# EXHIBIT G

# Inquiry into the convictions of Kathleen Megan Folbigg

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| 2. | Judgment on Crown application to open on the late served statement of Dr Allan Cala | 1 April 2003 |
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**IN THE SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION**

**Wood CJ at CL**

**Friday 21 February 2003**

**Regina v Kathleen Megan Folbigg – 70046/02**

**JUDGMENT**
**On application for adjournment, and application for vacation of hearing date**

1 **HIS HONOUR:** This matter is fixed for trial on Monday next. However, it has emerged, as a result of some further consideration of the matter, inter alia, by Professor Hilton, that there are some possibilities which have not been fully explored in relation to the death of the four children, or in relation to the incident involving one of those children which led to a serious medical condition, although not causing, at that stage, his death.

2 In part, the question which now arises emerges from a somewhat similar event which affected the Sally Clarke case in the United Kingdom. That matter came before the Court of Appeal, which on 29 January 2003 made orders quashing the conviction on the basis that the appellant had not received a fair trial, in that the jury had not been given an opportunity of hearing, and considering, medical evidence that may have influenced its decision. It was said by Kaye LJ, delivering the judgment of the Court, that:

> *"This resulted from a failure of the pathologist to share with other doctors investigating the cause of death information that a competent pathologist ought to have appreciated needed to be assessed before any conclusion was reached."*

3 It was the case that the further tests, which should have been carried out, could no longer be carried out, with the result that a Court, hearing any retrial, would be deprived of the further assistance that might have been forthcoming.

4 An additional factor identified by the Court, and by the prosecution, in electing not to present the matter for retrial was the extent of publicity which had been given to the case.

5 What has now emerged has three aspects. The first of those is somewhat tenuous, and involves the situation that, in one child, there was evidence of a low level staph infection, which it is now suggested may have been indicative of some genetic disorder, or condition, which may have made that child vulnerable to an unexplained death.

6 If it were the case that retesting of such pathological samples, as are still available, were to show similar staph infections in relation to the other children, then that might have some relevance in relation to the aspect of coincidence reasoning, which is of importance for this trial.

7 Professor Drucker apparently proposes to undertake some further tests in this regard on behalf of the defence, although the results cannot be made available immediately.

8 The other aspects seem to be of potentially greater significance. Plainly I am not in a position to reach any informed decision on the medicine in a case as complex as this, but it does appear from the material placed before me, both from Professor Hilton and from Professor Christodoulou, that recent work has identified two possible genetic links either with an increased risk of SIDS or as a cause of SIDS.

9 The first relates to what is referred to as a polymorphism of the 5-HTT gene, in respect of which a particular sequence variation of the so-called L-allele, in the serotonin transporter 5-HTT gene, is associated with an

increased risk of suffering SIDS. As the report placed before me suggests, this is more a disease association than a true cause and effect situation. However, testing of the material still available for three of the children may be relevant to show either whether one or other of them shared that genetic variation, or whether none of them did.

10 The result of such testing could be very relevant for the coincidence reasoning, which was discussed in my judgment, and by the Court of Criminal Appeal when upholding my decision in relation to the separate trial application.

11 The second genetic question relates to the existence of a possible mutation in the SCN5A gene which has been found in some children who have died of SIDS. This gene encodes a channel which is apparently established as a direct cause of the QT syndrome, where the heart is at high risk of developing potentially life-threatening arrhythmia.

12 In response to that second possibility, the Crown has pointed to the fact that one of the children had been subjected to cardiac examination, from time to time during her short life, without any such condition having emerged. However, while that may be highly relevant to the coincidence question, it does not follow that one or other of the remaining children did not suffer from such a condition.

13 The defence wishes to have the pathological material, which is still available for three of the children, for either of these mutations. In fact, the Crown has already commenced that testing through the good offices of Professor Hilton, who had expressed some concern as to the fairness of this trial continuing in the absence of such further genetic testing.

14 As I made clear in the course of argument, it seems to me that the defence should at least have the chance of having these possibilities investigated. It may be that further investigation will show that none of the children had either of the genetic mutations which have been identified. If that is the

case, then the hypotheses which relate to these new developments would no longer have any application, and the Crown would be advanced in the course which it must undertake of excluding, as a reasonable possibility, any cause of the death of the four children other than deliberate act of the accused.

15 However, if it be the case that any or all of the children do show one or other of the genetic mutations, then that might be highly relevant so far as coincidence is concerned. In particular, it might water down the hypothesis which the Crown will advance that it is extremely improbable that, in one family, there would be five life threatening incidents of this kind unless they were due to unnatural causes; that is, deliberate asphyxia due to the act of the accused.

16 It is thought that the testing would take possibly six weeks, because it needs to be undertaken in either the United Kingdom or in the United States. Necessarily there might be some delay in identifying and transmitting the material to the relevant authorities, which no doubt would need to take its place in the queue for forensic testing in the relevant laboratories. If the testing were positive, then there would undoubtedly need to be a search for relevant literature, and medical opinion, concerning the validity of the theories or hypotheses which seek to relate such genetic variations to sudden unexplained deaths.

17 It was put by the Crown that there would be no reason why the trial should not commence on Monday since, on the Crown assessment, it could be six weeks or so before the experts were to be called. However, Mr Zahra does not accept that a period of six weeks would elapse before the experts will be reached. On his assessment, it would be more likely that we would get to that stage after three weeks, since he does not anticipate any lengthy cross-examination of the ambulance officers and other health professionals who dealt with each of the cases upon the initial admission of the children to hospital, or in relation to the individual post-mortem

examinations, save, no doubt, where they were conducted by any pathologist whose expert opinion is now relied upon by the Crown.

18 It appears to me highly undesirable to start a trial, with an eight to ten week estimate, with these possible question marks hanging in the air, particularly as the further testing might call for the qualification of, and gathering of opinions from, additional experts, who have carried out work on the hypotheses which have apparently been identified only recently in this troubled area of infantile mortality.

