

AMENDED EXHIBIT F



Inquiry into the convictions of Kathleen Megan Folbigg

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4.	Day 4 Craig Folbigg [XXN (continued)]; Dr Barry Springthorpe (paediatrician) [XN, XXN, RXN]; and Craig Folbigg [XXN (continued)]	215-298	7 April 2003
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7.	<p>Day 7</p> <p>Dr Joseph Dezordi (paediatrician) [XXN, RXN]; Dr Ian Wilkinson (paediatric neurologist) [XN]; Murray Hetherington (ambulance officer) [XN]; and Craig Folbigg [RXN]</p>	478-536	10 April 2003
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9.	<p>Day 9</p> <p>Dr David Cooper (paediatrician) [XN, XXN, VD, RXN, FXXN, FRXN]; Professor John Hilton (forensic pathologist) [XN]; Voir dire; Professor John Hilton (forensic pathologist) [XXN, RXN]; and Dr John Cash (GP) [XN, XXN, RXN]</p>	583-661	14 April 2003

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10.	<p>Day 10</p> <p>Dr Paul Innis (GP) [XN, XXN, RXN]; Margaret Tanner (clinical nurse) [XN, VD, XN, XXN, FXN]; Dr Christopher Seton (sleep disorders specialist) [XN, XXN, RXN, FXXN, FRXN]; Brian Wadsworth (ambulance officer) [XN, XXN, RXN]; and Dr Allan Cala (forensic pathologist) [XN, VD, XN]; Voir Dire; and Dr Allan Cala (forensic pathologist) [XN (continued), VD]</p>	662-743	15 April 2003
11.	<p>Day 11</p> <p>Dr Allan Cala (forensic pathologist) [XN (continued), XXN, RXN, FXN] Lea Bown (foster sister) [XN]; Voir Dire Lea Bown (foster sister) [XN (continued), XXN, FXN, FXXN]; Deborah Grace (neighbour) [XN, XXN]; Barbara Unicom (neighbour) [XN, XXN]; Melissa Smith (neighbour) [XN, XXN, RXN]; and Dr Bridget Wilcken (clinical geneticist) [XN, XXN, RXN]</p>	744-828	16 April 2003
12.	<p>Day 12</p> <p>Voir dire</p>	829-858	17 April 2003

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13.	<p>Day 13</p> <p>Dr Ian Wilkinson (paediatric neurologist) [XXN, RXN]; Voir Dire;</p> <p>Dr Ian Wilkinson (paediatric neurologist) [RXN (continued)];</p> <p>Karen Hall (friend of the Folbigg family) [XN, XXN]; Carol Newitt (Craig Folbigg's sister) [XN, XXN]; Professor John Hilton (forensic pathologist) [FXXN]; Voir Dire;</p> <p>Professor John Hilton (forensic pathologist) [FRXN, FXXN];</p> <p>Kerrie Anderson (childcare worker) [XN, XXN]; Dr Alex Kan (pathologist) [XN, XXN, RXN, FXXN]; and Voir Dire</p>	859-938	23 April 2003
14.	<p>Day 14</p> <p>Voir dire</p>	939-953	24 April 2003
15.	<p>Day 15</p> <p>Bernard Ryan (detective senior constable of police) [XN]; Voir Dire; and Dr Susan Beal (paediatrician & epidemiologist) [VD]</p>	954-993	28 April 2003
16.	<p>Day 16</p> <p>ERISP played to the Court; and Voir Dire</p>	994-1012	29 April 2003
17.	<p>Day 17</p> <p>ERISP played to the Court</p>	1013-1024	30 April 2003
18.	<p>Day 18</p> <p>Voir Dire;</p> <p>Professor Peter Herdson (forensic pathologist) [XN, XXN, RXN];</p> <p>Professor Peter Berry (paediatric pathologist) [XN, XXN, RXN, VD, RXN, FXXN]; and Bernard Ryan (detective senior constable of police) [XN, XXN, VD, RXN]</p>	1025-1096	1 May 2003

Tab	Document	Page numbers	Date
19.	Day 19 Dr Brian Bailey (cardiologist) [XN, XXN, RXN]; Voir Dire; Dr Susan Beal (paediatrician & epidemiologist) [XN, XXN]; Allan Reid (ambulance officer) [XN, XXN, RXN]; Virginia Friedman (blood analyst) [XN, XXN, RXN]; and Bernard Ryan (detective senior constable of police) [VD]	1097-1169	5 May 2003
20.	Day 20 Adjournment	1170-1175	6 May 2003
21.	Day 21 Professor John Hilton (forensic pathologist) [FXN, FXXN, FRXN]; Jan Bull (gym instructor) [XN, XXN]; Voir Dire; Jan Bull (gym instructor) [XXN (continued), RXN]; Professor Roger Byard (paediatric forensic pathologist) [XN, XXN]; Voir Dire; and Professor Roger Byard (paediatric forensic pathologist) [XXN (continued), VD, XXN, RXN]	1176-1259	7 May 2003
22.	Day 22 Dr Owen Jones (paediatric cardiologist) [XN, XXN, VD, XXN, RXN]; Debbie Goodchild (friend of Kathleen Folbigg) [XN, XXN]; and Judith Patterson (friend of Kathleen Folbigg) [XN, XXN]	1260-1299	8 May 2003
23.	Day 23 Adjournment	1300-1305	12 May 2003
24.	Day 24 Crown closing address	1306-1379	13 May 2003
25.	Day 25 Defence closing address	1380-1452	14 May 2003
26.	Day 26 Defence closing address (continued)	1453-1520	15 May 2003

Tab	Document	Page numbers	Date
27.	Day 27 Judge's summing up	1521-1522 1-91	19 May 2003
28.	Day 28 Judge's summing up (continued)	92-136	20 May 2003
29.	Day 29 Judge's summing up (continued)	137-139	21 May 2003



Inquiry into the convictions of Kathleen Megan Folbigg

Corrections to trial transcripts

Location	Note
T22.53	"reference" to "admission"
T65.31	Date corrected from "1997" to "1998"
T185.8	Section of statute corrected to s. 102
T185.45	Section of statute corrected to s. 102
T189.32	Correct "directly" to "indirectly"
T202.44	Corrected to indicate an objection to tender
T244.57	"you see" to "so"
T468.54	"formal" to "normal"
T486.23	"have" to "had"
T498.44	"differ" to "different"
T522.23-26	Strikeout
T609.17	"passed up" to "pass over"
T616.35	"anterio lateral" to "anterolateral"
T619.42	"disparate" to "desperate"
T624.5	"petechae" to "petechiae"
T656.49	"fall" to "full"
T676.13-15	Strikeout
T708.24	"significant" to "significance"
T708.54	"next" to "neck"
T735.3	"crown prosecutor" to "his honour"
T761.56-57	"did not die" to "died"
T762.27	Delete "is"
T777-T781	At bottom of page add "VD"
T810.20	"executing" to "excused"
T822.14	"IGG" to "IgG"
T823.16	"IGG" to "IgG"
T823.22	"IGG" to "IgG"

T823.37	"IGG" to "IgG"
T856.16	"Beal's" to "Herdson's"
T867.20	"parted" to "part"
T872.1	"their" to "there"
T898.15	"like" to "look"
T904	"Hall" at bottom of page to "Newitt"
T907.51	"significant" to "significance"
T980.53	Delete "air"
T988.43	"hard" to "heart"
T991.39	"emCAD" to "MCAD"
T1051.10	"IGG" to "IgG"
T1051.26	"IGG" to "IgG"
T1051.55	"IGG" to "IgG"
T1072-T1084	"Herdson" at bottom of page to "Berry"
T1083.16	"The doctor" to "Doctor Dezordi" & add "it" to end of sentence
T1086.5	Second "is" to "would you like it"
T1148.18	Delete "know"
T1176.44	"Bristol" to "Busuttil"
T1189.45	"Zahra" to "Cook"
T1189.49	"Zahra" to "Cook"
T1190.15	"Zahra" to "Cook"
T1190.41	"Zahra" to "Cook"
T1208.21	"if" to "that"
T1209.51	"epileptic epilepsy" to "epileptic seizure"
T1210.29	"stopped" to "stop"
T1212.42	Delete "^ word objection"
T1214.29	"a sleep" to "asleep"
T1215.14-15	"I don't think so. We can exclude encephalitis" to "I don't think we can exclude encephalitis"
T1216.42	"that is a short watershed type" to "that is a watershed year"
T1220.48	"processes" to "process"
T1225.20	"and" to "an" and "findings" to "finding"
T1226.26-30	Replace lines to "I have my own summary of the answer written"

	down 'Would you have diagnosed cause of death as myocarditis but in view of other deaths in the family, would diagnose cause undetermined',"
T1226-T1230	Delete "BYARD XX" at bottom
T1231.26	"sloppy" to "floppy"
T1234.2	Delete "His Honour: Yes."
T1240.44	"Littleton's" to "Hilton's"
T1241.44	Add "you" between "it... are"
T1251	Add "VD" at bottom
T1255.51	First "that" to "does"
T1256.58	"Macscopy" to "Macroscopically"
T1257.49	"of" to "by"
T1261.9	"an" to "and"
T1266.58	"hoards" to "hordes"
T1267.5	"hoard" to "horde"
T1268.49	"and" to "an"
T1270.15	Delete "h" from spelling
T1270.18	Delete "h" from spelling
T1271.12	"and" to "an"
T1271.16	"and" to "an"
T1271.25	"incident dental" to "incidental"
T1317.17	"1989" to "1999"
T1325.3	"cough" to "could have"
T1343.17-18	Full stop after "inadequate", no full stop after "it"
T1343.47	No full stop after "realised"
T1344.5	Add "well" between "may... be"
T1344.12	Delete "perfect" and add "the imperfect"
T1347.32	"Sarah" to "Laura"
T1348.45	Replace "Kathleen comes inside" with "Lea goes outside"
T1355.17	"the potted" to "potted"
T1362.41	"misdénomér" to "misdénomér"
T1370.32	"1977" to "1997"
T1371.22	Delete "

T1413.32	Add "no" between "and... more"
T1415.5	"attended to resuscitation" to "attempted to resuscitate"
T1415.12	"excluded" to "excluding"
T1415.14	delete "the"
T1429.24	"1112" to 112"
T1449.4	"Singhaira" to "Singh-Khaira"
T1478.28	"lives" to "lies"
T1485.49	"McDermott" to "McDermid"
T1486.36	"breathing" and "breathed" to "grieving" and "grieved"
T1491.30	"punctated" to "punctate"
T1491.32	"punctated" to "punctate"

FHI:EE:RT:5

D1

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TUESDAY 1 APRIL 2003

10 70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG

15 HIS HONOUR: I just wanted to make a couple of inquiries
before the jury panel came in. I shall retire shortly so
that that can happen, but may I ask counsel are they quite
content with the set-up of the transcription service?

20 CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: Mr Crown, my Associate gave me a message to
the effect that after the jury is empanelled, you want to
have them sent away so that two points of law can be
argued?

25 CROWN PROSECUTOR: I don't know if there is a need to
raise both of them. My friend might indicate.

30 ZAHRA: There is one of them. There are two matters that
my friend raised about twenty to ten this morning.

HIS HONOUR: I just want to remind you both that I made
myself available for the whole of last week to deal with
matters of this kind.

35 ZAHRA: Can I indicate the issue that causes us such
concern? We have written to the Crown in objection to the
record of interview. The response to this correspondence
was that in fact it would not be relied on unless
40 infanticide was raised. It was a matter that was
obliquely referred to the other day, but I understand was
not going to be pressed during the opening.

45 At twenty to ten we were notified by the Crown and taken
to some passages of the record of interview and he
indicated to us that he now wished to open. So it is
nothing of our making that this has occurred, your Honour.
We were around, willing to argue this, at an earlier
stage.

50 CROWN PROSECUTOR: Your Honour, I will check the
correspondence.

55 HIS HONOUR: I haven't come here to referee a fight
between you two about the history of the matter. Can you
open without this material, Mr Crown?

CROWN PROSECUTOR: Your Honour, I think it would be

unfair to the jury not to explain the significance of that evidence. They are two very, very simple, very straightforward issues. I would be able to explain the Crown position in five minutes, if not less.

5

And the reason why I wish to raise them is that I am very confident that they will be admitted into evidence, and I think they are not line ball issues and they are, therefore, matters that I think the jury is entitled to have explained to them during the opening.

10

HIS HONOUR: All right then. Are we in a position then to have the jury empanelled?

15

CROWN PROSECUTOR: Yes, your Honour.

ZAHRA: Yes, your Honour.

20

HIS HONOUR: Is it convenient for me to retire for the jury panel to be brought in, or can they come in anyway?

CROWN PROSECUTOR: If your Honour pleases.

25

HIS HONOUR: I will just leave the Bench, officer. When I have done that would you mind having the jury panel brought in?

SHORT ADJOURNMENT

30

HIS HONOUR: Call the matter for hearing, please.

CROWN PROSECUTOR: I present an indictment against Kathleen Megan Folbigg.

35

ZAHRA: I have seen that, your Honour, and have a copy.

Mr M Tedeschi QC with Ms J Culver as Crown Prosecutor
Mr P Zahra SC with Mr A Cook for Accused

40

CHARGE 1: For that she on 20 February 1989 at Mayfield in the State of New South Wales did murder Caleb Gibson Folbigg.

45

PLEA: Not guilty.

CHARGE 2: Further for that she on 18 October 1990 at Mayfield in the State of New South Wales did maliciously inflict grievous bodily harm to Patrick Allen Folbigg with intent to do grievous bodily harm.

50

PLEA: Not guilty.

55

CHARGE 3: Further for that she on 13 February 1991 at Mayfield in the State of New South Wales did murder Patrick Allen Folbigg.

PLEA: Not guilty.

5 CHARGE 4: Further for that she on 30 August 1993 at
Thornton in the State of New South Wales did
murder Sarah Kathleen Folbigg.

PLEA: Not guilty.

10 CHARGE 5: Further for that she on 1 March 1999 at
Singleton in the state of New South Wales did
murder Laura Elizabeth Folbigg.

PLEA: Not guilty.

15 HIS HONOUR: I must direct some remarks to the members of
the panel from which the jury for this trial will be
selected. It is fundamental to our system of justice that
a trial should take place and a jury should reach its
20 verdicts only on the basis of the evidence that is given
in the courtroom. It is important, and juries are always
warned, that they are not to allow their decision in a
trial to be influenced by anything that may have come to
their notice from any other source.

25 It is possible that there is someone among you who may
know something about the facts of this case. It is
possible that among the witnesses the Crown proposes to
call there may be people whom some of you know or about
whom some of you know something or about whom you may
30 think you know something, which would make it difficult
for you to act impartially in considering how far you
could rely on the evidence of such witnesses.

35 In a moment I am going to invite the Crown Prosecutor to
read to you the list of witnesses the Crown expects will
be called in this case.

40 If there are persons whose names appear in that list of
witnesses the Crown reads to you who give rise to the kind
of difficulty to which I have referred, you should make
that known to the court immediately. You can do that
simply by standing up in your place. One of the Sheriff's
officers will come to you and obtain information from you
and I will deal with the matter as seems appropriate.

45 I think that during the instruction that has been given to
you all this morning you have been told that the trial may
last as long as ten weeks. In fact, the estimates vary
between six weeks and ten weeks, but it is better, I
50 think, to be conservative about it and assume that the
trial will last as long as ten weeks.

55 After the Crown has spoken to you, please bear in mind
what I have said. If there is any of you who has
difficulty in taking your place on a jury in a trial of
this length and of the kind which the Crown Prosecutor
will outline for you, please stand up and, as I say, I
will deal with the matter.

Thank you, Mr Crown.

5 CROWN PROSECUTOR: Would your Honour feel it appropriate to tell the jury something a little bit about the nature of the case because there might be someone on the jury who, because of that, feels unable to serve.

10 HIS HONOUR: Yes. Do you want me to do that or will you do that?

CROWN PROSECUTOR: Whichever your Honour prefers.

15 HIS HONOUR: Members of the jury panel, the Crown will be at liberty to add to anything that I am saying to you now, but let me just remind you of the charges which have been read to the accused, Mrs Kathleen Megan Folbigg and to each of which she has pleaded not guilty.

20 The Crown case is that she murdered each of four young children of hers and her husband's. The first one is said to have taken place in February 1989 at Mayfield. That's, as you may know, a suburb of Newcastle. The name of the child was Caleb Folbigg.

25 The second is said to have been on 18 October 1990, also at Mayfield. The child's name was Patrick Allen Folbigg.

30 I have made a mistake. The second charge is a charge which involves the infliction of grievous bodily harm upon that child. The murder charge for that child follows and the date of the murder is said to have been 13 February 1991, also at Mayfield.

35 The third child concerned was called Sarah Kathleen Folbigg. The accused is said to have murdered her at Thornton which, I take it, is also in the Newcastle area on 30 August 1993.

