Inquiry into Convictions of Kathleen Folbigg

Submissions on behalf of Kathleen Folbigg

PART C - CALEB

The Trial – Crown Approach Relating to all Deaths

1. At trial the Crown clarified the method of killing as smothering with the intention of killing them or rendering them unconscious. The Crown Prosecutor stated in opening:[1]

The Crown, in this case, says that the accused smothered each of her children to death. We say that at the time she either intended to kill them or she deliberately intended to render them unconscious to, in effect, put them to sleep, or she restricted their breathing by smothering them knowing that they may well die. And any one of those three would be sufficient to prove the mental aspect of murder.

2. With respect to Caleb[2] and Sarah[3] the nominated cause of death on autopsy was SIDS. As a way of showing a link with smothering when the cause of some of the deaths had been identified as SIDS involved, the Crown claimed that SIDS was caused by 'a lack of oxygen during sleep'.[4] This proposition provided a link to smothering, which involves a lack of oxygen. He stated:[5]

The cause of SIDS and the mechanism of death of SIDS is unknown. All that the doctors know is that there is some illness or illnesses which causes otherwise healthy babies to suddenly die from lack of oxygen during sleep. (emphasis added)

3. The link between sleep, lack of oxygen and SIDS proposed by the Crown was incorrect.[6] The cause of SIDS deaths is unknown. It cannot be attributed to

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[1] Exh F T 26.20.
[2] Exh H p 7.
[3] Exh H p 98
[4] This proposition is incorrect as a matter of science, as a sudden infant death can be caused by arrythmia.
[5] Exh F T 30.10.
[6] T Bajanowski, B. Brinkmann and M. Vennemann, 'The San Diego definition of SIDS: Practical application and comparison with the GeSID classification, *Int J Legal Med* (2006) 120: 331-336.

lack of oxygen any more than it can be attributed to many other causes of death such as arrhythmia. Moreover, attributing a death to lack of oxygen is misleading, especially in a SIDS death which is unobserved. Prof Cordner stressed the impossibility of knowing whether a lack of oxygen caused a death. This point is made when he stated:[7]

Forensic pathology cannot tell if the heart stops first, or breathing stops first, or they both fade away together, or some other pathophysiological cascade leads to death in any particular case.

4. In any event, the obligation was on the Crown to exclude any reasonable natural case of death. This was clearly recognised at trial, and the Crown acknowledged that it had to exclude any alternative cause of death, disease process, or physiological feature that placed the child at risk of sudden death, in order to establish guilt. The Crown Prosecutor said:[8]

Different doctors will give different opinions in terms of the degree of probability, but of course none of them can say what caused the induced asphyxia. All they can say is that there was some form of obstruction that caused oxygen not to be able to get into the lungs and that's what caused these babies to die. They cannot say that it was accidental or deliberate, whether it was suffocation or a blanket or whatever. All they can say is that it was induced asphyxiation from an external cause -not from an internal cause, not from any internal abnormality of the children, but from some external cause.

The Crown case is that from these doctors, from these experts, you will be able to conclude the following. Firstly, none of these children died from the mysterious disease of SIDS. Next Caleb didn't die from a floppy larynx or any other natural causes. Next Patrick did not have a spontaneous epileptic episode when he had his ALTE, but he suffered brain damage from lack of oxygen which caused him to become epileptic. Next that his epilepsy did not cause him to suddenly stop breathing and die. Next that Sarah

[7] Stephen Cordner MB BS FRCPA FRCPath Professor of Forensic Pathology (International), Monash University Head, International Programmes (VJFM) REPORT AND OPINION IN THE CASE OF KATHLEEN FOLBIGG, Inquiry Exhibit C, page 42.8.
[8] Exh f, T 66.54-T 67.24

didn't die from a displaced uvula or any other natural cause. And lastly that Laura did not die from myocarditis or any other natural cause.

The Crown case is that from these expert witnesses you will come to the conclusion that all four children died from the same kind of unexplained asphyxiating event. (emphasis added)

5. This statement to the jury is important because it recognised that the test in criminal law required the Crown to exclude a reasonably available cause of death. It was, and is, not good enough for the Crown to advance evidence that there were two or more potential causes of death and there was not enough information to choose between a natural cause and smothering. The Crown had to exclude the natural cause. In this Inquiry, the submissions of Counsel Assisting do not grapple with this issue.

All Children

6. With respect to all children, a monogenetic genetic cause has not been excluded. A digenetic cause has not been considered by the genetics experts and has not been excluded. A cause relating to a genetic cause and some exogenous stressor, such as pollution or infection has not been considered by the genetics experts and excluded. These have been addressed elsewhere in these submissions.

7. Further, with respect to three of the children (Patrick, Sarah and Laura), there was evidence they each suffered from some mild viral illness at about the time of their deaths. Bacteria were identified in microbiological samples on autopsy (some of them in sterile sites like the spleen) and either macroscopic or microscopic examination demonstrated tissue congestion or inflammation which was consistent with a physiological response to infection. In other words, the clinical signs in the hours or days before death, the microbiology results and examination of tissues combined so as to point to a physiological response to infection. This infection is was a potential cause of death.

8. Caleb had laryngomalacia, Patrick had a complicated encephalopathy and infection, Sarah had infection, and a displaced uvula, and Laura has myocarditis (which is infection of the heart).

9. After all the evidence at trial, the defence made a submission that the Crown could not exclude a natural cause of death.

Response to Counsel Assisting's Submissions re Caleb

10. Dr Cala's concerns regarding blood and froth found on Caleb, as described by Counsel Assisting at paragraph of Chapter 3, relate, of course, not to matters observed by him but the "presence of blood and froth whatever that was" observed by "somebody". Dr Cala, poignantly, opines he does not "know exactly what the cause of it was" before embarking on a series of speculations.[9]

11. The conclusions of Dr Cala that, "I'm not satisfied that I've read or seen anything that provides me with an explanation for that at this stage" are apt.

12. Despite it being said, at paragraph 5 of Chapter 3, that the other forensic pathologists did not share Dr Cala's view, indeed they did.[10]

13. The presence of blood and froth on Caleb has no significance under the circumstances.

14. Counsel Assisting's observations at paragraph 7 to 11 of Chapter 3 are of no assistance to the Inquiry in determining the significance or otherwise of the blood and froth found by "somebody", on Caleb, following his death.