19 Part of the problem arises from the fact that SIDS itself is not an attribution of a specific cause of death, but rather a grouping into which are included all those cases of infant death where there is no identifiable or explained cause. In those circumstances, it remains an area of complexity and uncertainty, and it appears to me that in fairness to both the Crown, the community and the accused, it is essential that these further matters be explored, and either eliminated, or identified as possible rational causes of death.

20 In that respect, I have had regard to the concerns expressed by Professor Hilton but, more importantly, I have had regard to the entirely unsatisfactory situation which arose in the United Kingdom in the case of Clarke.

21 In all those circumstances, I take the view that, although further time will be lost, fairness to the accused, to the Crown, and to the community does require that these matters be explored. As a consequence, I will vacate the fixture for Monday and direct that the matter be listed before Barr J, with a view to being refixed at a time after the relevant further testing can be carried out.

22 I direct that the matter be listed before Barr J at 9.30am on Friday, 28 February 2003.

23 I will grant the parties leave to approach his Honour in chambers if it appears that such date does not provide sufficient time to establish when the case might be refixed for hearing.

24 Bail will continue on the same conditions as previously.

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

REVISED



GRAHAM BARR J

Tuesday, 1 April 2003

70046/02 REGINA v Kathleen Megan FOLBIGG

JUDGMENT – On application to open on the late served statement of Dr Cala

1 **HIS HONOUR:** Objection is taken to the use of a report dated 28 March 2003 of Dr Cala. Dr Cala will be giving evidence about the cause of death of the child Laura.

2 He says, and I expect that it may be otherwise established, that myocarditis was found during the autopsy. He says, in a letter of 19 June 2001:

> If I had examined the body of Laura Folbigg in isolation, without the knowledge I had at the time of previous infant deaths in the family, I might give the cause of death as myocarditis.

3 The Crown and the defence have for a long time now had possession of or access to a videotape recording of the activities of the child Laura in a swimming pool on the day before she died.

4 In his report of 28 March 2003, Dr Cala says that he has seen the video and expresses an opinion whether a child doing the things that the child is doing in the video is likely to have been suffering from myocarditis.

5 The evidence may well be admissible. The difficulty is that the Crown has dropped it on the defence at the last minute. The defence has qualified an expert who initially throws some doubt whether one can make such a diagnosis in such a manner.

6 The late service of the report and the doubt whether it may properly be used for the purpose desired by the Crown cause me to doubt whether it will be received into evidence.

7 I consider, therefore, that the question of its admissibility will need to be deferred and that if the Crown opens on it the Crown will run the risk associated with such an opening.

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I CERTIFY THAT THIS AND THE ONE PRECEDING PAGE(S) ARE A TRUE COPY OF THE REASONS FOR JUDGMENT/~~SUMMING UP~~ HEREIN OF HIS HONOUR JUSTICE GRAHAM BARR.

Associate

15.4.03
Date

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

GRAHAM BARR J

Thursday, 3 April 2003



**70046/02 REGINA v Kathleen Megan FOLBIGG**

**JUDGMENT – On admissibility of video of 28/02/99**

1 **HIS HONOUR:** Objection is taken to the tender of a video through the present witness, Mr Craig Folbigg, of the child Laura playing in a pool on 28 February 1999, the day before she died.

2 I think that the probative value of the evidence is apparent.

3 Objection is taken because, it is submitted, the accused will suffer unfair prejudice as a result of the emotion that the jury will feel upon seeing the activities of the young child.

4 I have already told the jury that they are not to judge this case on their emotions. I have no reason not to believe, and every reason to expect, that they will obey what I have said to them. They will be given a further direction to the same effect when I sum up to them.

5 I do not consider that any unfair prejudice will result to the accused from the jury seeing the videotape because I think that any risk of it will be removed by the directions I have given and shall give. I propose to receive the evidence.

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

REVISED



GRAHAM BARR J

Monday, 14 April 2003

70046/02 REGINA v Kathleen Megan FOLBIGG

JUDGMENT – On application to cross-examine Professor Hilton, see p 646 of the transcript

1 **HIS HONOUR**: The Crown seeks leave to cross-examine Professor Hilton to suggest that he was in error in his report to the coroner in which he attributed the death of the child Sarah to SIDS. As I understand it, SIDS is an acronym which is susceptible of fundamental misunderstanding. It has been called a syndrome, and indeed that is what the final letter stands for. It has been called a disease. I confess that I do not fully understand what it does mean. It seems clear that it is not a disease and I understand it to be no more than a label which is attributed to a death which is believed to have been natural but the cause of which cannot be assigned. I think the other necessary part of the definition is that the dead person must be a very young child.

2 It is the Crown case that the accused suffocated all the children whom she is charged with murdering, including Sarah.

3 It is well established that if it is necessary for the Crown to put to the jury that its own witness is wrong in his conclusion, it must in fairness put to him that he was wrong so as to give him an opportunity to respond. Obviously the Crown must have leave to cross-examine so that that can be done.

4 The Crown, however, wishes to go further. It appears from a document issued by the American Academy of Paediatrics in February 2001, a copy of which is marked 24 for identification, that there may be certain views held in the professional community about the circumstances in which assignation of a SIDS death is contraindicated.

5 The Crown originally wished to put to Professor Hilton propositions from the paper and ask him whether, in the light of those propositions, he were not wrong in calling Sarah's death a SIDS death.

6 The Crown no longer seeks to do that because there seems to be a live debate about whether the paper, or all of the paper at any rate, ought to be received into evidence. The Crown now wishes to defer the tender of the paper. It does, however, want to put a precise proposition of fact extracted from the paper to the professor, and the Crown informs the Court at the same time that there will be evidence from at least one other witness to the same effect.