40 The final charge is a murder at Singleton, which is in the lower Hunter Valley, not far from Newcastle as you know, on 1 March 1999. The name of the child was Laura Elizabeth Folbigg.

45 My reading those details to you may have brought to your minds anything that you may have heard about this case and I ask you for the moment, for present purposes, to bear those matters in mind.

50 Thank you, Mr Crown?

CROWN PROSECUTOR: Ladies and gentlemen, the Crown will be calling the following witnesses or at least some of them during the course of the Crown case.

55 THE CROWN PROSECUTOR READ THE PROPOSED LIST OF WITNESSES.

CROWN PROSECUTOR: One further matter, if I might, your Honour, I wonder if your Honour would tell the jury that

if there is any person who, by virtue of the nature of the case, as opposed to the length of it, might be compromised in what your Honour has already spoken about, that now is the time for them to tell your Honour.

5

HIS HONOUR: Ladies and gentlemen, I do not know what the evidence may or may not establish in due course, but those of you who are members of the jury panel should understand that what the Crown charges here is that the accused, in effect, smothered each of the four young children.

10

I think I am correct in saying that the first three of the children were under 12 months of age, a few weeks or a few months of age. One of the children was between one and two years of age, but they were all little children and, as I say, the charge is that the accused deliberately smothered them. It will be for the Crown to prove, of course, that that happened.

15

20

I mention the matter to you now so that if there is any member of the jury panel who feels constitutionally unable to deal with a long case of that kind, you should indicate that as well. I shan't be asking any questions and if any of you prefers not to be a member of a jury panel dealing with a case of that kind, then you should indicate it. Now is the time please for any of you who has any of the difficulties to which I have referred to stand up and make that known to the Sheriff's officer.

25

30

Yes, please don't address me from there, sir. Have you spoken to the Sheriff's officer?

COURT OFFICER: Your Honour, it is a matter to do with the potential juror's employment.

35

CROWN PROSECUTOR: I have got no objection, your Honour, to your Honour discharging him.

HIS HONOUR: Can you get the juror's card, please?

40

Sir, would you mind coming forward into the well of the court, please?

Just have a look at this card and tell me whether this is your juror's card?

45

POTENTIAL JUROR: Yes.

HIS HONOUR: Please hand it back to the officer. I don't want you to state your name or anything that would enable you to be identified. Do you follow?

50

POTENTIAL JUROR: Yep.

HIS HONOUR: Will you have difficulty with your job if you undertake a 10-week trial?

55

POTENTIAL JUROR: Yes--

HIS HONOUR: Thank you. That is all I want to know.
Thank you.

5 I am excusing you from service on this occasion. You
might like to go back and take your place in the court.
The Sheriff's officer will direct you what you should do
in due course.

10 Is there any other member of the jury panel who has any of
the difficulties to which I have referred?

COURT OFFICER: Your Honour, it is a matter of a personal
nature.

15 HIS HONOUR: Would you like to come forward, sir? What's
the difficulty that you have, sir?

POTENTIAL JUROR: Because I am getting married for more
20 than seven years. I'm waiting for a child - for
children--

HIS HONOUR: Don't worry. You are excused.

25 Is there any other member of the jury panel who wishes now
to apply to be excused? This is the last chance you will
have. If you don't take your chance now and you are
selected to form part of the jury, you will be part of the
jury for the rest of the trial.

30 Very well. Thank you.

CROWN PROSECUTOR: Your Honour, there is one other issue
I only just thought of. That the members of the jury will
35 be required to have a fairly sophisticated knowledge of
English and an ability to read large amounts of
handwritten English in very poor handwriting, so it would
require fairly good knowledge of English, written and
spoken form.

40 HIS HONOUR: What kind of sophisticated English is this,
by way of experts reports?

CROWN PROSECUTOR: No, I am talking about the diaries,
45 your Honour.

HIS HONOUR: The Crown Prosecutor has just informed me,
ladies and gentlemen, that the members of the jury will
need to be very familiar with the English language and
50 will have to read and understand fairly extensive tracts
of writing and it is handwriting, and I am told that it
may not always be easy to understand. If there is any of
you who is likely to have difficulty reading and
understanding such material, I suggest that you make that
55 fact known now.

Mr Zahra, is there anything else that you think I ought to
draw to the attention of the jury panel?

ZAHRA: No, your Honour.

5 CROWN PROSECUTOR: Your Honour, there are two persons of the panel who look very slightly and vaguely familiar to me. I don't know. It might be that I don't know them--

10 HIS HONOUR: We don't normally name the Crown. Would you like me to tell the panel what your name is, Mr Crown?

CROWN PROSECUTOR: Yes, your Honour.

15 HIS HONOUR: This is the last time you will hear me name the Crown Prosecutor. It is not traditional to do so in criminal cases, but the Crown Prosecutor has told me that the faces of two of you look vaguely familiar to him. If it turned out that you did know him, I think that it would be inappropriate for you to be members of this jury.

20 The Crown Prosecutor's name is Mark Tedeschi. He is Queen's Counsel. He is the Senior Crown Prosecutor for the State of New South Wales and he has held that position for a number of years now.

25 Is there any of you who knows Mr Tedeschi, even ever so slightly? If so, would you please stand?

Thank you, Mr Tedeschi. That seems not to be a problem. The empanelment can commence then.

30 ZAHRA: Might I assist the accused in this process?

HIS HONOUR: Yes, please, Mr Zahra.

35 JURY EMPANELLED

40 HIS HONOUR: I want to direct some remarks to the members of the jury panel who have not been selected to serve on this jury. Your task in this court is now over and, in a moment, I am going to ask you if you will go with the Sheriff's officer and follow the directions that the Sheriff's officer will give you. I do not know whether there will be any other work for you to do under your jury summons. You may be excused. You may be asked to form
45 part of another panel. You will be told about that. But I don't want you to go without thanking you, on behalf of the community, for attending and being prepared to serve as jurors, as you have. The community owes a debt to its citizens who perform that function. With those thanks, I
50 will let you go now with the Sheriff's officer.

Members of the jury, as you have heard from the formal reading of the charges, this is a criminal trial in which the accused, Kathleen Megan Folbigg, is charged with
55 having committed the offences you have now heard read and, to some small degree, explained.

The case against Mrs Folbigg, who will be known throughout

these proceedings as the accused, will be presented by the Crown Prosecutor. The Crown Prosecutor is the gentleman who addressed you a few minutes ago and read to you the list of names of witnesses he expects to call. Seated on his right is another barrister. She also appears for the Crown.

On the opposite end of the Bar table is Mr Zahra of Senior Counsel. He appears for the accused and he is assisted by Mr Cook of counsel. How the barristers go about dividing their labours is not a matter for me; it is entirely for them. You may hear from Mr Tedeschi for the Crown throughout, you may hear from Mr Zahra throughout, you may hear from the other barristers; I do not know.

Your role in the trial is that of judges. For the purposes of this trial, you are judges every bit as much as I am, but we have different jobs to do. My job is all to do with the law; I have to see that the trial is conducted in accordance with the procedures that the law lays down.

It will be your task, as the judges of the facts of the case, to decide whether the Crown has proved what the law requires it to prove. Because, in carrying out this task, you act as judges, you are subject to certain obligations which attach to all judges. One is the obligation to avoid all contact with people involved in the case or connected with it.

You will have understood from what took place earlier that we are always very concerned that the members of a jury be people who have no connection with the events out of which a trial arises and no connection with the people who are concerned in those events.

For much the same reason, it is important that from now on, until the trial is over, none of you has any contact with any person who is connected with the trial in any way. It is part of your obligation as judges to ensure that nothing takes place which could cast doubt on the fairness of the trial.

From now on, until the end of the trial, there will be in and around this court building people who are involved in the trial in one way or another or who have some connection with the trial or with the people who are involved in it. If any of you were seen to have any contact at all with somebody who, whether you knew it or not, turned out to have a connection with the trial, that could give rise to a concern that the trial was not being fairly conducted. Either a concern that there was some undisclosed connection between you and that person, or worse, that somebody was trying to influence you in your decision in the matter.

So, I would ask you, please, as you are moving around the court building today and throughout the whole of the

trial, would you please be very careful to have no contact at all with anybody whom you encounter in the premises except the uniformed Sheriff's officers. That is the only way we can be sure that nothing will happen to cause the
5 trial to abort.

Should anybody approach you, either at court or anywhere else, and seek to speak to you about the case, you must refuse to have anything to do with them and you should
10 report that as soon as possible to one of the Sheriff's officers.

The next aspect of your role as judges is this: It is your obligation to decide the case on the basis only of
15 the evidence that is presented to you in this courtroom. The events that will be described in the evidence apparently took place in Mayfield or Thornton or Singleton, near Newcastle.

There was newspaper interest at the time of the committal of the accused to this court for trial. It is possible that you may already have read or heard something
20 broadcast about the matter and, even if you have forgotten it, the evidence may bring it again to your minds. It is vitally important that you put out of your minds any
25 memory you have or think you may have about the facts of the case deriving from any report like that and pay attention only to the evidence given here which may not correspond with anything previously reported or anything
30 you remember.

It is highly likely, having regard to the nature of the case, that it will be the subject of media interest while the trial is proceeding. In fact, the ladies and
35 gentlemen you see seated opposite you are, for the most part, members of the news media. And there are bound to be reports of the trial in the newspapers, perhaps on the television, perhaps on the radio.

It would be quite unrealistic for me to ask you not to watch such reports or listen to such reports or read such reports, but I do ask you to bear firmly in mind that
40 while, no doubt, the journalists who compile those reports conscientiously try to make them accurate, they are necessarily constrained by considerations of space and
45 time and also, no doubt, by the need to make what they report interesting to the readers or viewers whom they seek to inform and entertain. What journalists report is usually adequate and appropriate to inform the general
50 public, but it cannot assist you to know what the media is saying about the trial.

Because of the risk that such reports may inadvertently mislead or confuse you, you should put them out of your
55 minds and concentrate on the material which is put before you in court. Because you must base your verdicts only on the evidence given here, it is your duty not to discuss the case with anybody other than your fellow jurors from

now until the trial is over. You alone will have heard the whole of the evidence. You will be tempted to discuss the matter with your family and friends, but it is important that you do not do so, because anything they may say will not be based on the evidence. We want your verdict - not the verdict of your husbands and wives, friends and relations.

Because you are judges, it is important that you approach the matter quite dispassionately, without any prejudice or emotion. Because you are human beings you may have prejudices of one sort or another against or in favour of various kinds of persons in the community. You may react emotionally to the evidence. It is important that any such prejudice or emotional reaction play no part in your decision in the case. By all means, privately identify to yourselves your prejudices and emotional reactions, but only for the purpose of firmly laying them aside, so that they play no part in the process by which you reach your decision in any matter before you.

I invite you at your first adjournment to choose a foreperson. The position of foreperson is open to any one of you, woman or man. You may, if you wish, even change the position from one of your members to another. Whoever is your foreperson at any particular time has no authority over the rest of you. That person's role is simply this: that it is convenient from the court's point of view to have one person to speak on behalf of you all if communication is necessary between yourselves and myself. If any question arises on which I want the jury's assistance, the foreperson's job will be to discuss the matter with the others and communicate an answer to me. And, of course, the foreperson delivers the verdicts at the end of the case.

Secondly, common human experience is that if a group of people have to discuss a matter in the hope or with the purpose of reaching a considered decision about it, those discussions are usually much more fruitful if one of their number chairs their discussions. It is for those reasons only that you are invited to choose a foreperson. I remind you that in carrying out your task all of you are equal and the fact that one or other of you happens to be your foreperson at any particular time does not give that person any particular authority over and above that which you agree to give to that person as your chairperson.

You have the right to take notes as the trial proceeds and the Sheriff's officers will give you some writing materials, but I would urge you to be cautious about notetaking. It is not necessary for you to make notes of all the evidence. All the evidence will be recorded by the court reporters who sit in front of me here and, as the trial proceeds, they convert their record into a typewritten transcript which the barristers and I will have available to us.

5 You will not have the transcript itself, but, at any time during the trial, and particularly when you are considering your verdicts, you can, on request, have any part of the evidence of any witness read back to you as a reminder and you can exercise that right as often as you need and for a small or as large a part of the evidence as you need.

10 A problem with notetaking is that if you are trying to get lots of things written down, you have your head buried in your lap taking notes, you may fail to appreciate something about a particular witness which may have been of assistance to you.

15 The general experience is that it is far better to sit back, concentrate on the witness and listen to the flow of the evidence than to take copious notes. You will probably find it sufficient to make a note of some particular matter as it occurs to you so that you can remember to discuss it with your colleagues when you are out of court.

20 I should outline to you the course of the proceedings. The trial will begin with an opening address to you from the Crown Prosecutor. I have refrained from saying very much about the nature of the case to you, but the Crown Prosecutor will, no doubt, want to outline to you the facts and events out of which the charges arise and the evidence he expects to place before you to establish those matters.

25 You will understand that what the Crown Prosecutor says to you in the course of that address is not itself any part of the evidence. The purpose of the opening address is to give you a framework to make it easier for you to understand the evidence that follows.

30 When the Crown Prosecutor has addressed you, Mr Zahra will address you on behalf of the accused and, in the same way, the purpose of the address is to give you an indication of what the issues are likely to be that will arise for your determination in the trial.

35 When the addresses are finished, the evidence will begin. The Crown Prosecutor will place evidence before you by calling witnesses and by tendering documents. The witnesses will give their evidence in answer to questions which he will ask. When he has completed his questioning of a witness, counsel for the accused will have the opportunity of putting questions to the witness also. That is what we call cross-examination. And within certain limits, the Crown Prosecutor may have the right thereafter to put some further questions to the same witness to clarify any matters that are left in doubt.

40 When all the Crown evidence has been placed before you, the accused will have the opportunity of placing evidence

before you. When the evidence is complete, the Crown Prosecutor and then counsel for the accused will make their final addresses to you. Again, at that stage they will not be adding anything to the evidence. What they
5 will be doing is putting to you arguments about what evidence you should or should not accept, what view you should or should not take of this or that aspect of the case and what verdict you should come to in each of the charges.

10 Finally, it will come back to me to sum-up the case for you. I shall tell you as much of the law as you need to know to apply to the facts as you find them. I will identify for you the factual issues which seem to arise
15 for your determination and hopefully assist you in your consideration by relating those issues to the evidence that has been given.

20 Now, all this is going to take some time. As I indicated to you earlier on, the expectation is that the trial will finish within 10 weeks and perhaps as little as six weeks. The estimates vary.

25 Throughout that time, it is important that although you may well form provisional views as you go along about this or that aspect of the case and about the reliability or credibility of this or that witness, it is important that you keep an open mind until the end and until the time
30 when, having summed up to you, I invite you to go off and consider your verdict.

There are two things that I should draw to your attention. I have already mentioned the fact that there were
35 committal proceedings before a magistrate. That is a form of procedure that takes place whenever the police charge somebody with a serious offence. The magistrate conducts an inquiry to see whether there is sufficient evidence to justify the matter going for further trial in a higher court like this one.

40 The fact that the matter has come here no doubt indicates that the magistrate took the view that there was some evidence to justify a trial, but that is as far as it goes. The fact that the magistrate reached that
45 conclusion does not influence in any way the outcome of your decision. It is you who have the function of deciding, not the magistrate, and you will be hearing evidence which may well be different from that which the magistrate heard. So put right out of your minds the fact
50 that the magistrate apparently sent the matter here for trial.

55 The other thing I want to draw to your attention is this. Occasionally, in the course of a trial, judges are called upon to make rulings of law, which involve the judge hearing material from witnesses or hearing arguments which may not ultimately form part of the evidence or the arguments that go before the jury. Accordingly, whenever

I am asked to rule on some question of law, unless it is something that can be dealt with instantly, I will probably ask you to leave the courtroom while I deal with it.

5

That is not a matter of being secretive or concealing something from you which you ought to know. It is a matter of simplifying your task because, if you were to sit there and listen while evidence was put before me, and arguments were put before me based upon it, but which then did not form part of the material which you have to consider, it would be embarrassing for you. You would find it difficult to put it out of your minds. It is not embarrassing for me because I do not have to decide the facts.

15

As a matter of fact, counsel indicated to me this morning that, at about this stage of the proceedings, they want to raise a couple of matters for my decision and I shall have to make that decision in your absence, having heard from counsel in your absence. So, when I ask you to adjourn in just a moment, it will be for a somewhat longer adjournment than we would normally have at the moment, but we will get the trial on and running before you as soon as reasonably possible.

25

Just a word about times. The court sits each day from 10 o'clock in the morning until 4 o'clock in the afternoon. On an ordinary day, therefore, you wouldn't be required to be here earlier than the time that the Sheriff's officers ask you to be present in order for a 10 o'clock start, and you might expect to be excused at 4 o'clock, or very shortly thereafter.

30

We take an adjournment for lunch between 1 o'clock and 2 o'clock and, in order to break up a long morning, we ordinarily take an adjournment for morning tea between 11.30 and perhaps just before 12 o'clock. We find that it aids the concentration if we have those adjournments.