15. The observation by Counsel Assisting at paragraph 13 of Chapter 3 that "this was unlikely" in relation not Dr Beal's evidence that he would have given SIDS as the cause of Caleb's death is unsustainable. Dr Beal was cross-examined on this point and maintained his opinion. Dr Beal's opinion regarding what he

[9] T 127.38 – T 128.08.
[10] T 130.03-.10 and T 130.18-.20 and Exh H, Forensic Pathology Tender Bundle page 254.

would have done is not invalidated simply because another says they would have done something else.

16. The description by Counsel Assisting at paragraph 7 of Chapter 3 that Dr Cala "tempered his view at trial" on his issue understates Dr Cala's evidence in the Inquiry.

17. Dr Cala was taken to the issue of blood and froth observed on Caleb at T 127.32-.33. he answered from T 217.35 to T 128.08 and concluded with the quite firm answer "I'm not satisfied that I've read or seen anything that provides me with an explanation for that". he then went on at 128.46 to note, in relation to the froth and blood, "I don't know exactly the cause" of the blood and froth.

18. The concession was ultimately made by Dr Cala at T 129.40 that Caleb's death fit within category 2 SIDS. Whilst Dr Cala went on to express that he would not be happy to call Caleb's death a Category 2 SIDS, Counsel Assisting failed to query Dr Cala as to the basis of his rejection of the SIDS categories given his lack of enthusiasm on its face, was inconsistent with his previous answers.

19. The conclusion by Counsel Assisting at paragraph 25 of Chapter 3 that the opinions expressed to the Inquiry "remain broadly similar to those given at trial" is erroneous. Dr Cala gave evidence at trial that all four deaths derived from the same cause.[11] That cause was described in the answers during examination in chief by Dr Cala at Exh F T 726.50 – T 727.06:

> *… they were deliberately smothered.*

20. This was reaffirmed by Dr Cala during cross-examination at Exh F T 729.26 despite his concession he could not medically prove his opinion.[12]

[11] Exh F T 728.48.
[12] See Exh T 726.50 and T 729.54.

21. Dr Cala's evidence to the Inquiry contradicted that given at trial in that, at the Inquiry, Dr Cala constrained himself to his expertise and did not opine that Caleb had been smothered.

22. As to paragraph 24, this submission is incomplete. Since the trial there have been studies published that laryngomalacia can be a cause of death in infants. At trial, it was a theoretical postulate only. This has been addressed elsewhere in these submissions and a finding should be made to this effect.

23. The submission at paragraph 26 of Chapter 3 that it is highly unlikely laryngomalacia had any contribution to Caleb's death is not supported by the evidence. Counsel Assisting failed to explore the issue at all with Dr Cala, Prof Cordner or Prof Hilton. Laryngomalacia or laryngospasm can cause death. The clinical material demonstrates Caleb was highly vulnerable to it. It got worse when he lay flat and he had blood in his lungs which occurred about the time he saw Dr Springthorpe. Assuming it is highly unlikely, it cannot be excluded by the Crown.

24. Counsel for Ms Folbigg questioned Dr Cala on the issue who conceded he did not have the expertise to form an opinion.[13]

25. Prof Duflou advised the research of which he was aware noted ten per cent of cases could prove fatal.[14]

26. There is no evidence that negatived any potential role that Caleb's laryngomalacia played in his death and thus its contribution remains a possibility.

27. As to paragraph 31, an identified natural cause exists and cannot be excluded. The balance of paragraph 31 is not the relevant legal test. Ms Folbigg does not have to exclude an unnatural cause. In any event, any contribution that this

[13] T 245.10.
[14] T 245.22-.31.

finding could make to an attempt to advance coincidence evidence is seriously undermined.

28. The submission by Counsel Assisting at paragraph 32 of Chapter 3 is not relevant and offends the approach that ought be adopted by this Inquiry. It is not a matter for asphyxia or smothering to be excluded but rather, whether a state of facts existed or otherwise. The standard of persuasion required of a criminal inquest is beyond a reasonable doubt. The corollary of that premise is a reasonable doubt as described by s. 82(2)(a) of the *Crimes (Appeal and Review) Act 2001.*

29. To this end, the Inquiry needs to be reasonably satisfied that asphyxia or smothering occurred on the evidence before it. As His Honour Justice Dixon in *Briginshaw v Briginshaw* (1930) 60 CLR 336 aptly noted, "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality …"reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

30. The Inquiry could not be reasonably satisfied, on the evidence before it, that asphyxia or smothering occurred insofar as Caleb is concerned and thus a reasonable doubt exists s to the guilt of Ms Folbigg.

Submissions of the DPP

31. The DPP repeats the submissions of Counsel Assisting and falls into error for the same reasons.

32. Justice Sully described such a submission as to an alternative natural cause of death only as "*a debating point possibility*".[15] In other words, Justice Sully's conclusion was there was no real evidence that would assist in identifying why

[15] *R V Folbigg* [2005] NSWCCA 23 at [143] which needs to be read in the context of findings and observations at [63], [80]-[81], [91], [103], [128], and [143].

it was that a particular disease or physiological feature could cause death, the mechanism by which that death could be triggered, and there was no scientific material published at that time that recorded any instance of such a death occurring.

33. During the evidence given at this Inquiry, there were a number of wholly appropriate concessions, clarifications and corrections made by experts at the trial[16]) that explained the mechanism of death and established that such a mechanism had occurred. This of itself undermines the characterisation of such a cause being a "*debating point possibility*".

34. Further, scientific evidence that was published at the time of the trial and which was not identified by the experts at trial has now become available, and there has been a great deal of additional evidence that has been adduced at the trial relating to infection and immunology. This is recognised by the leading text in SIDS, that establishes the link between infection and sudden death in infancy.

35. These technical issues have been dealt with elsewhere in these submissions and will not be further developed here. However, they shall be applied to each child in turn.

Causes of Death – Caleb

Submissions of Counsel Assisting

36. Part 3 of Counsel Assisting's submissions deal with causes of death.

37. After canvasing the evidence, Counsel Assisting stated about Caleb's death:

On forensic pathology evidence, both "undetermined" and SIDS apply to Caleb's death. Both terms leave open the possibility of an unidentified natural cause, or unidentified unnatural cause, of death. (paragraph 30)

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[16] Professor Hilton and Dr Cala

. . . .