7 The proposition the Crown wants to put to Professor Hilton is as follows:

> What I would wish to do is to put to Professor Hilton that there are certain circumstances at a post-mortem which should indicate to the pathologist the possibility of intentional suffocation and that those include a previous unexplained or unexpected death of one or more siblings and a previous ALTE while in the care of the same person and that special consideration should be given at a post-mortem to the possibility of intentional asphyxiation where there is a history of an ALTE witnessed only by a single caretaker or in a family with a previous unexplained infant death. And that for that reason, or those reasons that he ought not to have diagnosed Sarah's cause of death as being SIDS, and that particularly in the light of the punctate abrasions and scratch that he ought not to have diagnosed her cause of death as SIDS.

8 I have taken into account the matters set forth in s 38(6). The Crown has given notice of its intention to seek leave.

9 As for s 192 **Evidence Act**, it is necessary to grant leave to cross-examine in any event for the reason I have explained. To extend the leave to permit cross-examination about the topic arising from the paper would not unduly lengthen the hearing. It would not be unfair to the accused because she can deal with it. It is an important matter and these are important charges.

10 I therefore grant leave to the Crown to cross-examine Professor Hilton by asking him a question or questions in the terms I have extracted.

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2 PRECEDING PAGES ARE A TRUE
COPY OF THE REASONS FOR
JUDGMENT ~~SUMMING UP~~ HEREIN OF
HIS HONOUR JUSTICE GRAHAM BARR.

.....  24.4.03
Associate  Date

**IN THE SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION**

**REVISED**



**GRAHAM BARR J**

**Tuesday, 15 April 2003**

**70046/02 REGINA v Kathleen Megan FOLBIGG**

**JUDGMENT – On admissibility of medical evidence of the probable state of health of Laura Folbigg – see page 718 of the transcript**

1 **HIS HONOUR**: When, before the Crown opened to the jury, I deferred the question of the admissibility of medical evidence of the probable state of health of the child, Laura, judged by a viewing of a videotape, now exhibit K, I was concerned to give the defence an opportunity to obtain a considered medical opinion whether that was a principled professional approach. Mr Zahra informed the Court at the time (and the circumstances were that a statement incorporating the desired evidence had only recently been served upon the defence) that a preliminary medical opinion suggested that the approach was professionally inappropriate. There the matter was left. Now it has to be broached.

2 Dr Cala is the witness who would give the evidence and would express an opinion, having looked at the activities of the child as shown on the videotape at a time twenty-four hours or so before she died, about the likelihood or probability that she might at the time have been suffering myocarditis.

3 There seems to me to be nothing inherently inappropriate in the process of reasoning. If a medical practitioner can examine a patient and come to

conclusions about the probable condition of that patient by observing the patient moving, it seems to me that that practitioner might well do so by viewing a recording of the person moving. I take it that myocarditis is a serious heart condition which might well have had an effect on the ability of the patient to move in circumstances like those in which the child, Laura, was filmed in the swimming pool. Accordingly, I think that the evidence is likely to have substantial probative value and it is that consideration to which the objection is, as I understand it, directed. There seems no possibility of unfair prejudice. This is the sort of matter with which the defence is well able to deal during the course of the trial, having now had the opportunity to obtain expert evidence on the matter. I propose to admit the evidence.

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I CERTIFY THAT THIS AND THE ONE PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT ~~SUMMING UP~~ HEREIN OF HIS HONOUR JUSTICE GRAHAM BARR.

..... 2.5.03

Associate Date

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

REVISED



GRAHAM BARR J

Wednesday, 16 April 2003

70046/02 REGINA v Kathleen Megan FOLBIGG

JUDGMENT – On admissibility of evidence of Dr Allan Cala; see p 744 of the transcript

1 **HIS HONOUR**: Objection is taken to evidence the Crown wishes to adduce from Dr Allan Cala. Dr Cala is a well experienced forensic pathologist and is now head of the Forensic Science Service for South Australia. He used to be employed as a pathologist in the New South Wales Institute of Forensic Medicine in Sydney, and in that capacity carried out an autopsy on the body of the child Laura, and provided a report for the coroner. In his report he stated his inability to determine the cause of Laura's death.

2 Such a conclusion is to be distinguished from one that a death is a SIDS death. The acronym SIDS is made up from the initial letters of the words Sudden Infant Death Syndrome. Having heard a number of expert witnesses give evidence about its meaning, I have the impression that it means no more than this, that the epithet is assigned to the death of a child of appropriate age who is believed to have died of a natural cause or natural causes, which cause or causes cannot be identified.

3 According to Dr Cala, the difference between the two conclusions is that a death should not be described as a SIDS death if unnatural causes, which

for present purposes means deliberate or accidental trauma, cannot be excluded.

4 The accused is charged with the murder of each of her four children, Caleb, Patrick, Sarah and Laura. She is also charged with the malicious infliction of grievous bodily harm upon the child Patrick. Caleb died at the age of nineteen months on 20 February 1989. The report to the coroner stated the direct cause of death as Sudden Infant Death Syndrome. Patrick was born on 3 June 1990 and, at the age of four and a half months suffered severe brain damage when he was in some way deprived of oxygen. He lived, however, and there was no occasion for any report to the coroner. As a consequence of his brain damage he suffered blindness and was susceptible to epileptic seizures. He died about four months later on 13 February 1991. A clinical diagnosis following autopsy noted encephalopathic disorder leading to intractable seizures, the underlying cause of which encephalopathy was undetermined on investigation, and asystolic cardiac arrest at home leading to death.

5 Sarah died on 30 August 1993 when she was ten and a half months old. Professor Hilton, then the head of the New South Wales Institute of Forensic Medicine, concluded that her death was a SIDS death. Laura died at the age of about nineteen months on 1 March 1999. Dr Cala reported in the way I have summarised.

6 The Crown wishes to adduce the following evidence from Dr Cala:

1. Dr Cala is not aware from his own experience or from reading medical literature that any child has ever died from a floppy larynx, a condition from which Caleb suffered.