40

During those adjournments, I expect the Sheriff's officers will provide you with some refreshments.

We shall ordinarily be sitting five days a week from Monday to Friday. However, we shall not be sitting on every Friday and I can tell you now that the court will not sit at all on Friday of this week, 4 April. And it is possible that we may take other Fridays off, or perhaps Friday afternoons off, and I will try to give you some reasonable notice of those times off.

50

Once again, we do this for a couple of reasons. It does aid your concentration and it does assist you to go about your normal business.

55

It is an imposition for anybody to have to be a member of a jury in a long trial and we recognise that jurors have private lives that they have an interest in keeping going

while the trial is kept going as well. So, as I say, I will give you some indication about those days off, or afternoons off, when I reasonably can.

5 You should know for this week that we shall be adjourning on Thursday at 4 o'clock and resuming on the following Monday at 10 o'clock.

10 That is all I want to say to you by way of this opening, ladies and gentlemen.

15 The next thing that will happen which involves you is that the Crown Prosecutor will, as we say, open the case to you.

20 It is the time at which we normally take the morning tea adjournment, so I will just ask counsel. Mr Crown and Mr Zahra, how long do you think it is going to take us to deal with the matters that you want me to deal with?

CROWN PROSECUTOR: I think under half an hour, your Honour.

25 HIS HONOUR: Mr Zahra?

ZAHRA: Yes, I think that is a reasonable estimate.

30 HIS HONOUR: Well, I can give you that indication, ladies and gentlemen. We will probably be able to resume before half past 12.

35 Now, you will take the morning tea adjournment, of course, during that time, and I expect you will have a nice cup of tea, so I will let you go now with the Sheriff's officer.

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Now, Mr Crown, Mr Zahra, do you want to tell me what this material is before I leave the Bench? If it is convenient, I can leave the Bench, read it while we take the morning tea adjournment, and then I will know what it is by the time I come back.

10 CROWN PROSECUTOR: Yes, I can.

Your Honour will recall that the fourth child is Laura Folbigg. Her post-mortem was conducted by Dr Allen Cala. Might I hand up to your Honour a very recent statement dated 28 March from Dr Cala, which refers to a video, and the Crown would wish to make mention of the video in the opening address.

15 HIS HONOUR: I suppose, by "disinterested" Dr Cala means "uninterested" in paragraph 6?

20 CROWN PROSECUTOR: Yes, your Honour.

Your will recall that Dr Cala found the presence of myocarditis in the lining around the heart and was of the view that it was not the cause of death and, in effect, what he is saying is that, by having viewed that video taken, I think the day before the death, that he is even more strongly of that view, for the reasons that he states in the statement.

25 So, we would wish to, in due course, tender the video, show it to Dr Cala, and I would just wish to state the relevance of the video to the jury in my opening address.

30 HIS HONOUR: Do I need to see the video to decide this matter, Mr Zahra?

35 ZAHRA: It may be prudent. I think there are some stills, in my recollection, that have been extracted from the video. They may suffice.

40 HIS HONOUR: But, Dr Cala is commenting on the way the child appears to be behaving. How can I tell that from stills?

45 ZAHRA: I am only offering it to your at this stage. I don't know whether my friend would think that--

50 CROWN PROSECUTOR: It is probably better if your Honour does see it. I am not suggesting that it is going to assist your Honour much, but it is probably best that your Honour does. That is the first area.

55 The second area, your Honour, is this. Your Honour will recall the debate that took place last week in relation to the reference in the accused's diary to her being her father's daughter, and the Crown wishing to refer to the fact that her father had killed her mother. Since then,

your Honour, I have had an opportunity to refresh my recollection of the accused's interview, and I draw your Honour's attention to questions 637 to 659.

5 HIS HONOUR: Just give me a moment, please, Mr Crown.

10 CROWN PROSECUTOR: 637 to 659 is where this area is covered, and I would particularly draw your Honour's attention to answer 644 and answer 645, and there is one sentence of that that the Crown would not seek to lead and, it is the sentence that begins, about seven lines down into the answer. It begins with the words, "I just found out recently" and ends with the words "all that sort of thing", so we would seek to have that deleted, in that
15 it is not relevant.

We would also draw your Honour's attention to answers 656 and 657.

20 Your Honour, it was rather remiss of us that we didn't seek to remind ourselves of this evidence when debating this matter before your Honour last week, and my friend is quite correct, we did say we weren't going to rely upon this evidence at the time.

25 At the time, I was only considering the significance of this evidence to be whether or not it provided an explanation for why the accused may have smothered her children, and we were looking, at, what is loosely called, the attachment theory, which is that children who have gone through the sort of early life that this accused went through may have difficulty themselves bonding with their own children. But this evidence is not relevant to that, because that issue really only arises in the event of the defence relying upon certain medical grounds, which we
30 understand they are not relying upon. But it is relevant, we submit, to understand the entry in the diary where she says that, in effect, she is over the losing temper stage now, although she is her father's daughter, and your Honour will recall the submissions that we made about that
35 last week.

40 Here, in this interview, she really provides a link between that entry in her diary and the fact of her father in a fit of temper having killed her mother. So we would wish to open to the jury on this so that when we come to that part of the diary we can direct the jury's attention to what we say the significance is of her statement in the diary that she's her father's daughter and we would submit
45 that the jury ought not to have to wait until closing addresses to have that alleged significance pointed out to them.

55 HIS HONOUR: Mr Zahra, I gather that you object to the whole of the statement of Dr Cala and to the video that goes with it.

ZAHRA: Yes, that is so, your Honour.

5 HIS HONOUR: What is objected to, if anything, in the record of interview or the parts of the record of interview to which the Crown has referred?

10 ZAHRA: Your Honour can see in fact that there are a series of questions at the point my friend has taken your Honour to that relate to this reference in the diary. We have already indicated to the Crown that we would be objecting to that series of questions touching upon this diary entry so far as it relates to--

HIS HONOUR: Starting where and ending where?

15 ZAHRA: I think it starts from 637 at page 174.

HIS HONOUR: You object to the whole of 637 through to?

20 ZAHRA: I think it goes to 657.

CROWN PROSECUTOR: 659.

ZAHRA: 659 sorry, yes.

25 HIS HONOUR: All right, thank you. I know what we are doing now. We will take the morning tea adjournment and I will have a look at this material.

30 Now, do we have equipment to play a videotape? You better make that videotape available, Mr Crown. How long does the video last?

35 CROWN PROSECUTOR: Ten minutes, your Honour. There are other family videos on it. What we will do is we will put it at the relevant spot for your Honour to look at.

HIS HONOUR: Well, I will look at that as soon as I come back then. And we will take the adjournment.

40 SHORT ADJOURNMENT

45 CROWN PROSECUTOR: Your Honour, the only further thing that I would like to do is, just by way of further and better particulars, to refer your Honour to what we say is the significance of these answers in the interview.

50 If I could take your Honour to answer 644, she is asked "What do you mean by 'Obviously I'm my father's daughter'?"... stuffing up anybody."

Then she is asked, "Tell me about your dad" in the next question "...by stabbing her 20 odd times."

55 Then, at the end of answer 645, she says, "I regard anyone who wasted their life like that and can do something like that", ie, killing her mother, "as just losers in general."

Then, over in parts of 656, "Just getting back to this, 'Obviously I'm my father's daughter'...of some kind." We would submit that it would be open to the jury to conclude that when she says "I was a loser of some kind" what she meant was "I was a loser of that kind" and "I was sort of destined to have some sort of tragic life of that kind".

Then, in 657, she is asked about whether there is a link between "I'm my father's daughter" and "losing my temper stage" and she says, "Yeah". So, we submit that those answers would allow a submission to be made to the jury at the conclusion of the trial that what she meant by "I'm my father's daughter" was that she considered that she might have been the same kind of person as her father in terms of losing her temper to the extent of forming an intention to kill.

Might we now play the video to your Honour? It is only four minutes long and it is the only item on this particular videotape.

HIS HONOUR: Thank you.

CROWN PROSECUTOR: Laura is the little girl in the red float.

VIDEO SHOWN

CROWN PROSECUTOR: The male speaker is Craig Folbigg.

Your Honour, as I said earlier, the Crown would wish to open to the jury on the effect of Dr Cala's latest statement.

HIS HONOUR: Yes.

Well, Mr Zahra, what do you say, first of all, about Dr Cala's additional statement?

ZAHRA: Your Honour, can I indicate that, whilst we have had the video for some time, we received the statement from Dr Cala that my friend wishes to open to the jury on last Friday. In other words, the evidence of Dr Cala that he was not prepared to make or draw certain diagnostic conclusions from that video was in fact only--

HIS HONOUR: You are not able to deal with this matter then?

ZAHRA: Your Honour, we briefly spoke with our expert yesterday afternoon to address this. Your Honour, he tells us certain things and I would submit, your Honour, that the ultimate decision that your Honour would need to make is in fact, firstly, in relation to the utility of the evidence, as compared with the prejudicial effect because of obviously seeing the child; those matters that your Honour was foreshadowing with the jury panel this morning - those sorts of concerns that might flow on from

seeing the child and the emotions that it might attract.

5 Your Honour, what Professor Byard tells us is that, in a sense, you can't make a diagnosis from watching a video. At this stage we haven't shown the video to him. We were unaware that it was going to be used for diagnostic purposes.

10 He indicates to us, your Honour, that there are significant bodies of research that he has referred us to to indicate that it doesn't necessarily follow that there are any obvious symptoms of myocarditis in a child, that in fact there is a significant portion of persons who die of myocarditis who don't show any symptoms before the
15 actual attack, so there is in fact going to be some argument in relation to the question of the utility to the evidence and the ability to make such a diagnosis and to draw the conclusions that are sought to be drawn by Dr Cala.

20 As I say, your Honour, we were only advised this morning that there was a prospect of this evidence being referred to in my friend's opening.

25 It may be, and in fact it is likely, that your Honour might need to hear some evidence on the voir dire. There are some observations that may be able to be made, but quite clearly what my friend is seeking to do is in fact for Dr Cala to be able to draw upon some observations and
30 to exclude the condition of myocarditis. We would suggest at this stage - bear in mind we have not had a lot of opportunity to consider this - that there is not much utility because of the divergent views of the experts of the witness's ability to draw these conclusions.

35 So, we are in quite some difficulty in addressing the issue to completeness at this stage and I can indicate, your Honour, as soon as we were given this report, they were matters that we in fact discussed with our expert
40 yesterday afternoon. He has referred us to some research reports in which one sees that a significant proportion of persons don't show any symptoms whatsoever. There is going to be an issue over the significance of this evidence and what we say will be the prejudicial effect of
45 seeing this particular video.

HIS HONOUR: What would be the prejudicial effect, Mr Zahra?

50 ZAHRA: Only the matters that your Honour had, in a sense, somewhat referred to, to the jury panel here today, that one would expect there are certain emotional responses from seeing the child the day before. It is
55 hard for persons to look at this type of video dispassionately. I know that obviously the jury is told to do so, but it is ultimately a human exercise, and those matters that were obliquely referred to, to the jury panel here today, the type of prejudices that might flow on from

seeing the particular video--

5 HIS HONOUR: Yes, I will just hear from the Crown on that. What do you say about late notice, Mr Crown?

CROWN PROSECUTOR: Your Honour, the defence has known about the presence of the video for a long time--

10 HIS HONOUR: No, come to the point made by Mr Zahra, please.

15 CROWN PROSECUTOR: They haven't known about Dr Cala's late statement, as indeed we didn't. We submit that it is a very simple, straightforward proposition that Dr Cala advances in his statement. It is very easily able to be understood and digested by counsel. The matters that my learned friend has raised in argument are really matters of weight rather than admissibility.

20 HIS HONOUR: Well, weight comes into my judgment about whether it should come into evidence.

25 CROWN PROSECUTOR: Well, in relation to whether or not there are people who might die of myocarditis without signs of it, in fact the matter is that this doctor, who is the head of the forensic pathologists in South Australia, is of the view that that is one of the factors that assists him, together with actually having viewed the heart and heart lining of this child, that assists him to come to the conclusion that although she had myocarditis it was very mild and it was not such that, in his opinion, it caused her death. It is one of the factors; it is not the only factor.

35 I expect that he would properly concede that there are some people who die of myocarditis without warning, just as he would also say that there are some people who die in car accidents who are found to have myocarditis that hasn't in any way affected them. But we would submit that it is one of the factors which he is entitled to take into account in expressing his view and the jury is entitled to know what that material is and the only way that that can be properly conveyed to them is by seeing the video themselves and, so far as prejudice is concerned, we would submit that it is one of those areas where your Honour can give very clear directions to the jury as to what would be an impermissible effect of the video and the only permitted use that they are able to make of it.

40
45
50 So, we would submit that in the weighing exercise your Honour would take into account that it is an area where your Honour could give adequate warnings to the jury.

55 FOR JUDGMENT ON APPLICATION TO OPEN ON THE LATE SERVED STATEMENT OF DR CALA SEE SEPARATE TRANSCRIPT

HIS HONOUR: Now, Mr Zahra, what do you say about the record of interview? I think the Crown used the

expression "attachment theory". I take it that the Crown is no longer saying that it is probable that because of her knowledge of, and perhaps relations with her father, and his history, she might have had difficulty in bonding with any of these children. What the Crown is saying is that the answers recorded in the passage of the record of interview explain what the accused meant in the diary entry upon which they are based. I don't suggest that that is all the Crown says about it, but let us start from there.

ZAHRA: Your Honour, again, as I foreshadowed this morning, we certainly didn't come prepared today to argue this particular point. However, I can assist the court, as far as is possible, by reminding myself of the content of this particular section of the record of interview.

Certainly, my reading of the series of questions and answers would suggest that there are probably a number of messages that one can glean from these paragraphs. There are, no doubt, references by the accused that, in a sense, when she was referring to her father, she was referring to him in his capacity - she describes him as a loser.

There is, in fact, a predominant purpose for the Crown, who wants to lead this evidence, and that is to suggest that what the accused is saying is that she recognises that there is in fact a link between the type of behaviour of the father and her behaviour; in other words, that the father has shown a propensity to lose control and be violent in a domestic setting, and I presume it will be suggested by the Crown to the jury that they can in fact say that what she is referring to in the record of interview is an acceptance that she is also a person of that kind.

Now, the type of behaviour of the father is in fact extreme behaviour resulting in, no doubt, a violent killing of the mother.

The other aspect of the reference is his behaviour towards the mother. For example, at question 645, the last line at page 177, "He was supposed to be a bit heavy-handed with my mother and she wasn't much better. She was a drunk and a gambler", and it goes on.

Your Honour, this poses a question of prejudice. It is difficult to frame the words which would properly indicate the potential for prejudice of the fact that the jury would know that the father had murdered the mother in a violent way and in fact was violent to the mother during the course of the relationship.

To suggest that there is any direction that the jury can be given to exclude that very factor, without emphasising it, is impossible to determine at this stage.

The prejudice is of the most extreme order and the danger

is that the jury might draw inferences that the accused is also a person of generally violent disposition in a domestic relationship. That may be one inference that can be drawn from the answers in the record of interview, but it is, in fact, not the only inference. It may be that what the accused is doing here is no more than suggesting that because of what the father has done he is a loser and in the same way that, because obviously he didn't achieve and in fact his life had ended in the way that it did, that I might also be considered to be a loser.

As to what the extremities of the meaning of that particular word is, is again difficult to understand, but one, on some reflection, sees that there are a number of interpretations that can be made as to the use of that particular term. But certainly the Crown is wishing to use these particular passages to suggest that, in a sense, the accused is making an admission that her behaviour towards the children is in fact violent in the circumstances of loss of control; that she is violent and a murderous person.

That is what the Crown in fact is hoping to argue, that because of this person, in fact it is tantamount to a position that she is in fact a murderous person; that because my father is murderous, that I am also murderous.

Directions cannot cure that potential for extreme prejudice.

As I have indicated, when one looks at the use of the word "loser" and the other expressions in the answers, it is difficult to suggest that it carries such significant weight as to amount to an admission of confession to murder. It goes nowhere near that conclusion.

HIS HONOUR: Thank you, Mr Zahra.

CROWN PROSECUTOR: There is just one further issue, your Honour. This evidence has been included in one of our tendency notices, so that we have put the defence on notice, early in the piece, back in October last year, I think, that we are relying on this as, in effect, tendency type evidence. Strictly speaking, I don't think it is tendency evidence.

HIS HONOUR: It doesn't sound to me like tendency evidence,.

CROWN PROSECUTOR: But we say it is really in the nature of an admission, rather than being tendency evidence.

HIS HONOUR: Well, it is an oblique reference.

CROWN PROSECUTOR: We would submit that, your Honour.