Most medical experts considered that the death could have been the result of an asphyxiating event. No medical expert excluded asphyxia or smothering. (paragraph 32)

38. "Asphyxiating event" and "asphyxia" are terms that have been dealt with elsewhere in these submissions and are virtually meaningless in the way the evidence was led.

39. This submission is also flawed in that it does not matter if an expert can exclude asphyxia or smothering. There is no onus on Ms Folbigg to do so in a criminal trial, or at this Inquiry. A finding should be made to this effect. The issue is whether any medical expert can exclude a reasonable alternative natural cause of death. A finding should be made to this effect.

40. If a reasonably available alternative natural cause of death cannot be excluded, then the conviction of the manslaughter of Caleb and the remaining four charges should be referred to the Court of Criminal Appeal.

41. These submissions are largely directed to this question.

Cause of Death – Caleb – Crown Case

42. The Crown postulate at trial was that Caleb had been murdered by smothering, leading to hypoxia and death. The murder was by Kathleen Folbigg and the murder occurred when she was in a rage.

43. The Crown opening is set out at paragraph 4 above.

Evidence at Trial.

44. In the hospital immediately after his birth, Caleb required oxygen at night which Dr Springthorpe described as a common thing with newborns.[17] Over the following days his condition improved and he was discharged home. It is

[17] Exh F T 265.32.

to be inferred that when he was at home, Caleb did not get oxygen therapy at night.

45. Ms Folbigg took Caleb to a clinic on 8 February 1989.[18] Ms Folbigg took Caleb to the hospital for an EEG.[19] By 15 February 1989, Ms Folbigg was regularly noting that Caleb was unsettled, inferentially in his cot. There are regular entries "*asleep. Slightly unsettled*" that appear in her diary.[20]

46. Caleb was diagnosed with undoubted congenital laryngomalacia by Dr Springthorpe. He said so in his letter to the general practitioner. In other words, the condition was inherited and would have been genetic. Craig Folbigg was a loud snorer, as was Sarah.[21] Laryngomalacia is also known as "floppy larynx".[22]

47. On 17 February 1989, Ms Folbigg made an appointment to see Dr Springthorpe [23]. At about this time there are regular entries in her diary that he was having difficulties being put to bed.

48. Dr Springthorpe and Craig Folbigg said that Caleb was taken by Kathleen Folbigg[24] to see Dr Springthorpe after the parents noted he was having difficulties with feeding.[25] Craig Folbigg was not at that consultation.

49. However, on the history given by Kathleen Folbigg to Dr Springthorpe on 17 February 1989, recorded in a contemporaneous treating document,[26] she reported that he had difficulty with breathing (or stridor) when he was upset or lying down.[27]

50. She was obviously asked by Dr Springthorpe about any difficulties with Caleb's feeding because Dr Springthorpe recorded in his letter that when

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[18] Exh AZ page 8.
[19] Exh AZ page 15.
[20] Exh AZ
[21] This of itself demonstrates a potential genetic link.
[22] Springthorpe T 266.32, Herdson T 1033.45.
[23] Exh AZ page 17.
[24] Craig Folbigg was at work Exh F page 102.04.
[25] According to Craig Folbigg – see Exh F T 101.40-.45 but see also T 236.26-.42.
[26] *Albrighton v Royal Prince Albert Hospital* (1980) 2 NSWLR 542, per Hope JA at 548 G-549 C.
[27] See Dr Springthorpe report 18 February 1989, Exh H page 28. Exh F T 269.58-T 270.02.

feeding *"there has been no cyanosis or gagging with his stridor"*,[28] but that was not the only clinical information of importance. Dr Springthorpe suggested a review in two months.

51. Unbeknown to Dr Springthorpe, what was actually happening either before or about the time of that consultation with Dr Springthorpe was that Caleb had acute bleeding in his lungs.[29] This is the clear inference available by reason of the discovery of haemosiderin deposits discovered in his lungs at autopsy. According to Dr Berry, haemosiderin takes 36 to 48 hours to develop.[30]

52. Despite the history of stridor being exacerbated at night and when Caleb was upset, Dr Springthorpe did not order further investigations.

53. Kathleen Folbigg was reassured by the advice from Dr Springthorpe,[31] and Craig Folbigg did not notice any difficulty with feeding after that time.[32] Craig Folbigg never saw Dr Springthorpe[33] so any information that Dr Springthorpe received was from Kathleen Folbigg.

54. Craig Folbigg only spoke with Dr Springthorpe after Caleb died, and it was then he told Dr Springthorpe he was concerned about the stridor.[34]

55. On the night of his death, Caleb was unsettled.[35] Craig observed the Caleb's stridor and was concerned about it. He was so concerned that he wanted to take Caleb to bed with him.[36] Craig gave evidence at trial that he mentioned his concern about stridor to Ms Folbigg on the night Caleb died.[37]

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[28] Exh H page 28.
[29] Cala T 233.08, Forensic pathologists T 233.16-.41, Berry T 1208.29.
[30] Berry T 1057.04
[31] Statement undated in Exh E being Exh AK from trial.
[32] Exh F T 209.05-.32.
[33] Exh F T 209.34.
[34] See Dr Springthorpe report 18 February 1989, Exh H page 29, see also T 209.09 - T 211.35
[35] Exh AZ.
[36] Exh H page 28 (letter 21 March 1989), Craig Folbigg Exh F T 209.50-T 210.26, T 210.47 - T 211.20. If should be noted this cross-examination was cut short. Craig Folbigg did not recall this event anyway.
[37] Exh F T 209.53.

56. Caleb was fed by Ms Folbigg and she had difficulty settling him.[38] The likelihood is that the stridor was making Caleb difficult to settle. Caleb was placed to bed by Kathleen Folbigg on his back.[39]

57. There was nothing about Kathleen Folbigg's behaviour that was of concern to Craig Folbigg at that time[40] and there was none on the night in question.[41]

58. Caleb was wrapped in a bunny rug when found.[42] Kathleen Folbigg was clearly devastated at the discovery and was screaming.[43] She was crying for weeks.[44]

59. Caleb was blue around the lips when Kathleen Folbigg saw him[45] and Craig Folbigg saw his lips were blue.[46]

60. The evidence of the ambulance officers when they arrived on location at 0259 hours was that the airway was obstructed.[47] The two ambulance officers who arrived first were David Hopkins[48] and Dick Baines.[49] The airway was cleared by Dick Baines.[50] Hopkins stated: [51]