2. That no cause of Caleb's death was found.

3. In the light of the evidence of Dr Wilson, Patrick's ALTE was consistent with his having suffered from a catastrophic asphyxiation

event from unknown causes, that no cause of Patrick's death could be found.

4. That it was inappropriate for Professor Hilton to call Sarah's death a SIDS death.

5. That no cause could be assigned for Laura's death.

6. That he could not think of any single natural cause that would account for all four deaths.

7. That there was in his view an unnatural cause which could account for all the deaths, namely smothering.

8. (Possibly) that each of the four children died from an unexpected catastrophic asphyxiation event of unknown origin.

7 No objection is taken to the proposed first, second, third, fifth or sixth questions. I shall therefore pass over them, except to observe that to ask whether there is a single natural cause that might be assigned may cloud the issue. I would have thought that the appropriate enquiry should be about any natural cause or causes.

8 I can defer consideration of the eighth question since it is not certain that the Crown wishes to ask it and, in any event, any debate that might thereby arise may be settled by this judgment.

9 The fourth and seventh questions fall to be considered together. As the basis of the fourth question the Crown put into Dr Cala's hand, in the absence of the jury, a copy of a paper marked 24 for identification, a statement of the American Academy of Paediatrics entitled *Distinguishing Sudden Infant Death Syndrome from Child Abuse Fatalities*. Its date is February 2001, and though it apparently appears in a scientific magazine called *Paediatrics*, it is not a scientific paper. It calls itself a policy

statement. It contains a number of propositions of opinion which the Crown says are held by members of the scientific community.

10 The same thing was done during the evidence-in-chief of Professor Hilton. The document was put into his hand and he was asked whether he agreed with propositions in it. Ultimately the tender of the paper was withdrawn and questions were asked of Professor Hilton without objection inviting his agreement with propositions extracted from the paper. The evidence was as follows:

> Q. Professor Hilton, would you tell us whether or not you agree with this proposition, that there are certain circumstances which should indicate to a pathologist conducting a postmortem the possibility of intentional suffocation and that they include the following: The previous unexpected or unexplained death of one or more sibling, that is, a brother or sister, of the deceased. What do you say to that?
> A. Yes.
>
> Q. And another factor that should indicate the possibility of intentional suffocation for a pathologist conducting a postmortem is an ALTE, that is, an acute life threatening event of a sibling while in the care of the same person who cared for the deceased?
> A. Yes.
>
> Q. And would you agree with this proposition, that when conducting a postmortem examination one should give consideration to the possibility of intentional asphyxiation, that is smothering, in cases of unexpected infant death with a history of ALTEs, or one ALTE, witnessed only by a single caregiver in a family, or of previous unexplained infant deaths. Do you agree with that?
> A. Broadly, yes.

11 When Dr Cala was examined on the *voir dire* there were these questions and answers:

> Q. Did it list the same criteria there?

A. Yes. This February 2001 statement is a review and to some extent I think probably some editing has taken place to streamline or fine tune this document.

Q. In your view, what are the criteria that must be met before a diagnosis of SIDS can be made, referring, if you wish, to the article?
A. Yes. Well, this article says, and I will quote from it:

> "SIDS, also called crib or cot death, is the sudden death of an infant under one year of age that remains unexplained after thorough case investigation, including performance of a complete autopsy, examination of the death scene and a review of the clinical history. SIDS is the most common cause of death between one and six months of age. The incidence of SIDS peaks between two and four months of age. Approximately 90% of SIDS deaths occur before the age of six months."

Q. Could I take you to page 3? Do you see some dot point notes there?
A. Yes.

Q. Referring to certain circumstances which should indicate the possibility of intentional suffocation?
A. Yes.

Q. What do you say in relation to those dot point notes and your view?
A. The dot points and my view coincide.

Q. And what do you say between the dot point notes and the generally accepted view of medical people world-wide working in the area of SIDS and pathology?
A. Generally it is the same view.

Q. So what is your view in relation to those factors? Perhaps if you can tell us what the factors are?
A. Yes. I will read from the text and there is a paragraph preceding it, and it says -

> "It is impossible to distinguish at autopsy between SIDS and accidental or deliberate asphyxiation with a soft object. However, certain circumstances should indicate the possibility of intentional suffocation, including,
>
> • Previous recurrent cyanosis, apnoea or ALTE while in the care of the same person."

Cyanosis is the bluing of the lips and fingers, apnoea is cessation of breathe and ALTE is apparent life threatening event. Second dot point:

> "Age of death older than six months.
>
> • Previous unexpected or unexplained deaths of one or more siblings.
>
> • Simultaneous or nearly simultaneous death of twins.
>
> • Previous death of infants under the care of the same unrelated person or,
>
> • Discovery of blood on the infant's nose or mouth in association with ALTEs."

Q. In your view would it be appropriate to diagnose SIDS as a cause of death where there has previously been a sibling in the same family that has died from unknown causes?
A. No, I would be very cautious about calling it SIDS, to the extent that I would not call a second death SIDS.

Q. And would you consider it appropriate to diagnose a death as SIDS where, as in the case of Sarah Folbigg, there had been two previous deaths and one previous ALTE from unknown causes?
A. I wouldn't diagnose that as SIDS.

Q. Do you think that the diagnosis of SIDS is an available diagnosis in your view?
A. Not under those circumstances with two previous deaths.

Q. Is your view in any way affected by the knowledge in relation to both Sarah and Laura that they had had sleep studies done which had excluded obstructive apnoea?
A. Yes, to the extent that that was a condition which is diagnosable during life and may run in families, and it appears that on the evidence that I have seen that neither child suffered from that condition.

Q. You have considered all four deaths of the Folbigg children?
A. Yes.

Q. And you have examined a number of records in relation to the other three children that you haven't seen, that is, Caleb, Patrick and Sarah?
A. Yes.

Q. Can you tell the court what the documents were that you reviewed?
A. I saw the post-mortem reports on Caleb, Patrick and Sarah, and I was able to look at the medical records, that is, hospital records and GP visits and so on, and the two previous deaths that had been referred to the coroner, I examined the police statement to the coroner.