HIS HONOUR: I shall defer giving reasons for the moment because I want to get on with the trial, but I do not

propose to admit evidence included in questions 637 to 659 inclusive of the record of interview. Whether that will lead to the consequential deletion of evidence I do not know, and I expect the Crown to follow that up.

5

CROWN PROSECUTOR: Might I enquire whether I ought not to open on that entry in the diary at all?

10 HIS HONOUR: I don't know what the other evidence in the case is, Mr Crown. I can't answer that question for you.

15 ZAHRA: Well, I cannot see the utility of opening on a phrase "obviously I'm my father's daughter". How does that assist the jury for the general purposes of the opening?

20 HIS HONOUR: We are speaking about the opening, not the question, for the moment, whether that passage from the diary note should go into evidence.

CROWN PROSECUTOR: I am inclined to leave it out of the opening.

25 HIS HONOUR: I think that is a sensible approach, Mr Crown.

CROWN PROSECUTOR: May we have the jury, please, your Honour?

30 HIS HONOUR: Mr Crown, may I just ask how long you are likely to be in your opening?

CROWN PROSECUTOR: I think about an hour and a half.

35 ZAHRA: I can indicate about half an hour, your Honour.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Thank you for your patience, ladies and gentlemen. I have dealt with the matters that counsel
5 wanted to bring to my attention and we can get on with the trial.

Yes, Mr Crown?

10 CROWN PROSECUTOR: Ladies and gentlemen, the Crown, representing the community of New South Wales, brings these charges against the accused Kathleen Folbigg. And because the Crown brings the charges, it is the Crown that has the burden of proving those charges. The accused
15 doesn't have to prove anything.

The standard of proof that is required before you can convict anybody of any criminal charge in New South Wales is proof beyond a reasonable doubt, so, at the end of this
20 trial, at the end of all of the evidence, it will be necessary for me, as the Crown Prosecutor, to be able to say to you: The Crown has proven each of those charges beyond a reasonable doubt.

25 Now, what I would like to do, during the course of this opening address, is, firstly, to give you an overview of what the charges are that Kathleen Folbigg is facing in this trial and what the elements are of each of those charges, because what the Crown has to prove beyond a
30 reasonable doubt are the elements of each of the charges. And, secondly, I would like to give you an overview of the evidence so that, as the evidence unfolds, you will know, in advance, what the significance of each individual part is.

35 It is a little bit like, what you are required to do in this trial, what you do in a jigsaw puzzle with each piece of evidence being a piece of the puzzle, and what I hope to do now is to show you the complete picture, which is on
40 the box of the puzzle, so that, hopefully, you will be assisted to know where each individual piece goes.

Your Honour, I wonder if the jurors might be provided with a pen and paper.

45 HIS HONOUR: Yes, they have been provided.

CROWN PROSECUTOR: Thank you.

50 With my learned friend's consent, I tender a copy of the indictment for each juror.

ZAHRA: I have no objection.

55 CROWN PROSECUTOR: It doesn't have my signature or the date on it; otherwise, it is the same.

HIS HONOUR: The copy of the indictment will not be marked

as an exhibit. It is merely a copy for each juror of the official record that founds this trial.

5 CROWN PROSECUTOR: Now, ladies and gentlemen, you will see from that document, which is the indictment as we lawyers call it; that was the document that I handed up to his Honour at the very beginning of the trial. It is the document that contains the charges that the accused is facing. You will see in there that charges 1, 3, 4 and 5
10 are murder charges. Charge 2 is a charge of grievous bodily harm with intent to do grievous bodily harm.

15 Now, I will explain to you a little later on why there is that additional charge of grievous bodily harm, charge number 2, in relation to the second child, Patrick.

20 There are murder charges in relation to each of the four children. Now, basically, the Crown alleges that the accused murdered each of her four baby children over the course of about ten years, one at a time. She only had one child at a time. It is alleged that she murdered each of them. It is also alleged, in relation to Patrick, and this is charge number 2, that she attempted to smother the child, but that the child was revived by ambulance
25 officers in hospital and didn't die on that occasion, but died some months later.

30 What I would like to do now is to tell you what the elements are of the two types of charges that are in the indictment; the charge of murder and the charge of grievous bodily harm with intent.

35 Firstly, the charge of murder, in order to constitute the charge of murder, the elements are as follows: Firstly, there must be a death. I am sure that won't surprise you, and in this case I don't think there will be any dispute that there was a death of the relevant child.

40 Secondly, the death must be caused by an act of the accused. Fairly straightforward.

45 Thirdly, there is a mental element that is required for the Crown to prove in the mind of the accused. That mental element is one of three different categories: Firstly, that she had an intent to kill; secondly, that she had an intent to do grievous bodily harm - and I will come back to what that means in a moment - and thirdly, that she acted with reckless indifference to human life.

50 Now, any one of those mental states is sufficient in order to constitute murder. The Crown only has to satisfy you of one of those for that element to be proven. Intent to kill is very clear.

55 In intent to do grievous bodily harm, grievous bodily harm just means really serious bodily injury. It doesn't have to be permanent injury, it doesn't have to result in any bleeding or anything like that. It just means really

serious bodily injury. To deliberately render someone unconscious can amount to grievous bodily harm.

5 So far as reckless indifference to human life is
concerned, what that means is that the accused engaged in
a course of conduct realising or foreseeing the
probability that the child may well die. In other words,
even though the accused might not have wanted the child to
die, if the accused foresaw that the child may well die,
10 that is sufficient to prove the mental element required
for murder.

All right, let me be a little bit more specific. Those
are the three aspects of the mental element of murder.
15 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
20 smothering them knowing that they may well die. And any
one of those three would be sufficient to prove the mental
aspect of murder.

Now, so far as any criminal charge is concerned, the Crown
25 does not have to prove motive, but in this case, although
we don't have to prove motive, the Crown has a number of
possible scenarios that it advances to try and explain why
this accused may have smothered her children.

30 It is not something that we are required to prove; it is
not something that you are required to be satisfied of,
but it is an explanation which we advance in the evidence
for your consideration.

35 The Crown case is that this accused had the following
possible motives. The accused had a very low threshold
for stress, and she was also deeply resentful at the
intrusions that her children made on her own life and, in
particular, on her sleep, her ability to go to the gym,
40 and her ability to socialise, including going out dancing.

She was constantly tired, resentful against her husband,
Craig, for not providing her with what she considered to
be adequate help, and she was constantly, we say,
45 constantly preoccupied, to an exaggerated degree, with her
weight gain due, in part, to the fact that she couldn't
get to the gym as much as she liked because of her
children.

50 The Crown case is that she either intended to kill them
during a flash of anger, resentment and hatred against her
children, or, alternatively, that she deliberately sought
to render them unconscious in an attempt to put them to
sleep, either so that she could get to sleep herself or
55 that she could have some time to herself.

Now, it might well be that at the end of the case you
can't say which of those it is and I say again it is not

necessary for the Crown to prove to you what her motivation was because motivation is something that is uniquely within a person's mind and sometimes it is very difficult to get right into a person's mind.

5

All that the Crown needs to be able to prove is that either she intended to kill or that she intended to do grievous bodily harm or that, at the time of smothering her children, she acted with reckless indifference to human life.

10

So those, ladies and gentlemen, are the elements of charges 1, 3, 4 and 5, charges of murder.

15

We then come to charge number 2, the charge of inflicting grievous bodily harm on Patrick Folbigg, the second born child, with intend to do grievous bodily harm. I should say that the charges in the indictment are in date order of the alleged event.

20

The Crown alleges that, on one occasion in October of 1990, the accused attempted to smother her second born child, Patrick Folbigg. However, instead of dying, he was resuscitated, initially by ambulance officers when he was found by them in a moribund condition, and he was further revived when the ambulance brought Patrick to the local hospital.

25

As a result of what the medical people call anoxia, which means lack of oxygen, what we call smothering, as a result of anoxia, he suffered extremely serious brain damage and, flowing from that brain damage, he was rendered blind and suffered from very serious epilepsy for the rest of his life before he died some months later.

30

The elements of the second charge are as follows: Firstly, there must be grievous bodily harm which, again, means really serious bodily injury. I don't think that there would be any dispute that to render someone blind and to cause somebody brain damage, to the extent that they suffer from epilepsy, amounts to really serious bodily injury.

35

The second element is that there must be an intent to do grievous bodily harm by the accused. In this case we say there was an intent at least to render the child unconscious, if not more than that.

40

Ladies and gentlemen, that is all that I would like to say to you about the law in this matter and the charges that are before you.

45

Might I now, with Mr Zahra's consent, give to you a chart which contains a very basic chronology of the births and deaths, and the episode of Patrick's near miss as well. I have one for your Honour.

50

HIS HONOUR: Thank you. You have seen this, Mr Zahra?

ZAHRA: Yes, I have, your Honour.

HIS HONOUR: The chronology will be exhibit A.

5 EXHIBIT #A CHRONOLOGY TENDERED, ADMITTED WITHOUT OBJECTION

10 CROWN PROSECUTOR: Ladies and gentlemen, you will see from that chronology, you have got the four children in the left-hand column in the order in which they were born and died. You have got their date of birth. Under "event", there is only a reference to what we loosely call "the near miss" of Patrick's; that is to use a neutral term. You might just like to write underneath that that he was four and a half months old at the time.

15 Then, in the fourth column, there is the date of the child's death. You might like to write in that Caleb Folbigg was 19 days old, Patrick Folbigg was eight and a half months old, Sarah Folbigg was ten and a half months old and Laura Folbigg was 19 months old.

20 The facts which the Crown anticipates will emerge during the course of the evidence are as follows: Kathleen, or Kathy as she was known to her friends and relatives, Kathy Folbigg was married to her husband Craig in 1987. They had known each other for some years and they had lived together prior to being married and, in essence, Kathy and Craig were married and living together right throughout the relevant decade of the birth and death of each of these children.

25 They originally moved in together, to an address in Mayfield, which is a suburb in Newcastle. At the time Kathy was 19, and they were married when she was 20 and he was 25.

30 Their first-born child, Caleb, was born on 1 February 1989 at the Western Suburbs Maternity Hospital at Waratah in Newcastle. He was perfectly well when he was born and they took him home to their house at Mayfield, and during that time the only problem that he had was that he seemed to have difficulty drinking from a bottle and breathing at the same time, which is a problem that a lot of babies have when they are very young. It was nothing unusual. Kathy took him to the local doctor. He suggested some simple remedy for that, and he lived a basically unremarkable existence for the 19 days of his life.

35 HIS HONOUR: Mr Crown, I will leave it up to you when you want to pause. It is a little after 1 already.

CROWN PROSECUTOR: Your Honour, perhaps that would be a suitable time.

40 HIS HONOUR: Very well then. Ladies and gentlemen, we will take the luncheon adjournment.

LUNCHEON ADJOURNMENT

RESUMPTION

CROWN PROSECUTOR: Ladies and gentlemen, I was telling you about the 19 days of Caleb Folbigg's life. I mentioned
5 that during those 19 days it was noticed, particularly by his father, that he was fairly noisy in his breathing during the time that he was feeding and, as a result of concerns expressed by Craig Folbigg, Kathleen Folbigg took Caleb to see a paediatrician. I think I said it was a GP.
10 In fact, it was a paediatrician by the name of Dr Springthorpe. Dr Springthorpe diagnosed a condition which is known as lazy larynx to lay people, but the medical terminology is inspiratory stridor. It is a very common condition; it is a condition which usually resolves
15 spontaneously with time. You will hear medical evidence that it had nothing to do with his death.

At about 8pm on Sunday, 19 February, Kathleen Folbigg put Caleb to bed in a cot in the sunroom of their home. That
20 night, at about 10 or 10.30, he was seen to be sleeping peacefully. At about 1am the following morning, by now we are into 20 February, Kathleen said later on that she had fed Caleb and placed him back in his bassinet shortly afterwards. I should tell you this: Craig Folbigg was a
25 particularly heavy sleeper. He could have World War III happening almost next to him and he would just snore through it. It would take the most incredible noise to wake him up.

30 Anyhow, at about 2.50am early on the morning of 20 February Craig was awoken by the screams of his wife Kathleen. He ran into the sunroom where he saw Kathleen standing over Caleb who was still in his cot. She was holding her hands on her forehead screaming, "my baby,
35 something is wrong with my baby". Craig noticed that Caleb was blue around his mouth and lips, that he was not breathing. He also noticed that Caleb was still warm to the touch.

40 Craig immediately attempted resuscitation of Caleb and whilst he did that Kathleen telephoned the emergency services. The ambulance arrived shortly thereafter. They made attempts to revive Caleb, but those attempts were
45 unsuccessful. He was taken to the Royal Newcastle Hospital where he was formally pronounced deceased.

A post-mortem examination was conducted by a pathologist by the name of Dr Cummings. Unfortunately, Dr Cummings is
50 himself now deceased so you will only have in evidence the written report that he produced upon the post-mortem examination.

Basically Dr Cummings found no identifiable cause of death. Because he could find no identifiable cause of
55 death, what he wrote down in his report was that this was a SIDS death. SIDS, of course, is an acronym for sudden infant death syndrome.

I would now like to explain to you a little bit about SIDS. SIDS, or cot death as it is sometimes called, is a mysterious illness or combination of illnesses which causes the sudden and unexpected death of an otherwise healthy infant during sleep. It occurs predominantly in babies between the ages of two and six months, with most of them being within the ages of two months to four months. It is very rare after six months and absolutely unknown after 12.

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.

It is, thankfully, a rare condition, but SIDS is basically what is known as a diagnosis of exclusion. That is, where you have a baby that suddenly and unexpectedly dies that otherwise has been well and where the pathologist can find no cause of death, and where that baby is within the appropriate age range, in the absence of any other suspicions, such as child abuse or smothering or some other cause of death like a genetic defect, in the absence of any other cause of death, a pathologist will often certify SIDS as the cause of death. So SIDS equals undetermined cause of death. That is what it means.

The incidence of SIDS is thankfully rare. The incidence of two SIDS deaths in the one family is extremely rare.

There are some factors which have been found by medical researchers to correlate slightly with the incidence of SIDS. These are obviously not the causes of SIDS. They are factors which correlate; for instance, the age of the mother. Surprisingly it seems that the younger the mother the higher the incidence of SIDS. Smoking, smoking seems to be a factor which affects the incidence of SIDS. That doesn't mean that there are thousands of parents who smoke in our community who have children who do not die of SIDS, but there seems to be a slight correlation.

Socioeconomic status is also a factor. That does not mean that poverty causes SIDS, but the medical researchers have found that there is this slight correlation between socioeconomic status and the incidence of SIDS. It is slightly higher where these factors are present and where there are a number of factors present the factors are higher still or the incidence is higher still.

There are differences in terms of different countries. Incidence of SIDS is different in different countries.

SIDS has become much rarer since about 1990, 1991, when it was discovered that placing children face down in their beds made them at a higher risk of SIDS.

There was a campaign which was launched which was known in some countries as 'The Back to Sleep Campaign' which

started in Australia in 1990 and was completely adopted throughout Australia by 1991 which was this Back to Sleep Campaign, which meant putting children on their backs or their sides rather than asleep prone on their fronts.
5 That of itself lowers the incidence of SIDS greatly.

Although the cause or causes of SIDS have still not been discovered, there has been extensive medical research over decades to try and find out what is the cause of SIDS. To
10 date it has been unsuccessful, but it has shown a number of things. Firstly, it is not a congenital disease that finds clusters in families.

Now, there has been a lot of testing for genetic diseases to see if they can be linked with SIDS over the years.
15 Thus far it has not been shown to be a genetic disease.

There is still, even now, testing being done in a variety of areas to try and determine what is the cause of SIDS.
20 There must have been hundreds of theories that have been advanced as possible hypotheses over the years and have been discarded over the years.

As I said, SIDS is not a single identifiable illness or disease; it is a diagnosis of exclusion. When a baby
25 between the ages of two and six months dies and an autopsy fails to reveal any other cause of death, the pathologist who does the autopsy will often call it SIDS. It does not rule out homicide because, as I said, SIDS equals death
30 from undetermined causes.

Medical experts will tell you that SIDS is defined medically as follows: it is the death of an otherwise
35 healthy baby of six months or under who has died during sleep, where an autopsy has failed to disclose any other cause of death, and where an extensive investigation of the baby's life history and the scene of death has failed to establish another cause of death such as child abuse,
40 baby shaking, suffocation, accidental suffocation or the like.

Because SIDS is not a genetic or inherited condition, the risk of SIDS in a family that has already had one SIDS
45 death is pretty close to the incidence in a family that has not had any deaths. In other words, a family that has had one SIDS death, a subsequent child is not much more likely to develop or to die from SIDS as a child in any other family that has not had a SIDS death.

That is, of course, subject to this: where you have a first SIDS death in a family that has those factors that I
50 have mentioned that raise the incidence of SIDS, those same factors are going to be present for subsequent children. So a family that has raised factors for one
55 child may have raised factors and a raised incidence for subsequent children.