> *Dick cleared the patient's airways. I have noted in my report* <u>*the patient's airway was obstructed*</u> *and I cannot remember exactly what obstructed the airway. …*

61. At some time proximate to the events, David Hopkins completed an ambulance report that clearly notes the airway was obstructed on arrival.[52] This record of

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[38] The submission is made that his stridor became worse when lying on his back, and it should be inferred that the child would find his stridor distressing.
[39] Exh AA Q 97 page 315.
[40] Exh F T 23.32.
[41] Exh f T 237.27-.56.
[42] Exh E T 246.39.
[43] Exh F T 246.41-.54.
[44] Exh F T 247.24.
[45] Exh AZ Q 106 page 318.
[46] Exh F T 104.25.
[47] Exh H page 15 paragraph 6, Exh H page 18.
[48] FPTB 14.
[49] FPTB Tab 9, Exh H page 18.
[50] Paragraph 6.
[51] Exh H page 15.
[52] Exh H page 18.

itself demonstrates there was some object, or substance obstructing the airway. Neither ambulance officer could recall what it was that obstructed the airway.[53]

62. It is submitted that the clear inference by this clinical finding by the ambulance officers is that the airway was obstructed by the collapse of the airway due to laryngomalacia or laryngospasm.

63. On autopsy, Caleb was found to have haemosiderin in the lungs. This indicates a prior incident of bleeding in the lung tissue. It takes about 36-48 hours to develop.[54] It does not indicate one way or another that the child has been smothered. But it does indicate there was bleeding.[55] The timing of the development of haemosiderin would coincide with Caleb's attendance upon Dr Springthorpe at a time when he was having respiratory stridor and intercostal recession, and there was a recorded report from the mother that his stridor was worse when laying on his back or when he was upset.

64. On autopsy, there was no evidence of vomitus, saliva or foreign object in the lungs.

65. There was no sign of smothering at autopsy.

66. With respect to Caleb, laryngomalacia was not recorded as a cause of death on his death certificate. At the time, the condition was not thought to cause death. The evidence at trial was there was no direct experience by Dr Herdson or his colleagues of a child dying from laryngomalacia.[56] There was evidence there was no child that had ever died of laryngomalacia.[57] Beal gave evidence of his knowledge of a child dying from severe laryngomalacia[58] but a literature search by him did not locate any report of such deaths so he thought it was a potential but very rare cause of death.[59]

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[53] See Hopkins Exh F T 142.26-.35, T 142.47, T 145.17 - T 146.09, T 147.23-.46.
[54] See Judge's summing up at Exh F pages 38-39, Byard T 1234.40.
[55] Exh F Berry at T 1057.45-T 1060.23. Prof Berry thought this would exclude Caleb from the definition of SIDS.
[56] T 1033.55.
[57] Herdson T 1034.45-.30, Berry T 1056.57 - T 1057.26.
[58] T 1204.04-.12.
[59] T 1204.39-.50.

67. At trial, Dr Springthorpe gave the following evidence:[60]

Q. Prior to his discharge on 5 February 1989, did you satisfy yourself that he was perfectly well?

A . Yes . He had slightly noisy breathing, so-called stridor, but we didn't feel that this had any impact on his feeding or sleeping.

Q. Is stridor a common condition in babies?

A . Very common.

Q. Does it basically mean noisy breathing?

A . Yes, emanating from the voice box.

Q. Did Caleb's father at some stage[61] express concern to you about Caleb's noisy breathing during feeding?

A. Yes, he did.

Q. Could you, on examination of Caleb, detect any abnormality at all?

A. Yes. This is a question of degree. In its most severe form, obviously children, when they try to breathe in, have collapse of their airways and complete obstruction. It was nothing of that severity at all. In its most minor degree, it is just a noisy breathing, which is not apparent when the children are at rest, but if they exert themselves or cry, then the stridor becomes more apparent.

Q. Did you review Caleb on 17 February 1989, when he was approximately two weeks of age?

A. Yes, I did.

Q. Was that in your rooms?

[60] Exh F T 265.37 - T 247.46.
[61] This was after Caleb's death.

*A.	Yes, it was. I took a photograph at the time.*

*Q.	You took a photograph of mother and child?*

*A.	That's right.*

*Q .	At that stage, did you examine Caleb?*

*A.	Yes, I did .*

*Q.	What did you observe about stridor on that occasion?*

*A.	The stridor was very, very mild. I have made a note at the time that there was an inspiratory stridor, <u>so a stridor on breathing in</u>, and some recession, which is <u>sinking in of the chest cage</u>, but no change of colour, no cyanosis, and <u>no gagging</u> [62] associated with it. I felt this was most likely due to a soft larynx, so-called laryngomalacia.*

*Q.	Can you spell that?*

*A.	L-A-R-Y-N-G-O-M-A-L-A-C-I-A.*

*Q .	Are you familiar with the term "floppy larynx" ?*

*A.	Yes, that is the common term for laryngomalacia .*

*Q.	What is a floppy larynx?*

*A.	The larynx is made of cartilage. Some children have very soft cartilage, especially if they are premature. <u>Otherwise, full-term infants - some have softer than average cartilage, which can then collapse on inspiration more readily</u>. This is a condition that invariably tends to improve during infancy and, <u>by the age of 12 months</u>[63], the vast majority don't have any problem.*

[62] This was relevant to feeding, not laying on his back.
[63] Caleb was 19 days old. He had not time to grow out of his laryngomalacia. Prof Duflou informed the Inquiry that studies showed that 90% of children grow out of the condition, and the remaining 10 per cent may die of it. He was not challenged on this.

Q. Was Caleb premature?

A. No, he is a full-term baby.

Q. When you examined Caleb at about two weeks of age, what was the degree of stridor that you observed?

A. It was mild. As I say, <u>it wasn't apparent at rest</u>[64]. I specifically asked the parents if it interfered with feeding or with sleeping and was reassured that it had not.

Q. Can you recall whether, on that occasion, you saw both parents or just one of them?

A. No. Saw both parents - oh, on the first occasion?

Q. This is on 17 February?

A. I don't have any note to that effect. I think it was - no, it must have only been the mother , because I would have taken a photograph of the father as well.

Q. On the morning of 20 February, did you receive a telephone call from Mrs Kathleen Folbigg , the mother?

A. That's right.

Q . Did she tell you that the baby had been found dead in his cot?

A. That's right.

Q . Did she tell you that he had been found dead in his cot at about 3am that morning?