Q. And, doctor, what is your view about the possible cause of death for the other Folbigg children, that is other than Laura?
A. It's my view that I suspect that they died in the same way that Laura Folbigg did.

Q. And what in your view, in what way did they die?
A. Well, I suspect, and I can't prove it medically, but I suspect that they were deliberately smothered.

Q. Are all the findings that you have seen on post-mortem for those four children consistent with deliberate smothering?
A. Yes.

Q. Is there any explanation that you could think of that would apply to all four children, other than deliberate smothering?
A. To account for all four deaths, I don't believe there's one other entity that could account for all four deaths apart from that.

...

Q. What you said in answer to a question by me, I asked "What in your view, in what way did they die?" You said, "Well, I suspect, and I can't prove it medically but I suspect that they were deliberately smothered."

Now, what I want to ask you is this: Although you cannot prove it as a fact medically, are your suspicions based upon medical knowledge or upon acting as an amateur detective?
A. Based upon medical knowledge.

12 The questions the Crown wishes to ask Dr Cala about the generally held views of scientists experienced in the field are somewhat more extensive than, but not different in principle from, those asked of Professor Hilton. As I have observed, no objection was taken to the questions asked of

Professor Hilton. That is no answer to the objection now taken, of course, if it is properly grounded.

13 Mr Zahra does not object to Dr Cala's opinion about the possible cause of death about any of the children taken by itself. What he does object to is the assignment of a cause of death for any child, taking into account not only the circumstances surrounding the death of that child but also the deaths of the other children and Patrick's ALTE. The same goes, of course, for evidence about Patrick's ALTE itself.

14 Any opinion so formed, Mr Zahra submits, begins with a scientific opinion, evidence of which can properly be given about the death of the subject child, but goes on to incorporate a further opinion which is not within Dr Cala's expertise, and perhaps not within any expertise, and of which evidence may not therefore be given.

15 I think that there is substance in this submission. An important feature of the way in which the Crown sets about proving its case, perhaps the central feature, is what will be asserted as the improbability that all four deaths and the ALTE happened naturally and coincidentally. When the authors of the policy statement of the American Academy of Paediatrics were drawing attention to the possibility, for example, of prior unexpected or unexplained deaths in the family in indicating the possibility of intentional suffocation, they were embarking upon some similar process of reasoning. No doubt the authors of the papers were right to draw the attention of professionals to the need to proceed cautiously when considering cases where the relevant features existed. However, the relevant statements in the paper are by no means statements of medical opinion.

16 Medical and other professional people no doubt come to conclusions by applying common sense to the facts before them, and many opinions so formed will be professional opinions evidence of which can be given in court. It does not follow, however, that every opinion expressed by a

person who has specialised knowledge based on training, study or experience, is an opinion based on that training, study or experience so as to become admissible in evidence. (**Evidence Act** s 79.)

17 The questions objected to have this in common, that they require Dr Cala in expressing an opinion about any event to take into account the very existence, unexplained, of the other events. Although the Crown adduced evidence that Dr Cala's opinion about all four deaths was professional, based upon his medical knowledge, and not amateur, there was no attempt to explain how this was so, and it nowhere appeared that in coming to his conclusion he took into account concerning the death of any child other than Laura any more than that the child died in unexplained circumstances while in the care of the same family.

18 It seems to me that a statement that an unexplained death is more likely properly to be called a SIDS death if there is no prior unexplained death in the family, but less likely properly to be called a SIDS death if there is such a prior unexplained death, is not a statement of medical opinion. I doubt whether it is a statement based on any kind of expertise. It may be common sense and it may be right, but that does not mean that evidence can be given about it.

19 It seems to me that Dr Cala cannot answer the questions objected to without incorporating in his opinion an opinion not an opinion not deriving from specialised knowledge based on his training, study or experience. I disallow the fourth and seventh proposed questions.

20 It will be in order to ask Dr Cala, dealing with the facts of any of the deaths individually or with the facts of Patrick's ALTE individually, whether any cause may properly be assigned, whether a designation of any death as SIDS is appropriate, and whether the death or ALTE was consistent with an unexpected catastrophic asphyxiating event of unknown origin.

21 During his evidence in the absence of the jury, Dr Cala said that he suspected that the deaths all resulted from smothering. There was this evidence:

> Q. And, doctor, what is your view about the possible cause of death for the other Folbigg children, that is other than Laura?
> A. It's my view that I suspect that they died in the same way that Laura Folbigg did.
>
> Q. And what in your view, in what way did they die?
> A. Well, I suspect, and I can't prove it medically, but I suspect that they were deliberately smothered.
>
> Q. Are all the findings that you have seen on post-mortem for those four children consistent with deliberate smothering?
> A. Yes.

22 I was unsure how he came to his view and asked him questions. There was this evidence:

> Q. Doctor, if it is possible will you please imagine that the only death about which you knew was Laura's death. Would you suspect that there had been a smothering there?
> A. I would suspect it. I would need to suspect any other form of inflicted trauma on the child and do what I could to exclude that possibility.
>
> Q. If Sarah's death was the only one about which you knew, would you suspect smothering?
> A. Again I would have to answer yes, with the same proviso.
>
> Q. If Patrick's death were the only death about which you knew, would you suspect smothering, and you didn't know about his ALTE?
> A. I would have to suspect it.
>
> Q. If you only knew about Patrick's ALTE and none of the deaths, would you suspect smothering?
> A. Yes.
>
> Q. If the only death you knew about was Caleb's, would you suspect smothering?
> A. Yes.
>
> Q. Why?

A. Because, as I have said previously, smothering can leave no trace and it can be very difficult to prove. But that faced with any child who dies suddenly I have to suspect foul play until proven otherwise and exclude it categorically as having played any role in the child's death, whether that be smothering, whether deliberate or accidental, suffocation, and so on. To not suspect smothering I don't believe is doing my job properly, under those circumstances.

