathologists and immunologists. For the reasons set out in Chapter 8, it is submitted that infection did not contribute to Sarah's death.

Laura

56. As with her siblings, the fresh evidence available is that no genetic variant has been identified which is or is likely to be disease causing and which contributed to her death.

57. Overall, it may be said that there is a difference in the range of opinions on the role of myocarditis in Laura's death now, upon autopsy findings alone, as compared with

the range of opinions given at trial. There is no difference, however, in expert opinion on the possibility of an unnatural cause having caused her death. It is submitted that myocarditis is a possible cause of Laura's death, however, there is no evidence received in the Inquiry which would elevate myocarditis as more than a possible cause of Laura's death.

58. No forensic pathologist at trial, or in the Inquiry, has excluded the possibility that her death could have been caused by smothering.

The diaries

59. Noting the significance of the diaries to the Crown case against Ms Folbigg at trial, in our submission there has been a substantial change in the evidence about and surrounding the diaries since the trial.

60. Ms Folbigg has now given evidence about various entries. The Judicial Officer should be satisfied, having heard sworn oral evidence from Ms Folbigg as to the interpretation of the diaries, and received considered expert opinion evidence about her mental state, that it was well open to the jury at trial to draw inculpatory inferences in the jury's interpretation of the diaries.

61. In our submission, and for the reasons given in Chapter 9, the Judicial Officer would find that Ms Folbigg has been untruthful in much of that evidence.

62. On that basis, we submit that the effect of Ms Folbigg's sworn evidence to the Inquiry is to strengthen a hypothesis as to her guilt rather than the reverse. It follows that in our submission, Ms Folbigg's evidence to the Inquiry does not give rise to any reasonable doubt about her guilt.

63. We further submit, for the reasons given in Chapter 9, that it is open to the Judicial Officer to find that the evidence about Ms Folbigg's possession and disposal of the diaries indicates that she lied about those issues because she was conscious of her guilt.

Sentencing

64. In our submission and for the reasons set out in Chapter 9 the Judicial Officer should be satisfied that in sentencing Ms Folbigg the sentencing judge had before him careful and competent expert evidence of relevant aspects of Ms Folbigg's mental

state. The opinion of Dr Diamond and further opinion of Dr Giuffrida now available do not raise evidence in this regard that is relevantly new. The extent to which the sentencing judge took psychiatric and psychological evidence into account was reviewed by the Court of Criminal Appeal in the sentence appeal. The new reports provided no basis to revisit that Court's findings.

65. Accordingly, we submit the evidence before the Inquiry, including the report of Dr Diamond, does not give rise to a reasonable doubt as to any matter that may have affected the nature or severity of Ms Folbigg's sentence.

Conclusion

66. The additional evidence elicited by the Inquiry has not affected the essential characterisation of the evidence as wholly circumstantial. It remains the task to consider all the evidence before the jury, the evidence available from the time of the trial and the evidence before the Inquiry.

67. Much of the evidence before and at the time of the trial is unchanged and has not been revisited by the Inquiry and in our submission, should be accepted by the Judicial Officer. Thus, the features of the Crown case set out at paragraphs 4(e)-(k), (m) and paragraphs 5(a), (c)-(j) should be accepted and taken into account in forming the ultimate view as to guilt.

68. The principles of law to be applied by the Judicial Officer include those governing the correct approach to reasoning to a verdict in a circumstantial case. In a circumstantial case, a finding of guilt should not only be a rational conclusion but should be the *only* rational conclusion that can be drawn from the circumstances.[20] The accused must be found not guilty if there is an inference consistent with innocence reasonably open on the evidence.[21]

69. To be reasonably open on the evidence, an inference must rest upon something more than mere conjecture. The bare possibility of innocence does not prevent a finding of guilt, if the inference of guilt is the only reasonable inference open upon a

[20] *Shepherd v The Queen* (1990) 170 CLR 573, 579 (per Dawson J); *Knight v The Queen* (1992) 175 CLR 495, 502 (per Mason CJ, Dawson and Toohey JJ); *The Queen v Baden-Clay* [2016] HCA 35, referring to *Barca v The Queen* (1975) 133 CLR 82 at 104 (per Gibbs, Stephen and Mason JJ).

[21] *Shepherd v The Queen* (1990) 170 CLR 573, 579 (Dawson J); *Knight v The Queen* (1992) 175 CLR 495, 502 (per Mason CJ, Dawson and Toohey JJ).

consideration of all the facts in evidence.[22] There is a very real distinction between drawing an inference from proven facts and engaging in speculation.[23]

70. *All* of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence.[24] This involves focussing not on each individual fact but rather their combined force.[25]

71. It was not the Crown case at the trial, and it should not be considered by the Judicial Officer, that the fact of the death of four children in unexplained and sudden circumstances is sufficient to negative reasonable doubt.

72. It is only when the circumstances of each of the deaths are considered in the context of all of the strands of the case against Ms Folbigg, including applying coincidence reasoning, that the conclusion is inevitable that no reasonable doubt exists as to her guilt. Indeed in refusing leave to appeal against the pre-trial decision about the admissibility of evidence as coincidence evidence, Hodgson JA considered that he would find a deficiency of proof of guilt in relation to each count without the evidence concerning the other children, but that additional evidence concerning the others would leave no rational view consistent with innocence.[26]

73. It remains, as was found by the Court of Criminal Appeal in the appeal against conviction, that there is ample evidence to justify findings, beyond reasonable doubt, that none of the deaths or the ALTE were caused by a natural cause; that any unidentified natural cause was only a debating point possibility, particularly in light of evidence other than the medical evidence; that the only conclusion reasonably open was that somebody had killed the children and smothering was the obvious method; and that the evidence pointed to no person other than Ms Folbigg.[27] No evidence has been received in this Inquiry which causes doubt as to any of those matters.

74. In a number of respects, evidence in the Inquiry strengthens the hypothesis as to her guilt.

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[22] *The Queen v Baden-Clay* [2016] HCA 35, referring to *Barca v The Queen* (1975) 133 CLR 82 at [104] (per Gibbs, Stephen and Mason JJ).
[23] *Lane v R* (2013) 241 A Crim R 321, 69.
[24] *The Queen v Hillier* [2017] HCA 13, [48]-[49] (per Gummow, Hayne and Crennan JJ).
[25] *Lane v R* (2013) 241 A Crim R 321, 70 (citations omitted).
[26] *R v Folbigg* [2003] NSWCCA 17, [32].
[27] *Folbigg v R* [2005] NSWCCA 23, [143].

75. First, the recent research in relation to SIDS risk factors and the understanding that the risk of recurrence of SIDS in the one family is largely determined by genetics and the family environment, renders it less likely that the children, in particular Sarah and Caleb, died with SIDS as the diagnosis of exclusion.

76. Secondly, there have been no advances in the thinking that SIDS remains virtually indistinguishable from smothering and as a consequence in 2019, it still cannot be excluded that any of the children was smothered.

77. Thirdly, the results of the genetic sequencing removes any reasonable doubt of any disease-causing genetic variant being responsible for any of the deaths.

78. Fourthly, the neurological evidence combined with Dr Cala's evidence as to the absence on autopsy of a degenerative condition in Patrick, supports strongly that he had a hypoxic event in 1990.

79. Finally, Ms Folbigg has been untruthful in much of her evidence concerning her diary entries and her possession and dispossession of the diaries.

80. We submit that the Judicial Officer should find that there is no reasonable doubt as to Ms Folbigg's guilt nor as to any matter that may have affected the nature or severity of Ms Folbigg's sentence.

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