A. Yes.

Q. Having been put down at around lam?

A. Yes.

[64] It was observed to be worse when the child was upset or laying on his back.

Q. *And that he had failed to respond to resuscitation attempts?*

A. *Yes.*

Q. *On 21 March 1989, that was about four weeks later, did someone come to your private rooms?*

A. *Yes. Both parents came to that appointment*[65]*. I had arranged for them to come on 7 February, but they weren't able - 7 March I should say, but they weren't able to keep that appointment, and I arranged for a subsequent appointment.*

Q. *Now, at some stage, did you speak to the pathologist who conducted the post-mortem examination?*

A. *Yes, I did, Dr Roy Cummings.*

Q. *Did Dr Roy Cummings tell you about his post-mortem examination?*

A. *He certainly did .*

Q. *As a result of what Dr Cummings told you, are you able to say anything about Caleb's cause of death?*

A. *We were not able to establish the cause of death, but I was specifically concerned about his larynx, and I asked Dr Cummings to particularly check to see if there were any cysts or webs, which can sometimes occur and cause noisy breathing, and we were very sure that this did not - there was no evidence of those*[66]. (emphasis added.)

68. This evidence is of critical importance in the face of the expert evidence at the Inquiry;

   (a) Dr Springthorpe advised the Court that in a severe form of laryngomalacia, it could give rise to a collapse of the airways;

[65] This was when Craig first met Dr Springthorpe, after the death.
[66] There was no microscopic examination of the cartilage to determine whether it was present, or less than expected. See Prof Byard's evidence set out below.

(b) A collapse of the airways could lead to complete obstruction of the airways;

(c) By inference, if there was complete obstruction, then the child could die of hypoxia;

(d) When he reviewed Caleb at two weeks of age, Caleb had inspiratory stridor and some recession (which include sinking in of the rib cage);

(e) The collapse of the airway can occur at any time;

(f) If Caleb was having recession in the chest, then it is clear the laryngomalacia was demonstrating some impact on breathing two days before his death;

(g) The recession had not been noted on earlier clinical assessments by Dr Springthorpe;

(h) While Dr Springthorpe gave evidence he was assured by his parents that they did not think it inferred with Caleb's sleep. He was on clear notice the breathing difficulties were worse when Caleb was lying on his back. He recorded it in his letter to the GP on 17 February 1989.

69. The basic evidence of Dr Springthorpe was consistent with Prof Byard to the following effect:[67]

Q. Can you assist us with the factors in relation to the voice box that you had examined that you find relevant?

A. Well, the difficulty with - I mean it has been said that he had laryngomalacia, which is just a general term meaning that there is some problem with the voice box. It is not normal. It is causing obstruction of the airway. That can cause problems in breathing . So babies can get stridor which is a wheeze when they inhale. Now it is not a single disorder. There are a whole lot of different conditions that can cause this. You can get folds in the lining of the larynx, you

[67] Exh F T 1202.28-T 1203.47.

can get cartilage in the larynx that is not formed properly, so the larynx sort of collapses or you may find no structural findings at all. It may just be that you have got a weak larynx[68].

Q. *Before coming to give evidence, have you been taken to various passages from the evidence of Dr Springthorpe?*

A. *That ' s correct.*

Q . *Were you made aware that Dr Springthorpe had reviewed Caleb on 17 February 1989?*

A. *That's correct, yes.*

Q. *And that was two days before his death?*

A. *That's correct.*

Q. *You have been taken to a reference of Dr Springthorpe in evidence in this court - and this is at page 266, line 19. The question was asked, "what did you observe about stridor on that occasion?" And the doctor said, "the stridor was very, very mild. I have made a note at the time that there was a respiratory stridor, so a stridor on breathing in, and some recession, which is sinking in of the chest cage, but no change of colour, no cyanosis and no gagging associated with it. I felt this was most likely due to a soft larynx, so-called laryngomalacia" ?*

A. *Yes.*

Q. *Now, were you also taken to the doctor's evidence in relation to a communication that he had with Dr Cummings?*

A. *I can' t specifically remember that, but , yes, I have read it.*

Q. *He was asked this question (267 line 39). "As a result of what Dr Cummings told you, are you able to say anything about Caleb's cause of death?" And he answered, "We were not able to establish the cause of death but I was specifically*

[68] This was not addressed on autopsy, but cysts and webs were excluded.

concerned about his larynx. And I asked Dr Cummings to particularly check to see if there were any cysts or webs which can sometimes occur and cause noisey (sic) breathing and we were very sure that this did not, there was no evidence of those." And then he was asked, "So in your opinion did the stridor have anything to do with his death?" And he answered, "In my opinion it had nothing to do with his death"?

A. *Yes. I would be concerned that you would ignore stridor. What we have got in Caleb two days before he dies, is evidence that there is some obstruction there, that he is making a wheezeing (sic) noise and his, the muscles between his ribs are actually coming in, so he has got some respiratory difficulties, stress. I think there is no doubt about that. Now nothing was found at autopsy. Well they didn't find webs or cysts, but the larynx itself wasn't looked at under the microscope. We don't know whether maybe there was no cartilage in the larynx, we would need a microscope examination to tell that. The other important thing I think with this type of floppy voice box is that there have been cases that have been written up in the literature where children have had well, they have just stopped breathing because of it and there has actually been no structural abnormality. It has been an abnormality of the way the larynx functions and so you can get a range of problems of the larynx from it being deformed to it just not functioning properly, and the end result is the same thing - you get problems with breathing, you get difficulty with respiration, and I think that given that finding I would not be able to exclude that as a possible factor in his death.* (emphasis added)

70. Dr Cummings did not perform an examination under the microscope by histologic slides. He did not undertake a full examination.[69]

71. Prof Byard gave evidence of the need to do more than a visual inspection of the larynx on autopsy:[70]

[69] Byard Exh F T 1233.41 - T 1234.37.
[70] Exh F T 1205.04-.25.