Q. Would you then suspect smothering in any unexplained death of a little baby?
A. I would suspect it until it had been excluded by a police investigation and/or results of my autopsy.

23 All I think Dr Cala meant by "suspect" when referring in isolation to any particular event was that he recognised the existence of the possibility of traumatic asphyxiation as the cause, since it had not been possible to exclude it. The word "suspect" is an emotive one, unlikely to be understood by the jury in the sense in which Dr Cala used it. It would be better, I think, if Dr Cala did not speak about his suspicion about the cause of any death.

**********

I CERTIFY THAT THIS AND THE 10 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT / SUMMING UP HEREIN OF THE HONOURABLE JUSTICE GRAHAM BARR

Associate

26.5.03
Date

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

REVISED



GRAHAM BARR J

Thursday, 24 April 2003

70046/02 REGINA v Kathleen Megan FOLBIGG

JUDGMENT – On admissibility of evidence of Dr Berry and Prof Herdson – see page 940 of the transcript

1 **HIS HONOUR**: Objection is taken to the tender of evidence from Dr Berry to this effect:

> Sudden death of four infants in the same family who were previously well (in the case of Patrick before his initial collapse) due to natural disease is unprecedented in my experience, and I know of no substantiated examples in the literature. Nevertheless, it is important to explore this possibility.
>
> ...
>
> The sudden and unexpected death of three children in the same family without evidence of a natural cause is extraordinary. I am unable to rule out that Caleb, Patrick, Sarah, and possibly Laura Folbigg were suffocated by the person who found them lifeless, and I believe that it is probable that this was the case.

2 Objection has also been taken to passages from Professor Herdson's report, but the only one now in dispute is this:

> I am unaware that there had ever been three or more thoroughly investigated infant deaths in one family from sudden infant death syndrome.

3 As I understand it, the defence does not object to the qualifications of Dr Berry and Professor Herdson as highly experienced medical practitioners in the field of infant death and its causes.

4 What is submitted, as I understand it, is that what those witnesses would be doing, if permitted to express those opinions, would be reasoning by way of an opinion which they were not entitled to have. The evidence would therefore be non expert opinion, as that term is defined in section 79 **Evidence Act.**

5 For the most part I disagree with that submission. It seems to me that both witnesses can give evidence based upon their experience, both on their own account and from their knowledge from communication with other experts in their field of the incidence of unexplained infant deaths. It seems to me to be permissible for Dr Berry to give evidence that the sudden death of four infants in the same family who were previously well due to natural disease is unprecedented, and he can make that statement of opinion from his own experience. He can also say that he knows of no substantiated examples from the literature.

6 So long as he deals with the cases individually and does not rely on the kind of coincidence reasoning against which I ruled in considering Dr Cala's evidence, it seems to me also that Dr Berry is entitled to say that he is unable to rule out that Caleb, Patrick, Sarah and possibly Laura were suffocated.

7 It would not be permissible, however, for him to continue to say that he could not rule out that they were suffocated by the person who found them lifeless, because although in one sense unexceptionable, that is a piece of loaded evidence and liable to be misunderstood by the jury. He should

not, in any case, say that he thinks that it is probable that that was the case.

8 Conformably with my decision about Dr Berry's challenged evidence, I think it permissible for Professor Herdson to say that he is unaware that there have ever been three or more thoroughly investigated infant deaths in one family from sudden infant death syndrome.

**********

I CERTIFY THAT THIS AND THE
2 PRECEDING PAGES ARE A TRUE
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JUDGMENT ~~HANDING UP~~ HEREIN OF
HIS HONOUR JUSTICE GRAHAM BARR.

Associate 24.4.03 Date

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

REVISED



GRAHAM BARR J

Wednesday, 7 May 2003

70046/02 REGINA v Kathleen Megan FOLBIGG

JUDGMENT – See page 1230 of the transcript.

1 **HIS HONOUR:** Most if not all the expert witnesses who have given evidence about the possible or probable cause of each child and of Patrick's ALTE have two opinions. The first is based on circumstances directly relevant to the event in question, namely the medical history of the child, the circumstances in which the child was found, the results of the post-mortem examination and the results of subsequent tests. The second is based on that evidence and the fact that each of the other children has died unexpectedly or has unexpectedly suffered an ALTE.

2 I have excluded evidence of the second opinion because insofar as it differs from the first it seems to me to depend entirely on lay coincidence reasoning. It is to be expected that an expert witness will form such an opinion but that does not make it an opinion of which evidence may be given.

3 Counsel throughout the trial have been careful, in accordance with my judgment, to make clear to witnesses that their opinion about any child is sought on the first basis and not the second. Mr Zahra did so when questioning Professor Byard this morning. However, there were this question and answer about the child Laura:

> Q. What is your process of reasoning, coming to the conclusion of that being undetermined?
> A. If I looked at her cases in isolation I would, without anything else, I would have said myocarditis. But the fact that there have been other deaths in the family makes me less certain that I can say myocarditis. So I said undetermined because of the circumstances.

4 The Crown has applied for leave, as an exception to my ruling, to cross-examine Professor Byard about the opinion he expressed. The Crown wants to ask this:

> My application is that in relation to the death of the Laura, that I not be restricted to an examination of her case in isolation. So that I would be permitted to cross-examine the doctor about his diagnosis of the cause of her death, when viewed against the background of the other deaths that have preceded.
>
> ...
>
> What I would like to ask him is to show him the American standard, ask him to agree it is a Universal standard adopted around the world and it accords with his professional practice and draw his attention to the criteria for the finding of SIDS, and then ask whether the presence of other deaths or ALTE's in the same family, would in every case be a factor which would bear upon his ultimate diagnosis.

5 I accept Mr Zahra's assurance that he made it clear to Professor Byard before he gave his evidence that he would be asked only about the cause of death or ALTE of any child without taking into account any relevant event concerning any other child. Questions which precede the one I have extracted show that that was Mr Zahra's intention.