Unfortunately, on autopsy, SIDS and deliberate smothering

can often appear exactly the same. It is extremely easy for an adult to deliberately smother a young child, a baby, and to leave no trace of any external injury whatsoever, such as bruising. This is especially so if a pillow or other soft object is used, or even a hand.

The internal findings on a post-mortem examination of a smothered baby and a SIDS baby can be identical and, in particular, what happens when a young baby or, in fact, any person who suffers from total lack of oxygen for whatever reason, is that the lungs of the baby are desperately trying to stand. The chest is desperately trying to suck in air by negative pressure. Because of that if there is some sort of obstruction over the air intake of the child or in a SIDS death it is the same; you can sometimes get the little blood vessels inside the lungs bursting and bleeding into the lungs and these are called petechia. They are the little blood vessels and they burst due to the incredible effort at expansion of the lungs and you get petechia that bleed in the lungs both with SIDS and smothering. You don't always get it with SIDS; you don't always get it with smothering.

The Crown case is that when confronted by an unexplained death of a young baby, if a pathologist cannot find another cause of the death, or cannot find any illness that might explain the death, that pathologist will often diagnose SIDS.

The Crown case is also that, if a doctor who is conducting a post-mortem examination cannot find any actual cause of death, if there is even a slight abnormality, a slight enlargement of one of the organs which the doctor can find on a post-mortem, that the doctor may refer to that as a possible cause of death in the absence of some other explanation.

In reality, all of these cases that I have just described to you are causes where the actual cause of death is unknown or undetermined. The Crown case is that the post-mortem examinations of all four Folbigg children failed to disclose any actual, real, demonstrable, cause of death.

The first of those was the death of Caleb. The doctor was unable to find any cause of death, any cause for the sudden cessation of breathing of this child and, in the absence of any other explanation, wrote down SIDS as the cause of death on the post-mortem report.

Now, I need to tell you a little bit more about SIDS. About 20 or 30 years ago a theory arose that SIDS may have been related to apnoea. Apnoea is a usually temporary cessation of breathing during sleep. A lot of adults, particularly middle-aged adult males, have apnoea. They stop breathing during sleep and then start breathing again. It is very common for babies to have mild apnoea. Babies will often stop breathing for short periods of up

to fifteen seconds during sleep. It is perfectly normal. It is not a sign of any illness.

5 About 20 to 30 years ago a theory arose that perhaps SIDS was related to apnoea. Extensive medical research since has shown that mild apnoea is perfectly normal in young babies and that SIDS and apnoea are not related. In other words, the babies that have this mild apnoea have exactly the same incidence of SIDS death as babies that have no
10 apnoea.

Sarah Folbigg, the third child of Kathleen and Craig, was found to have this typical mild apnoea of the kind one finds in young babies. Her medical specialists were
15 completely unconcerned about it and it resolved as she got a little older.

However, during the 70s and early 80s, when the apnoea theory was being propelled by some US doctors, it became
20 popular for doctors to place babies that were thought to be at higher risk of SIDS than the general community of babies on what were known as apnoea monitors.

Now, the first apnoea monitors were used just in
25 hospitals. Then, when they became more widely used, they were given by hospitals to parents of children who were considered to be at possible risk of SIDS death to take home with them. Basically the apnoea monitor was a monitor that was attached to the child or that the child lay on
30 that would sound an alarm if the child stopped breathing. The first type, as I understand it, was a type that the child just lay on. If the child stopped the movement of breathing the alarm would go off. Those types of apnoea monitors were subject to constant false alarms. It was
35 extremely nerve-racking for the parents because these alarms would go off all the time. The parents would be woken, go rushing in and find the child was perfectly all right. The stress of it was just extreme.

40 The second category was a category where there were electrical leads put on the child's chest, attached to a monitor. Again, if the child stopped breathing and that was picked up by the leads, an alarm would sound and the parents would be alerted and come and see if the child was
45 all right. These also were subject to a lot of false alarms although not as many as the first category.

In spite of all of the evidence that SIDS was not related to apnoea and that the monitors did not lower the
50 incidence of SIDS, doctors throughout the world, in the absence of any other measure that they could effectively take to protect children, used to allocate these apnoea monitors to children that they considered at risk. One such family was the Folbigg family. Their third and
55 fourth children, Sarah and Laura, were placed on monitors by paediatricians who assessed SIDS. Sarah, child 3, was placed on one of the older type monitors and Laura, child 4, was placed on a newer type monitor, I think known as a

coronometrics monitor.

5 As I said Sarah was found to have this typical child
apnoea early in her life. I will tell you more about
Sarah's life and death later on.

10 Laura, of course, died at 19 months of age, which is well
over the age of SIDS death. More about that later. More
also later about Kathleen Folbigg's attitude towards
Laura's monitor.

15 The reason why Sarah and Laura were placed on monitors was
because there had been two previous deaths of children in
the family. In the absence of anything else that the
doctors could do, they allocated these monitors to the
third and fourth children in order to try and do
something, if something could be done, to prevent any
similar deaths.

20 There is another misconception about SIDS that I would
like to tell you about. That is the misconception that
there are children who have near miss SIDS events. By
that I mean that they are discovered unconscious, but
25 still alive in the process that leads to a SIDS death,
whatever that might be.

30 Now, we do not know what it is that causes a SIDS death.
For that reason it is not known how long it takes a baby
to die of SIDS because we do not know what it is. But
what we do know is that if a baby just stops breathing,
death occurs in about four minutes. The chances of a
parent or carer just happening to come across a child
during that crucial four minutes and to realise that the
child is not breathing just in that four-minute period is
35 so slight as to be a very rare occurrence.

40 Now, these incidents of what loosely we might call a
near-miss are known by another term in the medical
communities. The term is acute life threatening event or
ALTE. It is generally known as an ALTE, an acute life
threatening event. The medical experts will tell you that
ALTEs are, in fact - genuine ALTEs - are, in fact,
extremely rare, putting aside induced asphyxia, that is,
45 suffocation, deliberate suffocation.

50 The reason for that is, as I have said, the chance of
coming upon the child within that crucial four-minute
period realising that the child is not breathing is very
slight.

55 I should also tell you that if a baby is smothered, either
accidentally or deliberately, it takes about two minutes
for the baby to become unconscious, as I said earlier,
about four minutes for death to occur. The death is
caused by loss of oxygen to the brain.

In between the two the loss of oxygen to the brain can
cause irreversible brain damage. That is exactly what is

5 alleged to have happened to Patrick Folbigg, the second child. He had an ALTE, but was revived so that he did not die. He suffered a loss of oxygen for long enough to cause irreversible brain damage, but not long enough to cause death.

10 We also know that a baby of any age which is being smothered will fight for its life. Even a very young baby will struggle, but because of its age its movements will be quite uncoordinated. A baby of 9 months, on the other hand, will have much more coordination and a child of 19 months will fight with even more determination and coordination again.

15 That, ladies and gentlemen, is what I would like to tell you about SIDS.

20 In relation to Caleb's death, his larynx was considered by Dr Cummings to be normal. There were no external signs of injury. There were some changes to the blood cells in his lungs. I anticipate that you will hear evidence that the findings were consistent with both SIDS and smothering.

25 We now come to the second child, Patrick Folbigg. Kathleen and Craig's second child, Patrick, was born on 3 June 1990. You have it on your chronology. He was born at the Western Suburbs Hospital in Newcastle. He was born a healthy child and was taken home to their Mayfield house and he slept in a cot in a different room.

30 About 12 days after his birth a sleep study was done on him and it was found to be perfectly normal.

35 On 17 October 1990, when he was four-months old, Kathleen put him to sleep in his cot at about 8.30 at night. At about 10.30 he was seen to be sleeping peacefully. At about 3.30am the following morning, at this stage it is 18 October 1990, Craig was again awoken in his bed by the screams of his wife. He rushed into Patrick's room and saw Kathleen standing over Patrick who was lying in his cot. The railing was still in the up position. He looked pale. His arms and legs were limp. Craig picked him up and thought he detected some laboured breathing. He commenced resuscitation which he continued to do until the ambulance officers arrived. The ambulance officers then gave Patrick oxygen and he responded almost immediately to that.

45 The ambulance officers took him to the Mater Hospital at Newcastle and he was treated for an hypoxic episode. Hypoxic means low oxygen. Anoxic means no oxygen.

55 He was treated for an hypoxic episode and he was treated further at the Mater Hospital. He regained consciousness a number of hours after arriving at the hospital. Numerous tests were done at the hospital to try to determine what it was that caused the cessation of breathing and no cause was able to be found for it.

5 On the same day an EEG examination was done. An EEG is a test of the brain wave patterns and it was found to be normal. No signs of any airways obstruction, no signs of any disease, no abnormal blood tests.

10 The conclusion that they reached at the hospital was that he had had "an acute asphyxiating event", "an acute asphyxiating event".

15 The Crown case is that this acute asphyxiating event, or ALTE, was caused by an attempted suffocation of him by his mother, Kathleen Folbigg. That is the second charge in the indictment.

20 The lack of oxygen to his brain caused brain damage and a specialist paediatric neurologist will explain to you that such brain damage causes the brain tissue to die. When you get the brain tissue dying, after several days you can get swelling around the dead brain tissue. That swelling, two days later, caused Patrick to have a severe epileptic seizure.

25 A second EEG examination on 23 October, that is, a week after the acute asphyxiating event, showed some abnormality. An EEG examination two weeks after that showed a significant loss of brain matter. The specialist, I anticipate, will explain to you that it was the swelling caused by the death of brain tissue which, over time, caused epilepsy and other brain damage to occur, further brain damage to occur.

35 No cause could be found for the seizures, including any infection of the brain, or any other cause, apart from the hypoxic episode back on 18 October, that is, apart from the acute asphyxiating event that had caused the ambulance to come in the first place.

40 It was later determined that Patrick was blind from the loss of oxygen to his brain and he continued to have epileptic seizures, which were treated with medication.

45 I would now like to take you to 13 February 1991. Of course, the ALTE was when he was four and a half months. His death occurred four months later. On the morning of Wednesday, 13 February 1991, Craig left for work at about 7.30 and Kathleen was caring for Patrick at their home.

50 At about 10am she telephoned her husband at work and screamed to him on the phone, "It's happened again". Craig rushed home, but before he could get there his sister Kaz had arrived there. She had also been rung by Kathleen. She got there just before Craig.

55 When Kaz, Kaz being Craig's sister, arrived she wanted to go into Patrick's room to render assistance to him, but Kathleen told her not to go into the bedroom. When Craig arrived he saw Patrick lying on his back in his cot.

Again the side rail of the cot was in the up position.

5 Craig lifted Patrick up, took him into the lounge room, placed him on his back on the floor and attempted resuscitation of him, but without success.

10 When the ambulance arrived Patrick had blue colouring around his mouth and lips. He was still warm to the touch.

15 He was taken to the Mater Hospital where he was seen by an emergency medicine specialist and by a paediatric neurologist, but within a short time he was formally pronounced deceased.

20 The emergency doctor considered that Patrick had suffered a cardiac arrest prior to his arrival in hospital and he was unable to state what had caused the cardiac arrest. The paediatric neurologist noted that Patrick's appearance was consistent with a patient who had suffered asphyxiation.

25 In the absence of any other explanation, this doctor felt that Patrick could have experienced an epileptic fit which had resulted in the obstruction of his airways. A doctor at the hospital, Dr Wilkinson, issued a death certificate, stating that the cause of death was the obstruction of the airways due to an epileptic fit, but that was a fair assumption on the part of the doctor.

30 Two pathologists at the hospital conducted the post-mortem examination and one of them will give evidence before you. They concluded that Patrick must have died from a cardiac arrest due to a seizure from unknown causes. There were
35 no abnormalities that they found. There is no actual cause of death that they could specifically locate and they assumed that he had had an epileptic fit which caused a cardiac arrest.

40 Kathleen Folbigg quickly recovered from the death of Patrick and she very soon got employment. She found employment with BabyCo at Kotara as a sales assistant where she had to deal with babies and pregnant women.

45 After a time Kathleen told Craig that she wanted to have another baby. Craig expressed considerable reluctance. Kathy then put the hard word on him and said unless he was prepared for them to have another baby she would leave him. I might add that during all of this time Craig had
50 not the slightest suspicion that his wife had anything to do with the deaths of the children. He was very much in love with Kathy. One would almost conclude that he was besotted by her.

55 On being threatened that she would leave him unless he agreed to them having another baby, he reluctantly agreed and, by February of 1992, Kathy was pregnant with their third child.

Their third child, Sarah, was born on 14 October 1992. She was born at the John Hunter Hospital at Newcastle. She also was born, like the others, in perfect health.

5

When she was aged three weeks, an extensive sleep study was done on her and it was found to be perfectly normal.

10 By this stage Craig and Kathy had moved to a new house in a suburb of Newcastle called Thornton. For the first two or three months of her life Sarah slept in a cot next to her parents' bed. She then moved into a cot in her own bedroom which was adjacent to the main bedroom.

15 The SIDS association had supplied Kathleen and Craig with an apnoea monitor of the first kind that I have mentioned to you. This alarm was frequently going off with false alarms. On every occasion that the alarm went off she was found to be breathing properly and asleep. Kathy often
20 complained about the use of the apnoea monitor.

When Sarah was about two and a half months old Kathy went back to work at BabyCo. Kathy was constantly wanting to hand the responsibility for her child over to someone else
25 in order to pursue her gym activities and her social activities and there were arguments between Kathy and Craig about that.

30 In August of 1993, when Sarah was 10-months old, she was moved into a proper bed back in her parents' bedroom.

The apnoea monitor ceased to be used either the day before she died or two days before she died.

35 At about 8pm on 29 August 1993, Kathleen attempted to put Sarah to bed. Sarah at the time was suffering from a runny nose and she did not want to go to sleep. Kathleen became very angry with Sarah and Craig told Kathy to settle down. Kathy then angrily approached Craig carrying Sarah and virtually threw Sarah on to his lap from about
40 three paces away and she then stormed off and went to bed.

Craig nursed Sarah for about half an hour or an hour and eventually he put her to bed at about 10.30 or 11.

45

At about 1.10am that night, that is, early the next morning - by this stage it is 30 August 1993 - Craig woke up. He could see the time from a digital clock that was on his bedhead. He looked around the room. He noticed
50 that Kathy was not in bed with him. He noticed that Sarah was not in her bed which was in the same room. He could see under the door that there was the light on in the next room. What Kathy would do was when she was feeding the children she would take the children out of the bedroom if
55 they were in the same bedroom as Craig and feed them in another room. I might add she was not breastfeeding. She bottle-fed her children.

At 1.10 Craig could see the light in the next room and he assumed that Kathleen was attending to Sarah. He then went back to sleep.

5 About 20 minutes later, at 1.30am, Craig was awoken to the now all too familiar screams of Kathleen. She was standing in the doorway. Sarah was lying in her bed apparently deceased. She was still warm to the touch.

10 Craig commenced resuscitation of her until ambulance officers arrived. She was taken to the Maitland Hospital and she was found to be deceased.

15 When questioned much later by the police, Kathleen stated that she had first awoken at about 1.30, gone to the toilet and, upon returning from the toilet to her bed, she was able to tell that Sarah was not breathing. She made no mention of having been up with Sarah earlier that night at about 1 o'clock or shortly after that.

20 A post-mortem examination was conducted by Professor Hilton. Professor Hilton is the head of the New South Wales Institute of Forensic Medicine, which is basically what we commonly know as the morgue at Glebe. He found a
25 1.5 centimetre scratch on Sarah's upper arm and two tiny punctate abrasions, which are like prick marks, one below the lower lip and one near the midline of the chin. The lungs had collapsed. There were petechial haemorrhages. There was petechial bleeding in the lungs of the petechia.
30 He found that the uvula, the dangly bit at the back of the mouth, appeared displaced, but he only discovered that when he dissected the back of her throat and removed it from the body and examined it and he said it could easily have become displaced during the dissection process or the
35 movement of the part that he had dissected. He considered that this was not the likely cause of death. He found various other features which he will describe to you.

40 Dr Hilton, in the absence of any other explanation, found the cause of death to be SIDS. In other words, he was not able to find any cause of death. I anticipate that he will tell you, as will the doctors who conducted all the post-mortems, that the cause of death, or that the
45 findings on post-mortem, were consistent with the children having been deliberately asphyxiated.

I now come to the fourth child, Laura Folbigg. You will notice from the chronology that I have given you that
50 Laura was in fact born some years after Sarah's death. In fact, she was born about four years later.

55 During that time, Kathleen and Craig had numerous marital difficulties and they had a three months separation, but ultimately they decided to stay together. It was during that period that they decided to move away from Newcastle and they started to live in Singleton.

In 1996 Kathleen said that she would like to have another

5 baby. Craig was aghast at the idea of running the risk of
having another child die. He had been totally devastated
by the deaths and he was not prepared to run the risk of
another one. However, Kathleen worked on him and
eventually prevailed upon him, only on the condition that
he insisted on, that they have counselling, genetic
counselling, from somebody who could provide them with
advice to try and lower, or even do away with, the risk of
losing another baby.