Q. From your examination of the post-mortem report was there any histology of the upper airway?

A. No, no, there wasn't.

Q. Would that be of some assistance, if that were done?

A . Yes. I think it is important. To me, if I had a case like this, there are a number of steps that I would undertake. First of all, I would photograph the larynx, so that I could show somebody what the larynx looked like. I would probably also get a specialist in ear, nose and throat in children, to come and look at the airway as well - because they are an expert in the area and they could say "Yes, I see this. I think this" or maybe "it is normal", and I would also take sections to see if there was any cartilage there, if there was a problem with the cartilage, and also I would want to see if there was any infection or inflammation, because if we have got a narrowing of the airway from a floppy larynx and you get a bit more mucous than normal, this may actually worsen the situation. So it may not be a problem in a normal baby, but it may be a problem with a baby that has a small airway. (emphasis added)

72. The trial judge[71] noted Dr Springthorpe had given evidence laryngomalacia almost always resolved and noted Prof Byard could not exclude it as a cause of death.

73. The reason this condition improves as the child gets older is that the cartilage gets stronger.[72] This suggest that until he gets older, he is vulnerable.[73]

74. At trial, the prosecution was able to exclude the existence of webs or cysts in the larynx that may have caused noisy breathing by reason of the autopsy report of Dr Cummings[74]. However, there was no study done of the larynx

[71] T 31.
[72] Exh F Springthorpe T 271.27.
[73] Exh F Springthorpe T 271.35.
[74] Exh H page 9.

proper and no histology to determine whether the cartilage was sufficient to prevent obstruction the upper airway.

75. As such, the Crown could not exclude weak or absent cartilage in the larynx that may have triggered an upper airway obstruction. The mechanism causing hypoxia is collapse of the airway. If this occurs, there are no post-mortem findings that can identify whether laryngomalacia has taken place.

76. As Prof Byard points out, Caleb was obviously having difficulty breathing, or respiratory stress two days before his death.[75]

77. Further, according to Professor Byard the effect of floppy larynx can be worsened with a child lying on its back.[76] Further, Dr Springthorpe noted that if Caleb was unsettled, that worsened the laryngomalacia.[77] Caleb was upset on the night of his death and this would be expected to worsen the condition.[78]

78. That Dr Springthorpe considered the condition to be mild is not to the point.

79. At this Inquiry, Dr Cala relied on this opinion of Dr Springthorpe to suggest that laryngomalacia was not a likely cause of death. Two days before his death, Caleb was having obvious difficulties breathing. That could have been caused by soft or absent cartilage in the larynx. He was at risk of collapse of the upper airway, even in the absence of cysts or webs (identified by Dr Cummings). He was having bleeding in his lungs. With laryngomalacia the obstruction could be exacerbated by lying on his back. Dr Springthorpe noted that Caleb's stridor got worse when lying on his back.[79] On the morning of his death, Caleb was found lying on his back.

80. Under cross-examination by the Crown Prosecutor, Professor Byard stated that if this child died of a floppy larynx, it would have been a world first. This was

[75] Exh F T 1203.25-.31.
[76] Exh F T 1204.52 - T 205.03, Exh H page 28.
[77] Exh F T 270.05.
[78] Exh F T 270.40.
[79] Exh F T 269.58 – T 270.02.

very potent evidence at the trial and probably enabled the jury to put death by laryngomalacia to one side as a reasonable cause of death in Caleb.

81. As such, all of the evidence of Dr Byard that had been given at trial could be put to one side. It was, to use the words of Justice Sully, "*a debating point possibility*" as opposed to a reasonably available natural cause of death that could not be excluded by the Crown. It enabled the jury to ignore the breathing difficulties experienced two days before his death, the fact Caleb was found on his back and the fact that when discovered, his upper airway was obstructed.

82. Had Caleb's upper airway obstruction been caused by vomit or saliva, it is significant that none of it was noted in his lungs, as would be expected if he was breathing in.[80] Dr Cummings was deceased by the time of the trial and was unable to give evidence.[81] If it was a solid object that obstructed the airway, the ambulance officers would have noted it. Accordingly, the inescapable inference is the obstruction was caused by the structure of Caleb's larynx combined with his sleeping position.

Crown Address

83. In the Crown address to the jury was the following submission with respect to Caleb:

CROWN Prosecutor: … We know from the evidence that Caleb was a good sleeper a good eater[82]. Born healthy[83]. He had a very healthy 19 days of his life, except for some mild stridor, stridor being a floppy larynx.[84]

[80] See Exh E page 9, autopsy report.
[81] Exh F T 29.47.
[82] He had stridor when feeding and laying on his back worsened the stridor.
[83] He had laryngomalacia.
[84] It should be noted that stridor is not a floppy larynx. Stridor is a noise on breathing which can give rise to intercostal recession or sinking in of the rib cage on breather. See Springthorpe at Exh F T 266.23. Stridor can be caused by a floppy larynx.

His parents noticed he had difficulty, both in breathing and drinking at the same time.[85] *They took him to see Dr Springthorpe. Of course, he was their first child. … [Dr Springthorpe] was faced with what you must think was a very, a very minor medical complaint*[86]*. He found that this was mild stridor, mildly floppy larynx. What he actually said, what he gave in evidence was that, that he saw, had nothing to do with Caleb's death. He was so lacking in concern that he basically sent the parents*

home and said the child would grow out of it[87]*. And he said this: That it was nothing of the severity that would cause complete collapse of the airways*[88]*. It was just noisy breathing. It was "very, very mild". In his opinion Caleb's stridor had nothing to do with his death.*[89]

To him the cause of death was still a mystery. He was so surprised by Caleb's death that he particularly made enquiries of Dr Cummings who conducted post-mortem to look for some sort of webs of cysts in the vicinity of the airways that may have caused an obstruction[90]*. We know from Dr Cummings (sic) post-mortem report that there was nothing of that nature found. There was no abnormality of the larynx found whatsoever. There was no cysts or webs of anything that could account for an obstruction of the airways.*[91]

84. Further, in his address, the Crown prosecutor stated:[92]

Caleb was the same. Floppy larynx. Professor Berry never heard of it himself. Never seen one. His colleagues never heard of it. Professor Byard, the defence expert, never seen one. Never heard of it. Medical literature, never reported one. Never ever. In all of the reported medical literature over all of the years there has never ever been a child

[85] This is important given the material in *Otolaryngological Aspects of Sudden Death* and associated diagram. Further, this was not the whole evidence- Caleb's stridor was worse when upset or lying on his back.
[86] Which evidence at the Inquiry could cause a collapse of the airways, and hypoxia leading to death.
[87] At the time of his death, he had not grown out of it.
[88] It was worse when laying down. Both Craig and Kathleen were concerned about it on the night of Caleb's death. Craig wanted to take him to bed with them. At the time of Dr Springthorpe's consultation, there was of had been bleeding into the lungs. In ten per cent of cases, the condition will not resolve and the baby will die. Craig and Sarah also had otolaryngological issues with snoring.
[89] Dr Springthorpe did not give evidence at the Inquiry. He was not cross-examined as to whether there was a chance he had erred in his assessment of the significance of the laryngomalacia. This was the subject of cross-examination of Dr Cala at the Inquiry (T 244.25-245.16).
[90] This did not address the issue of whether the cartilage was present or sufficient.
[91] T 1309 – T 1310.
[92] Exh F T 1341.05-.24.

reported who has died from floppy larynx[93]. *Now I will come to consider that a little bit later, and I think it is an appropriate time for the luncheon adjournment.* (emphasis added)

HIS HONOUR: Mr Crown, you just said "who has died from floppy larynx".