6 Seen in context, therefore, the answer which expressed an opinion on the second basis was unresponsive.

7 After Mr Zahra had made his submission, the Crown said this:

> ... I must submit I heard it coming. I think the answer was hardly sprung without any warning, and my learned friend had every opportunity to stop the witness completing his answer and one can only assume that he chose not to.

8 I reject the submission of the Crown that Mr Zahra had every opportunity to stop Professor Byard completing his answer and that one could only assume that he chose not to. There are two reasons for this. First, I do not believe that Mr Zahra would deliberately adduce evidence already held inadmissible. Secondly there is no reason why he should have done so in this case because it disadvantaged his own client.

9 The application is refused.

**********

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Associate

27.5.03
Date

SUPREME COURT OF NEW SOUTH WALES

EXHIBIT ON VOIR DIRE **B**

JUDGE GRAHAM BARR J

R v K.M. FOLBIGG

CASE NO. 70046/02 DATE 29.4.03

RETURN TO Crown

ASSOCIATE

EXPERT CERTIFICATE in the matter of: Death of FOLBIGG children
Police -v-
Place: 103 Esplanade, Hove Date: 8 December 1999

---

Name: Susan Mitchell BEAL
Address: 103 Esplanade, Hove. S.A. Tel.No: 08 83773455
Occupation: Paediatrician STATES:-

## EXPERT CERTIFICATE

Section 177, Evidence Act 1995 No. 25

1. This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated anything which I know to be false or do not believe to be true.

2. I am 64 years of age.

3. I hereby certify:
My full name is **Susan Mitchell BEAL**
My contact address is **103 Esplanade, Hove. S.A.**
I have a specialised knowledge based on the following training, study and experience:- I graduated MBBS at Sydney University in 1958 and MD at Flinders University in 1986. I am currently employed as a Paediatrician at the Women's and Children's Hospital in Adelaide where I have been for the last thirty five years. I have been studying Sudden Infant Death Syndrome (SIDS) for over thirty years. In that time, I have published widely on SIDS, with more than fifty papers and book chapters. In 1986 I was awarded an MD for my thesis on SIDS.

I have interviewed the families of over five hundred infants who have died suddenly and unexpectedly, usually in the home on the day the baby died.

See Continuation Sheet ...

Witness: _____ Signature: _____

On the subject of recurrence of infant death in a family, I have published refereed papers (eg. Archives of Disease in Childhood). I have been invited to write book chapters on the subject, and been invited speaker on the subject in both Europe and America.

4. On Wednesday the 7th of December 1999, I had a conference with Detective Senior Constable RYAN from the New South Wales Police Service. Detective RYAN had previously forwarded a precis to me relating to the death of Caleb, Patrick, Sarah and Laura FOLBIGG.

EXHIBIT: SEE ATTACHED PRECIS MARKED ANNEXURE A

Detective RYAN showed me a quantity of medical, police and forensic records relating to Kathleen FOLBIGG, Craig FOLBIGG, Caleb FOLBIGG, Patrick FOLBIGG, Sarah FOLBIGG and Laura FOLBIGG. These records were indexed and contained within six large blue folders.

EXHIBIT: SEE LIST OF CONTENTS MARKED ANNEXURE B.

I carefully examined the files relating to the four children in the presence of Detective RYAN that day, and the files relating to Mr and Mrs FOLBIGG during the night by myself. Prior to making an assessment of those files, I would like to state my understanding about SIDS and Filicide gained from twenty five years of experience, personal research and study of literature.

When an infant dies suddenly and unexpectedly, occasionally a disease process is found. For the remainder it can be difficult to decide if the death is due to accidental suffocation, non-accidental suffocation or SIDS. The macroscopic and microscopic examination is rarely helpful but on occasion bruising or fractures or facial petechiae may point away from SIDS.

Witness: Signature:

For a first sudden unexpectedly death in a family the infant may be found prone and the diagnosis then is most likely to be SIDS. It may be found with the face covered, and then the most likely diagnosis is accidental death. In my own experience for infants found on their back or side with the head uncovered, there is a suspicion of filicide in 20% of the cases (compared with only 2% of prone infants where filicide was suspected).

Clues to suspecting filicide if there has only been one death are:

* Abuse in other children or infants in the family.
* Apparent life threatening events (ALTE) in the index or other children, especially if commencing always in the presence of the same person.
* Munchausen syndrome in the perpetrator (usually the mother) eg. suspicion of this problem is aroused when there have been several hospital admissions during pregnancy for disorders not really related to the pregnancy, and more visits to doctors then would be expected for the health and fitness of the person.
* A reluctance to be visited by SIDS Association counsellors or occasionally obsessive involvement with such associations.
* Suspicion expressed by other family members or friends. Sometimes this presents as an unwillingness for family members to become involved or to speak about the death.
* Conflicting statements about the circumstances surrounding the death.
* A history of childhood deprivation abuse or disruption in the perpetrator.

There are a few disorders which may present as recurrent infant death. These can be excluded by appropriate investigations eg. metabolic disorders or cardiac arythmias.

Witness: _____ Signature: _____

There are two more common causes of recurrent sudden unexpected infant death. The first of these has been largely eliminated ie. leaving young infants unobserved in prone. The second is filicide. This is not only recurrent in occurring in the next child, but is likely to continue into a third or even fourth or more children.

I would agree with the pathologist who said the first unexplained death in a family may be called SIDS, the second should be labelled undetermined, and the third is murder until proven otherwise.

5. Based on the records I have examined in regards to the family Folbigg, I have no hesitation in saying I believe that all four children were murdered by their mother. Apart from the fact that the full story fits my previous comments made and prepared for publication by me prior to being aware of this family there are other factors which point directly towards murder by suffocation. These are:

* the wide age range of the children at the time of their initial observed events or deaths - nineteen days (Caleb) to twenty months (Laura).
* the finding of two infants (Patrick on 18.10.90 and Laura on 1.3.99) moribund rather than dead. This is extremely rare in SIDS.
* small unusual observations eg. I wonder how often the mother needed to get up at night to go to the toilet within four hours of going to bed (which is what is recorded in police report relating to Sarah).
* the reluctance of the mother to use the cardio-respiratory monitor as mentioned by the father in a letter to Margaret TANNER.