10 Some weeks after they reached this agreement, Craig asked
Kathleen if she had gone to make an appointment with some
suitably qualified doctor, to which Kathleen replied that
it was Craig who was insisting on getting this counselling
and that he should arrange it.

20 They eventually were seen by Dr Chris Seton, who was a
specialist at the Westmead Children's Hospital in Sydney.
He gave them some advice about the risk of SIDS and
measures that could be taken to protect a child from SIDS.

25 So, four years after Sarah's death Kathleen and Craig
Folbigg had their fourth child, Laura. Laura was born on
7 August 1997 at the Singleton Hospital and again. Like
her brothers and sister, she was born in perfect health.

30 About a week or ten days after she was born she was taken
back to the Children's Hospital, where extensive testing
was done of her over a number of days. They included
sleep studies. Those sleep studies showed that she had no
sleep abnormality whatsoever. She was tested for
biochemical disorders. She was tested for blood
disorders. She was tested for metabolic disorders. She
was tested for chromosomal disorders and she was found to
be perfectly normal in every way. She was also tested for
heart defects.

40 After she returned home from this gruelling testing
programme at the Westmead Children's Hospital, she was
placed on one of the more modern monitors, a coronometrics
monitor, which measured respiration by means of leads,
although it was also liable to give false alarms from time
to time.

45 The other thing about this particular monitor was that it
had a facility within it to download the results which had
been obtained by the machine over a period of perhaps a
week using a modem to go down the phone lines to the
hospital. So, approximately once a week by arrangement,
50 this machine would be connected to a modem. The results
would be downloaded to the hospital and would be reviewed
by a person at the hospital who knew how to read the
results.

55 As I said, Laura initially suffered from mild apnoea of
the kind that children sometimes have, which is normal.
This had completely resolved by February 1998, when she
was six-months old.

At no stage did she show any signs of the more severe form of apnoea which is called obstructive apnoea. That is the style of apnoea which you sometimes get in adults when they snore heavily or even stop breathing because the back of the throat goes up to obstruct breathing.

The results which were downloaded showed not a single incident of any SIDS type event, or cessation of breathing which would cause any alarm to doctors.

There was one very strange reading that the expert will tell you looked as though some adult had put the leads on their own chest just to see what would happen during a daytime reading. There was just one occasion when that happened. The rest of the time the results were perfectly within the normal range. There was no incidence of anything happening that caused any concerns at the Westmead Children's Hospital.

From time to time disputes arose between Craig and Kathleen about Kathleen's failure to use the monitor and it caused Craig such consternation that in frustration he wrote to the Children's Hospital complaining that she was not using the monitor.

Initially Laura slept in a bassinet in her parents' bedroom. When she was about three-months old she was moved into a cot in her own bedroom which was adjacent to her parents' bedroom. In February of 1999, that is, the month before she died, she was placed in a single bed in her own bedroom.

By February of 1999, the relationship between Craig and Kathleen had deteriorated to the point where Kathleen was threatening to leave Craig and take Laura with her. However, Kathleen was convinced by Craig and Craig's sister not to leave but to stay and to deal with their problems. That was in February of 1999.

On the morning of 1 March 1999, Laura was suffering from a cold, including runny nose and congestion. Craig and Laura woke up at about 6.30. Craig fed Laura her formula from a bottle. Kathleen woke at about 7.

About the time that Craig was going to go to work - he worked at a motor dealership - Laura started to cry and Kathleen became extremely angry and stressed with Laura. She stood in the doorway, held her fists up to her forehead and yelled to Laura, "Stop bloody crying" and to Craig she said, "I can't bloody handle it when she's like this. It's only when you're around. When you're not here she's well-behaved.", or words to that effect. A verbal argument then took place between Kathleen and Craig, and Laura became extremely fearful of Kathleen.

A short time afterwards, at about 8 o'clock, Craig left to go to work. A little while later, at about 8.15, Kathy

rang Craig at work and told him that she was sorry. Craig asked her to come to his work at morning tea time and she agreed.

5 She then went to her local gym which she would regularly go to and she left Laura in a play group with other children at the gym, supervised by an employee at the gym. To all intents and purposes, Laura look perfectly well. She was active, she was playing with the other kids,
10 nothing unusual was observed about her.

Kathy went and had a work-out at the gym. After she finished she got Laura and took Laura to Craig's workplace where she apologised again to Craig for what happened that
15 morning.

Kathy then returned home with Laura, arriving there at about 11am. At about 12.05 that day, being 1 March 1999, Kathleen telephoned the 000 emergency number and reported
20 that Laura was not breathing. The ambulance officers arrived at 12.14, which is 9 minutes later, and they observed her attempting to resuscitate Laura on a breakfast bar. They found Laura was not breathing and that her pulse was flat. She was warm to the touch.

25 They continued to make attempts to revive her. They took her to the Singleton Hospital where hospital staff also attempted to revive her. Unfortunately she was pronounced
30 deceased later that day.

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Zahra, will you be asking me to deal with
bail at 4 o'clock?

5

ZAHRA: There are some matters my friend wants to raise on
bail. It is largely resolved.

10

HIS HONOUR: I ask you to bear in mind that we will need
to finish with the jury a few minutes before four so that
we can deal with those matters.

SHORT ADJOURNMENT

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: Ladies and gentlemen, I told you that Laura was pronounced deceased at about 12.45, that is, the early afternoon of 1 March 1999.

10 Craig had got a message at work that something was wrong with Laura and that he should go to the Singleton Hospital. He drove straight to the hospital and when he arrived there Kathy was there and she said to him, "Why didn't you come home? I rang you." Craig replied, "I didn't get any phone call" and she said, "I tried. I tried everything I could."

15 When she was briefly questioned by the police later that day, Kathy informed the police that Laura had fallen asleep in the car on the way home from Craig's work and that she had placed the sleeping Laura into her bed at about 11am. She said that about half an hour later she
20 heard Laura coughing and she went in to check on Laura about five minutes later and found Laura lying on her back in the bed apparently deceased. She told police that she had commenced CPR and called 000 for assistance.

25 That very night Kathy cleaned out all of Laura's things from the house, including all the photographs - not just of Laura, but of the other children as well. On the following Monday, 8 March, she went back to the gym.

30 A post-mortem examination was done on the body of Laura by a Dr Cala, who was then employed in the New South Wales Forensic Pathology Service, who is now the head of the whole of Forensic Pathology for the State of South
35 Australia.

40 Dr Cala noticed minor bruising on her leg. He found that there was mild inflammation around the lining of the heart, consistent with a condition known as mild myocarditis, which you often find in people who have viral
45 infections. In fact, many people who have colds or flu have this either during or after they have those illnesses. The heart itself appeared to be perfectly normal and the doctor was of the view that the myocarditis had not caused her death, although more severe myocarditis can sometimes cause death.

50 The doctor was unable to ascertain any cause of death and he was of the view that the cause of death was - this is what he wrote in his report - "undetermined". He will tell you that asphyxiation must be considered as a possible cause of death. He was of the view that this was definitely not a SIDS death due to the age of the child.

55 That, ladies and gentlemen, is what I anticipate will be the evidence concerning the lives and deaths of each of those children.

The Crown alleges that there are some common features to

5 all of these events, that is, all five of the events, the four deaths and the ALTE of Patrick, and that these common features help to prove that these children did not all coincidentally die of natural causes. In other words, the Crown points to these common factors to disprove that these children all died by sheer coincidence of natural diseases.

10 Not all of the five events have all of these features, but most of these common features can be seen in each of these events. I would like to tell you what these features or factors are so that, as the evidence unfolds, you will understand the significance of it.

15 The significant features to disprove mere coincidence are as follows. Firstly, the accused was the last person to see each of these children alive.

20 Secondly, the accused was the first person to find each of these children either dead or moribund. By moribund I mean virtually on the point of death.

25 Thirdly, each child was found very shortly after death or just before death. In the case of Patrick's near-miss, while the child was still warm to the touch.

30 Fourthly, in relation to the three events that happened at night, the accused claimed later that she found the child not breathing after having gone to the toilet and when returning to her bed, claiming that she could tell from afar that the children were not breathing.

35 Fifthly, in relation to four of the five events, that is, excepting the death of Laura, the accused called for assistance from either her husband or the ambulance service with little or no attempt on her part to render any assistance herself to the child. In fact, in one case, Patrick's death, she prevented her sister-in-law from giving assistance to the child.

40 Sixthly, at the time of the death or ALTE the accused Kathleen Folbigg was the only person either at the home or awake, bearing in mind that Craig was a very heavy sleeper, and, therefore, she had the opportunity in each case to do the child harm without being disturbed.

45 Seventhly, each of the autopsies either failed to reveal a cause of death or concluded that the child had died of SIDS, which was, in effect, a diagnosis of no cause of death.

50 Finally, eighthly, each child had been relatively well prior to death. Now, by "relatively well" one has to bear in mind that Patrick, of course, was blind and suffered from epilepsy, but subject to that he was quite well and all of the other children were quite well. Each of the children immediately prior to their death were extremely well. I put aside colds and the like.

Of themselves, these similarities would not be sufficient to prove beyond a reasonable doubt that the accused smothered her four children. However, they provide some circumstantial evidence pointing to her involvement in their deaths and the ALTE.

The Crown case is that, when viewed with the medical evidence and the material in her diaries that I am about to come to, the totality of the evidence points to her involvement in all the five events with which she is charged.

Now, ladies and gentlemen, after the death of Laura, the relationship between Craig and Kathleen deteriorated to the point where several weeks after Laura's death Kathleen moved out of their matrimonial home and into her own unit at Singleton. She left a lot of her possessions in the former matrimonial home and, when Craig enquired of her what she wanted done with these things that she had left, she told him to throw them away.

On 14 May 1999, which is about two and a half months after Laura's death, Craig was in the process of throwing out the stuff that Kathy had left at their home when he found amongst her possessions a handwritten personal diary, written by her, covering the period from June 1996 to June 1997; that is the period before Laura was born but including in that period the time when Kathy was pregnant with Laura.

Craig was so alarmed by what he read in the diary that he approached the police, spoke to them and gave them the diary. The diary has a number of significant entries which are relevant to the deaths of the first three children.

A few days after that, Craig spoke extensively to Detective Sergeant Bernie Ryan and verbally told him what had happened when he woke up on the night that Sarah died.

Several days later, Craig told Kathy that he had been to the police and very shortly after that Kathy came back to the matrimonial home and effected a reconciliation. I expect that you will hear evidence that Craig went back to the police after this reconciliation to make a formal statement to the police and you will hear in evidence that when he spoke to the police he failed to give them the same account in that statement about the night of Sarah's death and he will explain to you why he lied to the police.

He will also explain to you why he didn't suspect anything after the deaths of their babies and why he, despite all the evidence, continued to believe that their children had died of natural causes and that Kathy had nothing to do with their deaths. He will also explain to you why he agreed to have more children after so many of them had

died.

5 On 23 July 1999, Kathy Folbigg was interviewed by the police at the Singleton Police Station. There was an extensive interview during which she denied having any involvement in the deaths of her children.

10 She was asked whether she had any further diaries. She said that she did not, that she had disposed of all of the diaries on Mothers' Day 1999 by throwing them into a bin at her home in Singleton.

15 Several hours after her interview, the police executed a search warrant at the former matrimonial home at Singleton and they located another diary, this time from the period 1997 to 1998, in a secluded spot where she could easily have missed it.

20 This period of the second diary extended from shortly before Laura's birth into the first year of her life. This diary also has a number of significant entries relating to the deaths of her children and also in relation to her attitude to Laura. When this diary was found Kathy told the police that she had forgotten that it
25 was there.

30 Now, ladies and gentlemen, the Crown case is that these diaries contain entries which show her involvement in the deaths of her children, her attempts to deal with the guilt about her involvement in their deaths, her belief that she has grown and matured and learned from what happened to the others and that it will not happen again with Laura, her belief that she is now able to be a proper
35 good mother to this child, despite what has happened to the others, her belief that the dark moods which overtook her with the others will not happen again with this child.

40 Then, later on, her frustrations with parenthood, when Laura was a little older. You will see right throughout both diaries her continuing preoccupation with her weight, with tiredness, with a battle of wills, particularly with Sarah, but also, to some degree, with Laura, her frustrations that she didn't get more assistance from Craig, her belief that if she ever gets into the dark
45 moods again that this time she will know better and she will just hand over the baby to Craig or someone else so that the same thing will not happen, and the like.

50 Basically the Crown case is that from these diaries you will be able to ascertain that Kathleen Folbigg genuinely believed that she had changed, that she had grown, that she would no longer place herself in a position where she would kill one of her babies.

55 These diaries, the Crown case is, were written totally for herself and for no-one else. They were written often at the end of the day when she was in bed just before sleep. Sometimes they are almost illegible. Many hours have gone

into deciphering them. They contain details of her most personal thoughts about her intimate private life with Craig, which are not tendered to titillate anybody, but are tendered to show that this was a very serious diary with her innermost thoughts about the most intimate subjects. They deal with her frustrations with her weight gain, the frustrations with the restrictions the babies placed on her life. As I said earlier, her tiredness, her moods, her lack of toleration for her babies and her inability to control her actions with her babies. They deal with the hope that she will be able to control herself.

They also show her feelings that Laura was a better baby than the others, particularly Sarah. So that Laura would survive, because Laura didn't press her buttons in the same way that Sarah had.

Indeed, you will hear evidence that Laura was a particularly docile and placid child. These diaries will also explain to you why she wanted to have more children.

The Crown case is that these are a close and intricate insight into her mind before and during the life of her fourth child and a retrospective insight into the deaths of the other three.

There are a few entries which show that what she wrote was never meant to be read by others. The diaries are voluminous. As I have said, they will be tendered to you in their entirety for you to be able to assess how much they were meant for her eyes only and how they were expressing her genuine feelings.

What I will do now is to read to you the most cogent or the most significant entries in the diaries from the Crown's point of view, which we say are the ones that you would give the most attention to.

I might mention that it is our intention to tender photocopies of the original diaries and also to tender a typed version of these particularly significant entries to assist you to decipher what she has written so you do not feel the need, unless you wish to, to write anything down at this stage.

There is one other diary that came to light much later, in fact, I think about two years later. That is a diary from 1990 where there is one entry. I will read you that first because I will read them to you in chronological order. It is from 3 June 1990. You will see that that was the date of Patrick's birth. She wrote this on that day:

"This was the day that Patrick Allen David Folbigg was born. I had mixed feelings this day whether or not I was going to cope as a mother and whether I was going to get stressed out like I did last time. I often regret Caleb and

Patrick only because your life changes so much and maybe I'm not a person who likes change, but we will see."

5 We then come to the first of the main diaries, the diary from 1996 to 1997. The first lot of entries are from the period when she had decided that she wants to get pregnant with their fourth child, but is not yet pregnant, is having some difficulty getting pregnant.

10

18 June 1996:

15 "I'm ready this time and I know I'll have help and support this time. When I think I'm going to lose control like last times I'll just hand baby over to someone else. Not feel totally alone. Getting back into my exercise after will help my state of mind and sleeping, wherever possible, as well. I have learned my lesson this time."

20

22 June 1996:

25 "I watched a movie today about schizophrenia. Wonder if I have a mild curse of that. I change moods really quickly. In my most dangerous mood I'm not nice to be around and always want to be anywhere but where I am. As long as it has music and men to show off to. Then there are times I wish to be more of a homebody and please my hubbie. Am I strange or is this behaviour normal? Guess I'll never know. "

30

21 July 96:

35

"Stressed a little now, probably because it will be a couple of more months before I'm pregnant. Pretty sure I'm not now. Having, or had, what I think is a period. God, I hope so, or these tablets will cause brain damage. Probably would be just desserts for me, considering, but not fair for Craig at all. I would feel like failure and wouldn't cope at all. Can't be dwelling on what ifs. I truly deserve anything life throws at me, so my philosophy is whatever happens happens and it's the way it shall be. I'm going to try my hardest this time. If anything does happen, I'll just leave and try to let Craig go in peace and start again. No, I wouldn't. I'm not that brave. Really, I depend on people and other people's help too much."

40

45

50

25 July 1996, she was writing in her diary about Craig being away and she writes:

55

"Did miss him in bed though. Just the comfort that someone else was going to be there. Like, I know that it would be me who would hear a

break-in first, not him, but at least if I screamed loud enough he'd hear me."

5 The significance of that is to show how solid a sleeper Craig was.

26 August 1996:

10 "Went to clairvoyant last week. So did Craig. I always believe there is more going on than just human nature. I seem content now because I now know that even though I'm responsible it's all right. She accepts and is happy there. I've always felt her strongly, and now I know why.
15 She is with me. I think my mother is too. Nice to know that Craig's mum and guardian angel are with him. He seems more relaxed now he knows they are still with him."