CROWN PROSECUTOR : Yes I did, your Honour.

HIS HONOUR: That was deliberate?

CROWN PROSECUTOR: Yes. I have made a submission both in relation to floppy larynx and in relation to displaced uvula.

Judge's Summing Up

85. The trial judge summed up on the laryngomalacia as follows:[94]

Let me deal now with the only natural process as a candidate for the cause of death, namely the floppy larynx. No expert has ever dealt with, heard about or read about a death from floppy larynx. Again, that does not mean that it could never happen.

Although the expression "floppy larynx" describes the softness of the larynx, the voice box, which is part of the respiratory tract, it is otherwise an inexact term. Professor Byard tells you that it describes a range of conditions. There can be folds in the lining, improperly formed cartilage, or the expression may just mean a weak larynx. Obviously, with such a range of possible conditions under that description, you might expect that there might be a range of effects. Because the death of Caleb was diagnosed as SIDS, the larynx was not preserved. None of the experts, except Dr Springthorpe, ever knew just what the larynx looked like, or had a chance to form an opinion why it was, as the term goes, floppy.

Caleb was seen by Dr Springthorpe, a specialist paediatrician with a particular interest in the development of problems in children, SIDS and child abuse, before his discharge home from hospital after his birth. At that time, 5 February 1989, he noted that Caleb's

[93] This evidence had changed by the Inquiry. Laryngomalacia could cause death.
[94] Exh F page 29.

breathing was slightly noisy, but he did not feel that this had any impact on his feeding or sleeping. Stridor, he said, was a very common condition in babies. After Caleb was taken home Mr Craig Folbigg noted that he had difficulty in feeding and breathing at the same time. He would stop feeding in order to breathe and he made a noise when he breathed. That is the noise that has been called stridor. He was concerned about it and as a result an appointment was made for Caleb to be seen again by Dr Springthorpe. The accused took him to the consultation.

Dr Springthorpe observed that the stridor was very mild. He made a note that there was an inspiratory stridor, that is on breathing in, and some recession or sinking in of the chest cage, but no change of colour, no cyanosis, and no associated gagging. Cyanosis is the way a part of the body may go blue when it lacks blood. He diagnosed laryngomalacia, or floppy larynx. That, he said, is a condition that invariably tends to improve during infancy, and by the age of twelve months the vast majority of children do not have any problem. The stridor was not apparent, he said, when Caleb was at rest. The accused assured him that it had not interfered with his feeding or sleeping.

Dr Springthorpe was the only medical practitioner who saw the larynx or who has been able to tell you from his own observation precisely how things appeared during Caleb's life. He said that any effect that a floppy larynx might have would be exacerbated if the child was supine, lying on the back, and it would be exacerbated by distress. He was of the opinion that the floppy larynx was not related to the death.

The other opinions of the medical experts called by the Crown on floppy larynx are set forth for you in the document marked 39 for identification. I think there is no purpose to be served by my reading them to you. You can read them for yourselves. Professor Byard said that he could not exclude floppy larynx as a cause of death.

Evidence at the Inquiry

86. At the Inquiry, Prof Hilton gave evidence that was contrary to the evidence of Springthorpe on the resolution of laryngomalacia and the incidence of reported deaths. He opined as follows:[95]

WITNESS HILTON: Caleb was, Caleb was reported as having on clinical grounds, laryngomalacia and then the clinician who made that comment sort of backed away from it sometime after Caleb was born. Laryngomalacia, if it were present, and there was certainly clinical indications that it was present, is likely to persist and laryngomalacia has been recorded as being a potential cause of death in small children.

MORRIS SC: And with respect to Caleb, it's a potential cause of death?

WITNESS HILTON: Yes.

87. Prof Duflou stated:[96]

I've certainly not seen any confirmed cases of laryngomalacia myself but I am aware that there is research which indicates that 90% of patients represent a benign self-limiting condition, disappears by the age of two to five years, and the remainder if untreated, 10% of cases can fatal.

88. Dr Cala gave evidence that appears to have been influenced by Dr Springthorpe and conceded he did not have the expertise to opine on that issue:[97]

MORRIS SC: Dr Cala?

WITNESS CALA: I don't - are you talking specifically about laryngomalacia.

MORRIS SC: Let's talk broadly about laryngomalacia and then specifically about Caleb?

WITNESS CALA: My understanding of it and it's not an inherently dangerous condition, that children who have it, have stridor, in other words they have an

[95] T 244.06-.16.
[96] T 245.27-.31.
[97] T 244.17 - T 245.16.

inspiratory type wheeze when they breathe, that it's felt to be a process that the child literally outgrows, as the larynx further develops with time and the cartilage within the larynx relatively normalises, in reference to Caleb, yes he had it but Dr Springthorpe was of the view that this was a relatively benign process and I would defer to his expertise, being a paediatrician who has probably seen countless children with this type of abnormality.

MORRIS SC: I mean Dr Springthorpe recommended conservative treatment, just a wait and see approach?

WITNESS CALA: Yes.

MORRIS SC: It's possible isn't it that Dr Springthorpe may have felt that this would resolve in due time and that it would not become a problem, which I suppose leaves open the possibility that it may not have resolved over time, correct?

WITNESS CALA: No, I'd agree with him, with his approach that this is a condition that's been known of for some time, over many years, and that children do not die from this condition and that is why he was prepared to just watch and wait and see, and allow the child to develop.

MORRIS SC: Dr Cala, it's been known that children do die of this condition, isn't it?

WITNESS CALA: If it's, if it's severe, although I haven't - I don't have any references to an autopsy study or even a case report on a child that has died of convincing laryngomalacia.