6. In support of filicide as being the cause of death of these children are the results of the study of Wolkind S, published in Acta

Paed Scand in 1993 where of forty three families with a second child dying suddenly and unexpectedly, thirty one (72%) were thought to be due to filicide. If those deaths that were partly explained were excluded thirty one out of thirty six (86%) were thought to be due to filicide. As far as I am aware there has never been three or more deaths from SIDS in the one family anywhere in the world, although some families, later proven to have murdered their infants had infants who were originally classified as SIDS.

Witness: _____ Signature: _____

SUPREME COURT OF NEW SOUTH WALES

EXHIBIT ON VOIR DIRE **C**

JUDGE GRAHAM BARR J.

R v K.M. FOLBIGG

CASE NO. 70046/02 DATE 29.4.03

RETURN TO Crown

ASSOCIATE

Does SIDS run in families?
It is only since about 1990 that it has been generally accepted that SIDS is strongly associated with

1. being left unobserved in prone (lying on the stomach)
2. having the face covered by bedclothes or other objects.

Prior to this time families tended to care for all their infants in the same way, usually the way the mother had learnt from her mother. Therefore there was a risk for a second baby in a family if it was placed prone, the same as the increased risk for the first infant because it was placed prone. This, of course, was a higher risk than for all the infants in the community who were not placed prone. In South Australia in the early 1980's approximately 40% of infants were placed prone. The risk for these infants was approximately 4/1,000, while the risk for the remaining 60% was approximately 0.8/1,000, giving an overall risk of about 2/1,000.

So the risk for having a second SIDS if you had already had a prone infant die, and you placed your next infant prone, was (4/1,000) 5 times that of a family who didn't use the prone position (at 0.8/1,000).

Since 1990 the incidence of SIDS has fallen dramatically throughout the world, e.g. in Australia from over 500 infants a year to less than 200 infants a year.

Naturally this means you would now expect a dramatic fall in families with a recurrence of SIDS, and you would therefore expect to find some other cause for 2 sudden unexpected deaths in a family.

Most pathologists or anyone else associated with SIDS would never diagnose a third sudden unexpected death in a family as SIDS, but would call it "undetermined". With a fourth in a family I do not think you would find a pathologist anywhere in the world who would call it SIDS.

In the family concerned there are at least 3 reasons why the fourth death would not only not be called SIDS but would alter the thinking about the first three deaths.

1. One of the children was aged over 1 year. This would rule out SIDS in many places, as the now accepted definition in the United States of America is SIDS is "the death of an infant under 1 year of age". Indeed the common age range for SIDS is 1 to 8 months, and to have three infants have their apnoeic episode outside this age range would be extraordinary.
2. All the infants were stated to be supine with their heads uncovered. SIDS in any infant is extremely rare in such a position (<2/10,000).

3. In all the families I know where there have been more than 3 sudden unexpected deaths there have been several initially described as SIDS until another diagnosis has been discovered and the earlier SIDS diagnosis has been changed.

In my personal experience interviewing the parents and caregivers of over 500 infants who died suddenly and unexpectedly, I believe there are 13 families who have had 2 infants die suddenly and unexpectedly, and one family with 3 infants who died sudderly and unexpectedly. In 6 of the families with 2 deaths I believe both to be SIDS. In the other 7 families either another problem was diagnosed or suspected. In the family with 3 deaths, when the third child died in 1979 I was still young and inexperienced and genuinely thought they could be 3 SIDS in a family, and indeed published data about the family. After later reviewing the data with a well-known pathologist the diagnosis of at least one infant was changed and I no longer believe any of these 3 infants died of SIDS.

I have been attending SIDS Conferences since 1972, frequently as an invited speaker, and know well most of the SIDS research workers throughout the world. I am well aware of 3 families who have had more than 3 sudden unexpected deaths. Although SIDS or pneumonia or other disorders were originally diagnosed in several of these infants, now in all 3 families it has been recognized and accepted that the infants and children were all intentionally suffocated. There, of course, have been many incidences of proven intentional suffocation in 2 infants in a family dying suddenly and unexpectedly, although personally in South Australia I have been involved in only 2 where it has been proven.

14-10-96 - Monday 9 00am

Sitting in bed deciding whether to go back to sleep till whenever. Could save me walking, except I need to. I have gone back up to 67kg I'm sure. Must loose at least 2kg before Sat night. Don't want to look fat.

I'm a Mog. Alex came up last yesterday. Was good to see them.

Yesterday was a great day. Wonder why. Craig - I always want to have people come over. Later wonder if Craig also likes to show off our home & hospitality. Children thing

a next time.

I have decided to be stubborn, & do what I want. For each of his behaviour everytime I do something he doesn't approve of. Sick of it.

Decided to live my life how I'm comfortable, not him

enough is enough

If we have children it will be a decision not one I've compromised & given enough for him

NO More

Kathy

Still isn't happening. Thinking of forgetting the idea. Natural fate & the man upstairs have decided I don't get a 4th chance. And rightly so I suppose. I would like to make all my mistakes - Terrible - thinking he conceited & mean something Hung. Plus I'm ready to continue my family line now. Obviously I'm my Father's daughter. But I think knowing my temper, stress & being frustrated with everything has passed. I now get the things happen & go with the flow. An attitude I should of had with all my children

If given the chance I'll have it with the next one. Planning the house is going along fine. Changing the layout & having it all tweaked & finally making it ours. Just need new mattress. If worst comes to worst I drive to work.

Catch later.

Must make more register entries, maybe every 2nd day. Nothing major happens all the time. But still should write everyday huh

Cathy.