20 8 September 1996:

"Feel now is the time for us to have another baby. Have finally realised is the right time for me. I have Craig and he wants a child that I can give him, and I have enough friends now
25 not to lose it like before."

14 October 1996:

30 "Children thing still isn't happening. Thinking of forgetting the idea. Nature, fate, and the man upstairs, have decided I don't get a fourth chance and rightly so, I suppose. I would like to make all my mistakes and terrible thinking be
35 corrected and mean something though. Plus I'm ready to continue my family time now. But I think losing my temper stage and being frustrated with everything has passed. I now just let things happen and go with the flow, an
40 attitude I should have had with all my children. If given the chance, I'll have it with the next one."

30 October 1996:

45 "I worry that my next child will suffer my psychological mood swings like the others did. I pray I'm prepared and ready, mindwise, for this next one. Maybe nature has decided I never
50 will be and it will never happen."

By 4 December 1996 she had already found out that she was pregnant and she writes on that date:

55 "I'm ready this time, but have already decided if I get any feelings of jealousy or anger too much I will leave Craig and baby rather than answer, being as before. Silly, but will be the

only way I will cope. I think support and not being afraid to ask for it will be a major plus. Also, I have and will change my attitude and try earnestly not to let anything stress me to the max. I will do things to pamper myself regularly and just deal with things. If I have a clingy baby, then so be it; a catnapper, so be it. That will be when I will ask for help and sleep whenever I can to keep myself in a decent mood. I know now that battling wills and sleep deprivation were the causes last time."

1 January 1997:

"Another year gone and what a year to come. I have a baby on the way which means major personal sacrifice for both of us, but I feel confident about it all going well this time. I'm going to call for help this time and not attempt to do everything myself any more. I know that was the main reason for all my stress before and stress made me do terrible things. Had a talk to Craig while in the bath tonight, our favourite talking spot. Haven't really cleared anything, just told him how I feel and what vibes I'm receiving from him."

14 January 1997:

"Well, best go. Time to return to bed and see if I can get some sleep. I'm sure this is training for when baby arrives. That's okay. I'm pretty sure this time I'll handle it better. Hope so."

4 February 1997:

"Still can't sleep. Seem to be thinking of Patrick and Sarah and Caleb. Makes me seriously wonder whether I'm stupid or doing the right thing by having this baby. My guilt for how responsible I feel for them all haunts me. My fear of it happening again haunts me. My fear of Craig and I surviving, if I did, haunts me as well. I wonder whether having this one wasn't just a determination on my behalf to get it right and not be defeated by me total inadequate feelings about myself. What sort of mother am I? I have been a terrible one, that's what it boils down to. That's how I feel and that is what I think I'm trying to conquer with this baby, to prove that there is nothing wrong with me. If other women can do it, so can I. Is that a wrong reason to have a baby? Yes, I think so, but it's too late to realise now. I'm sure with the support I'm going to ask for, I'll get through. What scares me most will be when I'm alone with baby. How do I overcome that?"

Defeat that?"

17 February 1997, she is referring to Craig:

5 "He should be for me, forever. Just because a
baby is entering our lives makes no difference
really. One day it will leave. The others did.
But this one's not going in the same fashion.
10 This time I'm prepared and know what signals to
watch out for in myself, changes in mood, et
cetera. Help I will get, if need be."

28 April 1997:

15 "I think this baby deserves everything I can
give her, considering I really gave nothing to
the others. I think even my feelings towards
this one are already deeper. Shame, but that's
20 the way it is. I think it's because I'm 30 now
and time to settle and bring up a child.
Obviously I wasn't ready before all that."

16 May 1997, she is talking about a friend of hers called
Mel:

25 "I think that she will be a great help in
preventing me from stressing out as much as I
have done in the past. Night-time and early
30 mornings, such as these, will be the worst for
me. That's when wishing someone else was awake
with me will matter, purely because of what
happened before. Craig says he will stress and
worry, but he still seems to sleep okay every
35 night and did with Sarah. I really needed him
to wake that morning and take over from me.
This time I've already decided if I ever feel
that way again I'm going to wake him up."

40 I pause there to say the Crown case is that that was a
reference to the early morning of the day when Sarah died,
when Craig woke up at 1.10, to see that both Kathleen and
Sarah were out of the room. The light was on in the next
45 room and then at 1.30 Kathleen raises the alarm about
Sarah's death.

I continue, 29 May 1997:

50 "Need new diary soon. I've actually nearly
filled up this one. Think it has helped writing
my thoughts and feelings down regularly. Felt
as though it's become a friend that I can
off-load on, and it doesn't back answer me.
That's the best thing. Laugh at stupid things
55 I've written in the past, but they were
important to me back then, as this is now."

That entry the Crown says is significant to show that this
was a very serious personal diary just for her own use.

This is still before Laura's birth. 6 July 1997, she is talking about her life with Craig:

5 "Maybe then he will see, when stress of it all
is getting to be too much, and save me from
feeling like I did before, during my dark moods.
Hopefully, preparing myself will mean the end of
10 my dark moods, or at least the ability to see it
coming, and say to him or someone, 'Hey, help.
I'm getting overwhelmed here. Help me out.'
That will be the key to this baby's survival; it
surely will. But enough dwelling. Things are
15 different this time. It will all work out for
sure."

11 June 1997:

20 "Don't think I'll suffer Alzheimer's disease.
My brain has too much happening, unstored and
unrecalled memories, just waiting. Heaven help
the day they surface and I recall. That will be
the day to lock me up and throw away the key,
25 something I'm sure will happen one day."

26 June 1997:

30 "This time I'm positive, with support from
friends, et cetera, and Craig, this time
everything will work out fine and the sight and
visions of the future I've been having will come
true this time. With the other three I never
bothered to think of school and teenage years,
35 maybe because I always knew they'd never get
there. But this one I see myself taking her to
school, and Craig doing homework, et cetera,
with her. Therefore, I assume I'm actually
ready for the family life now, where I wasn't
before. Feeling secure, loved, successful and
40 wanted by Craig has helped me, and, to a degree,
the fact that I don't wish to die with no-one
really knowing I was here. At last, now, I know
my son or daughter will. If God or that elusive
higher power doesn't take them away from me once
45 they are older to punish me. I'm trying to do
this right. I hope that is received and
understood."

50 The last entry I want to read to you from before Laura's
death:

55 "I accept that my identity as a person starts
with me. I've decided that's the way it must
be. I have no past, no relatives to remind me,
and I am it, so, therefore, the choice of this
baby was to extend me, natural, and one I've
made happily and wholeheartedly, and would make
again, I'm sure. Problem was with the other

three kids felt I didn't deserve to be extended, and that I was condemning them to life with me. That feeling has changed, so this time all is well and well it will go."

5

Laura was born on 7 August 1997. On 25 August 1997 she wrote this:

10 "Scary feelings. I've realised I actually love her and have bonded with her. Wish to protect her, et cetera. Maternal instinct is what they call it. I now know I never had it with the others. Monitor is a good idea. Nothing can happen without the monitor knowing, and since
15 I'm not game enough to not plug it in because they'd want to know why I hadn't, everything will be fine this time."

20 I pause there to say that the Crown case is that that entry shows that she saw the monitor as almost being something to check her, to stop her doing anything, because if she did do anything to the child the monitor would go off. If she didn't have the monitor on, people would want to know why, so she liked the idea of the
25 monitor, because it kept her honest.

20 September, that is about six weeks after the birth:

30 "Sleep. Who needs it? Yes, I'm getting a little bit irritable now. This is my punishment for the others, to be continually woken up, because this time we know that we have a child with a sleeping disorder. Even though I'm sure they are all false alarms, the thought is still
35 scary. Am getting very stressed because I can't depend on Craig for any real support or help. He doesn't hear her, or the alarms. How dare he complain to me about lack of sleep? What the fuck would he know? Think he'll have to sleep in other room, just so he's not disturbed.
40 Selfish prick. Well now I know where I stand. Craig is refusing to help and hasn't even attempted to in any way. Just wants me to bear all the stress so he can keep selling his cars and making money. I suppose the stress of
45 having to provide for us is real, but it's nothing compared to this."

50 23 October 1997, talking about Laura:

55 "She sleeps pretty good during the night too. Hell of a lot better than Sarah ever did. I think that's why I seem to be coping better this time. Sure, I'm really tired during the evening, but not too bad during the day. Also, exercise is helping me to relieve stress and energising me during the week. I was feeling fat and lazy last time. I'm really not this

time."

25 October 1997:

5 "Just watched video of Sarah. Little upsetting
but she did some funny things. Made us laugh.
Think John was a little upset but he hid it
well."

10 I think John was a friend or a relative. I am not sure.

15 "I looked at it but have to be honest and say I
cherish Laura more. I miss her, yes, but I'm
not sad that Laura is here and she isn't. Is
that a bad way to think? Don't know. I think
I'm more patient with Laura. I take the time to
figure what is wrong now, instead of just
snapping my cog. Also, she is a far more
agreeable child and is easy most of the time.
20 Not sure how Craig feels about Sarah now. Know
that even though he tried, he loves Sarah just
as hard and wasn't prepared for that. I thought
he could remain standoffish, but couldn't. I
think Laura is beautiful, compared to Sarah.
25 She was cute, but Laura has a special look about
her. Her slight difference in looks gives her a
beautiful face, not just pretty, cute and
cuddly, gorgeous and beautiful. Well, so far
anyway. Looking at the video, Sarah was boyish
30 looking. Laura has definitely feminine
features. They are chalk and cheese, and,
truthfully, just as well. Wouldn't have handled
another one like Sarah. She saved her life by
being different."

35 The Crown case is that what she is saying is that Laura
has saved her life by being different to Sarah.

40 29 October 1997. I have another four pages to go, perhaps
ten or 12 minutes, or I can stop there.

HIS HONOUR: We might continue in the morning.

45 Ladies and gentlemen, we shall end the proceedings there
today. As you hear, the Crown has a few minutes still to
go in his address and then Mr Zahra will speak to you.
After that, I expect we will start with the evidence.

50 I want to say a couple of things to you before you leave
this afternoon. They are really by way of reminder, I
think, of things I said to you this morning. They arise
out of the need for you to keep yourself proof from any
influence from outside; that is to say, from any influence
from any person other than your own jurors, your own
55 fellow jurors.

I told you that there would be people around the
courthouse who were concerned with the case. One thing

5 that follows from that is that when you are excused this afternoon, you should get straightaway from the courthouse. Do not stay around these buildings at all, but leave the area immediately and go about your business elsewhere.

10 For the same reason, when you receive instructions from the Sheriff's Officers about where and when you should attend tomorrow, please take those instructions to heart. Do not get here too early, so that you have to wait around the place and run the risk of running into somebody who is concerned with the case. Do not speak to people you do not know about the courthouse. Speak only to the Sheriff's Officers, or to your own fellow members of the jury.

20 When you get home tonight, you are going to be asked what you have been doing. It is perfectly all right for you to tell the persons you speak to that you have been selected to serve in a jury in the Supreme Court, but leave it at that. Already, now, you know of the case that the Crown intends to make out in this case. The evidence you might well hear has been foreshadowed. If you begin to discuss the detail of this with anybody, before you know where you are you will be getting advice from somebody, and that will be the beginning of the end for you, you see, because somebody else will be overbearing your minds and your thoughts. You must not let that happen. It will be difficult for you to keep things quiet but it is your obligation to do so, so I direct you, again, you must not discuss the evidence in this case with anybody, other than your fellow jurors when you are all together in the jury room.

35 Well, I will let you go now. Please return for a start at 10 o'clock tomorrow. Good evening.

JURY EXCUSED

40

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Normally, in a situation when an
accused is charged with serious offences like the present
ones and where the Crown case is of a nature as this one,
bail would be opposed and in all likelihood bail would be
refused.

10 HIS HONOUR: I can accept the first. I do not accept the
second, but go on, Mr Crown.

15 CROWN PROSECUTOR: We do not oppose bail. However, what
we would ask for are very stringent conditions on the
granting of bail; namely, we understand that arrangements
have been made by some Salvation Army officers, very
kindly. We understand that Major Hilton Harmer, who is
the Court chaplain, and his wife, who is also a court
chaplain I understand, have made arrangements for Mrs
20 Folbigg to stay with a Mr and Mrs C Warry at 206 Forest
Road, Arncliffe. They are prepared to have her stay at
their place for the duration of the trial.

25 HIS HONOUR: I cannot, for the life of me, understand why
this is being reported. The occasion for this would never
arise. These are materials that are going on in the
absence of the jury and must never be reported on. If any
member of the news media wants to explain to me why a
record of this should be made, that member may now speak.
Otherwise do not record anything.

30 Yes, Mr Crown.

35 CROWN PROSECUTOR: We understand that they will provide
her with meals. We would ask for bail to be conditional
upon her proceeding directly from the Court to the home of
Mr and Mrs Warry, and in the morning proceeding directly
from their home either to her solicitor's office or her
counsel's Chambers, or the courthouse.

40 We would ask that she both leave the courthouse and
approach the courthouse in the presence of either her
solicitor or one of the Salvation Army officers; in other
words, she is either to be at court or at this address or
going between the two, and nowhere else.

45 When it comes to the weekend, perhaps it would be
appropriate then to consider whether or not there should
be any variation to that. We would ask for that condition
now.

50 We understand that Mr and Mrs Warry are prepared to inform
Detective Ryan of any breach that they are made aware of
of the bail conditions. So, if she were to not go to
their home, or to leave their home outside normal court
55 hours or outside what would normally be time to get to
court in time, then they would report it to Detective
Ryan.

I hand up a letter that has been given to me by my learned friend.

5 Perhaps, for abundant caution, I would ask your Honour to suppress the name and address of the people who have kindly offered to make their home available.

HIS HONOUR: I will do that, Mr Crown.

10 ZAHRA: I had discussed the matter with my friend. Those conditions are acceptable. I have explained the rationale of the curfew to Mrs Folbigg. She understands there are real dangers in bumping into members of the jury. I think it is quite prudent. We do not want to restart the trial.

15 HIS HONOUR: It will not be necessary for any member of the press to leave just yet.

20 Mr Crown, Mr Zahra, I am thinking of including a condition that the accused delay her departure from court each day so as to avoid any accidental contact with, particularly, the jury, and to be here by a particular time in the morning.

25 Mr Zahra, I do not want to cut across any arrangements that the accused might wish to make with you or your solicitor, however. If she is in the company of her solicitor, I do not suppose it really matters what time she arrives here.

30 ZAHRA: We have already thought for her to get here between quarter past and half past nine in the presence of my instructing solicitor or myself would be sufficient to ensure that she does not have contact.

35 HIS HONOUR: Unless it were volunteered, I would not direct that she be in the company of her solicitor or yourself, but if you or your solicitor are volunteering that that should happen, then that's the condition that I shall make. I would not normally wish to bind a legal practitioner in that way.

40 ZAHRA: My instructing solicitor had offered that previously.

45 HIS HONOUR: Bail is continued on the following conditions: that the applicant be of good behaviour; that she reside with Mr and Mrs C Warry, 206 Forest Road, Arncliffe; that she leave Court each sitting day not earlier than 30 minutes after the Court adjourns and proceeds directly to the office of her solicitor and then to 206 Forest Road, Arncliffe, or, alternatively, direct to the latter address; that she leave 206 Forest Road, Arncliffe, on each morning on which the Court sits and proceeds directly to her solicitor's office and, thereafter, travels directly to Court in the presence of her solicitor, and that she arrives no later than 9.30am.

55

I note the other matters in the letter. I am not inclined to make them conditions of bail, but the assistance of the officers of the Salvation Army is appreciated and noted.

5 In case it should not be clear, I order that there be no publication of debate on bail or of the conditions of the accused's bail.

10 ADJOURNED PART HEARD TO WEDNESDAY 2 APRIL 2003

15 oOo

EE:FHI:RT:8

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION5 BARR J
AND A JURY OF TWELVE

SECOND DAY: WEDNESDAY 2 APRIL 2003

10 70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG

15 IN THE ABSENCE OF THE JURY

15 HIS HONOUR: Is Mr Huntsdale here? You telephoned my
associate this morning. Thank you very much for doing so.
I should explain to counsel that I think Mr Huntsdale was
20 the reporter who was leaving last evening while I was
still dealing with a matter which was not to be reported.
He telephoned my associate this morning and put in an
apology. I do not think that an apology was necessary. I
thank you for your courtesy in telephoning. Looking back
at what I said I was somewhat brisk when you left the
25 Court. I could have asked you in a kinder fashion to
remain while I dealt with the matter. Thank you for your
courtesy.

30 CROWN PROSECUTOR: There is one thing I thought I should
mention which relates to Mr Folbigg, the first Crown
witness after Mr Zahra's opening. He and Kathleen Folbigg
are still legally married although they have not lived
together since 1999 and, indeed, Mr Folbigg, as I
35 understand it, is engaged to someone. Because of the fact
that they are still legally married there are certain
consequences that arise under the Evidence Act. At my
suggestion he has obtained legal advice about that and
about another matter to which I will also come. As I
40 understand it, he is willing and anxious to give evidence
for the Crown. He does not wish to ask for any
application not to give evidence, he does not wish to make
any application not to give evidence.