MORRIS SC: To that extent you don't have - do you consider you have the expertise to form a view about what level of laryngomalacia is likely to kill somebody and what doesn't?

WITNESS CALA: I don't, I don't have that expertise.

MORRIS SC: Just to put it blankly, withdraw that, it is possible that a laryngomalacia may not resolve with conservative wait and see treatment, do you agree with that?

WITNESS CALA: In theory it's possible.

89. Duflou gave evidence:[98]

WITNESS DUFLOU: I've certainly not seen any confirmed cases of laryngomalacia myself but I am aware that there is research which indicates that 90% of patients represent a benign self-limiting condition, disappears by the age of two to five years, and the remainder if untreated, 10% of cases can prove fatal.

90. Prof Hilton made an important point that Caleb did not have time to grow out of the laryngomalacia:[99]

WITNESS HILTON: Could I add one thing arising out of the previous little bit of discussion, Caleb died at a very young age which means if in fact laryngomalacia were present, he really didn't have the time to grow out of it.

91. This explanation by Prof Hilton completely answers Dr Cala's concerns that Caleb's condition was mild and he would likely grow out of it and so he was influenced by Dr Springthorpe's conservative management. A finding should be made to this effect.[100]

Submissions

92. Caleb suffered from undoubted congenital laryngeal stridor caused by laryngomalacia.[101] It concerned his parents on the night of his death- Craig told Dr Springthorpe this at a consultation after Caleb's death. He was difficult to settle. This could have been caused by the stridor.

93. Since the trial, there has been greater focus by otolaryngologists with respect to SIDS – Marom T et al *Otolaryngological Aspects of sudden infant death syndrome* (International Journal of Paediatric Otorhinolaryngology 76 (212) 311-319. In this regard, the structure of the upper respiratory system (including the larynx) undergoes significant critical development changes in the first year of life.

[98] T 244.26-.31.
[99] T 244.44-.46.
[100] T 244.25 - T 245.16.
[101] Exh H page 29.

When first born, the position of the larynx, and the epiglottis, enables simultaneous breathing and drinking. Caleb was unable to simultaneously breathe and drink. Caleb also suffered from stridor when lying on his back or upset.

94. It could not be said Caleb was an entirely healthy child (as submitted by the Crown at trial).[102] A number of concerns were expressed by the experts about this assumption:

    (a) Prof Byard;[103]

    (b) Prof Elder.[104]

95. Caleb was not the entirely healthy child as submitted trial. He had upper respiratory tract issues. He had bleeding in the lungs about the time Kathleen Folbigg took him to Dr Springthorpe. It is no answer to rely on the opinion of Dr Springthorpe. Dr Springthorpe assessed Caleb and formed a view and decided upon conservative management. It is entirely possible his assessment was inadequate or his hopes that conservative management would resolve the problem did not come to pass. He was not aware of the bleeding in the lungs. Caleb was still at an age where improvement could not have been expected to resolve his laryngomalacia. He was a child at risk according to the statistics presented by Dr Duflou.

96. Dr Springthorpe's letter stated:

    "…both the parents in retrospect were sure that the stridor did not distress Caleb unduly during sleep".

97. That the parents thought that the stridor did not interfere unduly with Caleb's sleep should be seen in the context that they were not medically trained and had been told at all times that Caleb's condition was mild and nothing to worry

[102] Exh F, T 1309.50.
[103] Exh F T 1203.25-.46, T 1204.20-.25.
[104] Exh F T 35.27, T 51.26.

about. That Dr Springthorpe introduces into his letter the qualifier of "*unduly*" indicates that there was stridor present during sleep.

98. It is entirely possible that after he was laid on his back by Ms Folbigg, and he went to sleep, and she went back to bed, Caleb suffered airway collapse due to laryngospasm or some other obstruction relating to his larynx due to lack of cartilage or musculature. This would explain the obstruction of the airway observed by ambulance officers on arrival at the house and the lack of obstruction on autopsy.[105]

99. Had the evidence that laryngomalacia could cause death in the manner indicated at this Inquiry, then the defence counsel would have been able to mount a far stronger argument about likelihood than he was able to at Exh F T 1420.05 - T 1421.15.

100. Further, the Crown would not have succeeded on obtaining a joint trial of all of the charges.

101. The combined evidence at trial and this Inquiry (and particularly to the effect death from laryngomalacia is now a recognised potential cause of death, rather than a theoretical possibility, as was the case at the time of trial) demonstrates an almost overwhelming alternative natural cause of death. This is not just a "*debating point possibility*" when the whole of the evidence is taken into account. It cannot be displaced on the basis of unproven inferences to be derived from theories of "four deaths in one family" nor can it be displaced by one interpretation of the diaries seen through the prism of a presumption of guilt.

102. Further, the jury returned a verdict of manslaughter with respect to the death of Caleb. In so returning that verdict, there was a perversity of reasoning that was not readily available on the Crown case.

103. For the reasons set out above, we submit that there is a reasonable doubt about the death of Caleb. The papers should be referred to the Court of Criminal

[105] Hilton T 243.25 - T 244.16.

Appeal with respect to his death. If this decision is made, then, by reason of the joint trial and the "four deaths in one family" reasoning, then all four charges should be referred.

Submissions of Counsel Assisting

104. All references to the submissions of Counsel Assisting will be in [ ].

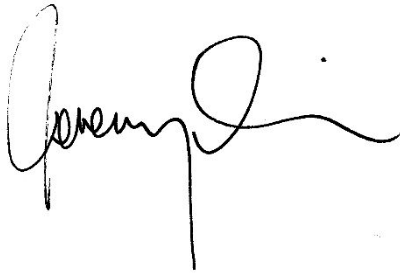
105. As to [24], Counsel Assisting has neglected to mention the significant research and publication on the role of infection.

106. As to [26], this submission neglects the detail of the evidence. Caleb's death was clearly likely, indeed highly likely, to have been caused by laryngomalacia or laryngospasm.

107. As to [31], the reference to genetic cause should e to known genetic cause.

108. As to [31] and [32], this is the wrong test. The obligation of the Crown is to exclude reasonably available alternative causes of death. This was accepted at trial. As noted elsewhere, the coincidence evidence is no longer what it was and would not likely be admitted into evidence because its prejudicial effect outweighs its probative value. In this regard, we rely on our submissions as to the coincidence evidence.

Dated: 7 June 2019



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