45 He has obtained advice from Mr Ian Strathdee of Senior
Counsel. On Mr Strathdee's recommendation there is one
area of evidence in which he wishes to seek a certificate
from your Honour. Your Honour will recall that during the
opening I told the jury that at one stage Mr Folbigg had
50 given the police an honest account of what had happened
around the time of Sarah's death. The accused had then
effected a reconciliation. When Mr Folbigg went back to
the police he, in effect, lied to them and did not give
them the correct account.

55 HIS HONOUR: He lied to them?

CROWN PROSECUTOR: Yes. It is in relation to that failure
to tell the police what really happened just before the

death of Sarah that he wishes to request a certificate to protect him. I do not know that it is necessary. If it is an offence it is probably a summary offence in which case it would have to be brought within six months.

5

HIS HONOUR: It is not, as I understand it, an offence to tell a lie to a police officer per se. However, it may depend upon the context.

10

CROWN PROSECUTOR: Yes.

HIS HONOUR: I take it that you would like to deal with this witness initially in the absence of the jury?

15

CROWN PROSECUTOR: Yes.

HIS HONOUR: Mr Zahra, do you see any difficulty about that?

20

ZAHRA: No.

25

HIS HONOUR: What we might do then is have a short adjournment as soon as Mr Zahra has finished his opening speech and during that we can have an extended morning tea if it happens to be that time, something of that kind, and we can deal with the evidence during the adjournment.

IN THE PRESENCE OF THE JURY

HIS HONOUR: We will resume now with the Crown
Prosecutor's opening address.

5

CROWN PROSECUTOR: Ladies and gentlemen, yesterday
afternoon I was reading to you from the extracts from
Kathleen Folbigg's first diary. I think we had actually
got to her second diary.

10

The last entry that I read to you was from 25 October
1997, when Laura was about nearly three-months old. You
will recall that I read to you a section of the diary
where Kathleen Folbigg is comparing Laura with Sarah and
she says:

15

"Looking at the video Sarah was boyish looking.
Laura has definite feminine features. They are
chalk and cheese and truthfully just as well.
Wouldn't have handled another one like Sarah.
She saved her life by being different."

20

You will recall that I told you that the Crown case was
that that last entry that she saved her life by being
different was a reference to the fact that Laura was a
much more sedate, a much more docile and much more
compliant and easy child than Sarah had been. Sarah had
pressed the accused's buttons whereas Laura didn't to
nearly the same extent.

25

30

The next entry is from 29 October 1997:

"Wonder if Craig was serious about trip to
Melbourne. Would be great to see Leah's face,
but also scary because it is a little similar to
what we did with Sarah, but Laura is different
totally. She doesn't push my button anywhere
near to the extent that she did, which is good
for her is all I can say."

35

40

3 November 1997:

"Why is it when I'm so tired, I'm feeling sick,
shitty, I can't sleep, very depressed with
myself at the moment, feeling deprived of my
freedom. I know that's the price that you pay
for having a baby, but I'd not be human if it
didn't get me down a little every now and then.
It's because my release and enjoyment of the
gym's been taken away. I have to take her with
me most times now, which means I can't enjoy
myself and turn off like I usually do because
she's there and I worry about her. Someone's
awake. Got to go. Lost it with her earlier.
Left her crying in our bedroom and had to walk
out. That feeling was happening and I think it
was because I had to clear my head and
prioritise as I've done in here now. I love

45

50

55

her, I really do. I don't want anything to happen."

5 9 November 1997, Laura is three-months old:

10 "Craig was pretty drunk Friday night. In his
drunken stupor he admitted he is not really
happy. There's a problem with his security
level with me and he has a morbid fear about
15 Laura. He - well, I know there's nothing wrong
with her, nothing out of ordinary anyway.
Because it was me, not them. Think I handle her
fits of crying better than I did with Sarah.
I've learned to, once getting to me, to walk
20 away and breathe in for a while myself. It
helps me cope and figure out how to help her.
With Sarah all I wanted was her to shut up and
one day she did."

20 28 November 1997:

25 "Could get back into the gym, but I have to take
her with me and it's too hard and I don't enjoy
the classes any more because she's there and
Craig doesn't like Mel or anyone else looking
after Laura except me, so gym's out."

Mel was a close friend of the accused.

30 The next entry is after that entry, the previous entry
being 28 November. The next entry has the date written "8
November", but it is obviously not correct; it should have
been "8 December". So it is in its correct chronological
order, but has the wrong date in the diary:

35 "Had a bad day today. Lost it with Laura a
couple of times. She cried most of the day.
Why do I do that? I must learn to read her
better. She is pretty straightforward. She
40 either wants to sleep or doesn't. Got to stop
placing so much importance on myself. Must try
to release my stress somehow. I'm starting to
take it out on her. Bad move. Bad things and
thoughts happen when that happens. It will
45 never happen again."

The next entry is dated 15 December 1997. Before I read
you this entry I need to explain to you some things in
50 order for you to understand the significance of this
entry. You will recall from a previous entry that
Kathleen Folbigg had been to see a clairvoyant. The Crown
case is from that entry and from other things that she
wrote that I will not read to you that she believed in
reincarnation. She believed that the souls of her
55 deceased children were there for clairvoyants who had
special abilities to be able to contact. She believed
that Laura had had a life in the other world before being
born. I should also tell you that Kaz is her

sister-in-law, that is, Craig's sister.

What she wrote was this:

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

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

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

30 17 December 1997:

 "Tell you what, don't think anyone could read
this and find out all my secrets. I write like
a five-year old. Disgusting to book."

35

31 December 1997:

 "Getting Laura to be next year ought to be fun.
She'll realise a party is going on and that will
40 be it. Wonder if the battle of the wills will
start with her and I then. We'll actually get to
see. She is a fairly good-natured baby. Thank
goodness. It will save her from the fate of her
siblings. I think she was warned."

45

4 January 1998:

 "Sarah's missed. We watched her video. Made me
realise how much I love Laura and cherish her
50 like I never did the others. I don't take her
for granted. I think with age has come a lot
more patience and resignation, but I can't fix
or changes things, eg, if she doesn't sleep all
night so be it. Sure it shits me and makes me a
65 little grumpy, but I sort of catch up during the
day sometime."

The next entry reads 16 January 1997, but it obviously

should be 16 January 1998:

"Been daydreaming again about life on my own."

5 I pause there to say the Crown case is that at this stage, in January 1998, she was already having thoughts about leaving Craig.

I continue:

10

"Wild, highly exaggerated as if I could or really want to. Always seem to when not really happy. Sorry to say. I don't get excited any more. Craig just doesn't do it for me any more. 15 Has to be because of this last pregnancy, plus I'm tired all the time. Want to do nothing but sleep. It's not Craig; it's me. Plus we don't get to go out to dinner or dancing together any more. There isn't much - well, there's no 20 romance between us any more. It's all let's make money and raise Laura. We've forgotten ourselves in the process. Sad how that happens. One of my problems is I've lost me again. I'm just Mrs Craig Folbigg. Now I'm just Laura's 25 mother as well. Where's Kath gone, a person in her own right who needs to have writing lessons, but probably better if I don't. Then no-one, not even me, will be able to read this when I'm gone."

30

20 January 1997, by this stage Laura was about five-months old:

35 "The gym was a pivotal part of me and now, because I can't go without taking Laura, it's put a damper on everything. I've had my one and only escape taken away from me."

28 January 1998:

40

"Very depressed with myself, angry and upset. I've done it. I've lost it with her. I yelled at her so angry that it scared her. She hasn't stopped crying. Got so bad I nearly purposely 45 dropped her on the floor and left her. I restrained enough to put her on the floor and walk away. Went to my room and left her to cry. Was gone probably only five minutes, but it seemed like a lifetime. I feel like the worst mother on this earth. Scared that she'll leave me now like Sarah did. I knew I was short 50 tempered and cruel sometimes to her and she left with a bit of help. I don't want that to ever happen again. I actually seem to have a bond with Laura. It can't happen again. I'm ashamed 55 of myself. I can't tell Craig about it because he'll worry about leaving her with me. Only seems to happen if I'm too tired. Her moaning,

bored, whingey sound drives me up the wall. I truly can't wait until she's old enough to tell me what she wants."

5 The final entry that I would like to read to you is from 6 March 1998. Laura was 7 months:

10 "Laura not well. Really got on my nerves today. Snapped and got really angry, but not nearly as bad as I used to get."

15 The Crown case is that she managed to restrain herself from killing Laura for some considerable time after that. In fact, it wasn't until a year later, in March of 1999, that the Crown alleges the accused smothered Laura to death.

20 That's all that I wish to say by way of quoting the diaries. I've already told you that they will be tendered to you in their entirety, so as to give you a feeling of her levels of frustration and to show that that they are very serious diaries mulling over the major issues in her life and also to show you that what she wrote was never meant to be read by others.

25 The only other major area of evidence that I would like to refer to is that there will be some expert medical evidence led in the Crown case of some specialists who have looked at these four babies after all of the deaths, so they have had an opportunity to look at all of them with an oversight of all of the facts that obviously the individual doctors, who only dealt with one or, at the most, two of these children, did not have.

35 Firstly, in December of 1999, further extensive genetic testing was done on blood samples of all four babies and the results were entirely normal. These doctors or these specialists who are going to give expert evidence of course had the opportunity of looking at the post-mortem reports of the pathologist who had done the autopsies on 40 the four children. These experts will give evidence about a number of things.

45 Firstly, they will tell you how rare SIDS is. How even rarer multiple SIDS in the same family is. How extremely rare it is to have multiple deaths in the one family from natural causes of any kind in the absence of some identifiable genetic abnormality and these specialists will enable you to conclude that these deaths were 50 consistent with induced asphyxiation, that is, suffocation caused by something being placed to obstruct the inlet of oxygen to these babies' lungs.

55 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 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.

Applying the facts, as I have just summarised them to you, to the law that I summarised to you yesterday, the Crown says that Kathleen Folbigg in anger and/or resentment and/or stress either intended to kill her children or intended to render them unconscious, thereby causing them grievous bodily harm or thereby intending to cause them grievous bodily harm. Alternatively, the Crown alleges that she was recklessly indifferent and that she realised that her actions in restricting their air intake may well cause them to die. The Crown says that she was well aware that by doing this she was placing her children at critical risk of death.

Ladies and gentlemen, the Crown says that this is not a case where you will hear any evidence in the Crown case to suggest that the accused Kathleen Folbigg had any mental illness such as postnatal depression, or Munchausen syndrome by proxy, or any other mental illness. Kathleen Folbigg did not kill or injure her children to get attention for herself or in a state of profound depression. The Crown says she killed them because she couldn't stand their crying and the demands that they made on her life.

Whilst all parents sometimes feel frustration, exasperation and anger with their children her feelings ran deeper to intense anger, hatred and resentment to the extent of prompting her to kill her children. She saw her children, the Crown says, particularly Sarah, as being engaged in a fierce battle of wills with her which she desperately had to win. When she could get away from her kids, such as to the gym, she was on top of the world and she was very eager at all stages of all the babies lives to resume her social life, her sporting life, her working

life, her sexual life that she had had when she didn't have children.

5 Some of the time she coped well with the demands of parenthood. With Laura particularly, who was a very docile child, she coped a lot of the time, but inevitably the Crown says there were times when she could not abide or cope with the demands of parenthood. She eventually resolved her frustrations, her resentment and her flashes of anger by killing her children. The Crown case is that she was totally obsessed by her own needs, wants and desires.

15 The Crown will be calling evidence in four principal areas. Firstly, you will hear evidence about the circumstances surrounding the lives and deaths of the four Folbigg children. The first witness will be Craig Folbigg, the children's father, who will give evidence about their births, their lives, the discovery of their deaths - especially Sarah.

20 There will be evidence from emergency service officers, ambulance officers who attended. Then you will hear medical evidence about their lives, doctors who saw them at their births, shortly after their births, during the times that they were tested for a whole lot of different conditions. You will hear evidence from the doctors at the hospitals about where they were taken after they had died or had an ALTE, those doctors who tried to revive them in hospital.

25 You will hear evidence of the successful reviving of Patrick and his subsequent brain damage and its origins.

30 You will hear evidence from the doctors who conducted the four post-mortem examinations with the exception of Dr Cummings who is deceased and you will then hear expert evidence from the specialists that I just mentioned a little while ago who have had the opportunity of reviewing all of the medical material in hindsight.

35 The third area of evidence will be Kathleen Folbigg's diaries. There are two diaries, one of which was handed over to the police by Craig and the other of which was found by the police during a search, together with one entry in the 1990 diary that I have referred to and there is another entry in a calendar relating to the death of Sarah which will also be tendered.

40 Finally, you will have the interview which was conducted by Detective Sergeant Bernie Ryan with Kathleen Folbigg. It is a very lengthy video. My learned friend may be able to shorten it somewhat to take out irrelevant bits that we can find. Even with some bits taken out of it, it is a very long interview and most of it will probably have to be played. In this interview she gave her version of the deaths of each of the children and, as I have mentioned to you, she denied any involvement in their deaths.

5 That, ladies and gentlemen, is the basic outline of the way in which the Crown will structure its evidence. I anticipate that the experts' specialists' evidence will be at the end. There are, I think, two of them who are coming from overseas, so there might be some give and take in terms of where the witnesses will be placed. By and large we will try and do it in chronological form to make it as easy as possible. So in relation to the lives and deaths of each child, we will be calling hopefully all of the evidence about, first, Caleb, then Patrick, then Sarah, then Laura in chronological order, dealing with each child individually so as hopefully not to confuse everyone, including me.

15 That will mean that there might be some people that we call twice or even three times because, for instance, there is one ambulance officer who I think attended at least two of the deaths and there are some doctors who saw two or more children during their lifetime. So we will be recalling those people to try and keep the evidence of each child in tact.

20 That, ladies and gentlemen, concludes the opening address on behalf of the Crown.

25 As his Honour told you in his opening remarks the opening address is not to substitute for the evidence. Your deliberations, of course, must be based on the evidence that is given, not based upon my opening. The purpose of the opening is to tell you the full account of what we anticipate will be given in evidence during the Crown case so that you will know where it all fits in as it unfolds. It may well be and probably will be that there might be some areas of evidence that are different to what I have said in this opening. It might be that I have got it wrong. It might be that witnesses change their minds. I do not know. Obviously if there is a difference it is the evidence that is important, not my opening.

40 HIS HONOUR: Mr Zahra, I shall let you manage this as you feel best. Do you want to begin immediately?

45 ZAHRA: I am happy to do so.

HIS HONOUR: If you would like to take an adjournment before you finish your opening address you need only indicate.

50 ZAHRA: As I have already indicated, I certainly will not be as long as the Crown Prosecutor. If I am still opening at about 11.30, I might just stop at that time for the regular break.

55 HIS HONOUR: I will leave it up to you.

ZAHRA: Ladies and gentlemen of the jury, if it is not already apparent now, it will certainly be the case that

you will realise that the matter, this matter, will impose quite a heavy burden upon you. The extent of that burden will be apparent to you as this trial progresses.

5 No doubt, it has not been a very long time since you
turned up here yesterday morning to report for jury
service. What has happened since that time is almost for
you a roller coaster: the anxiety of being selected, the
10 anxiety of turning up here, obviously the process in
itself, many of you would only have received a very brief
instruction, probably in the form of a video, many of you
would never have acted as a jury in the past. So much of
what has unfolded in the last day would have been very new
to you and it would have carried already some heavy
15 burdens upon you.

No doubt, there is a realisation that this trial is going
to take you away from your normal lives for some weeks.
In itself, that is quite a considerable burden.

20 You would, no doubt, have come to appreciate also that
from the Crown's opening that what you are called upon to
decide is what is a very significant and serious case.
You may already come to the conclusion, from hearing the
25 Crown's opening, that this case will also place some
considerable emotional burden upon you.

No doubt, at this point in time you will come in a matter
of short hours since yesterday from the normality of your
30 lives to the realisation that this case will have a
significant impact upon you.

It is accepted that in these circumstances it would be
very difficult for you to absorb what has happened
35 yesterday and, no doubt, it would be difficult for you to
absorb the complexity of the Crown's opening, in
particular, in the references to the evidence.

I do not intend to go over what the Crown has said to you
40 about the Crown's case. The Crown, no doubt, has opened
to you for the sole purpose of outlining their case to
you. It is probably best that the trial be left to
unfold, that the trial progress and the evidence is heard
very much in its context, but, no doubt, the outline of
45 the Crown case is somewhat helpful for you to understand
what the case is as they would want to present it.

I would hope during my opening to refer to some
50 fundamentals, some of the basic propositions of law, as
his Honour indicated to you, that he is in fact the Judge
of the law and that he will give you certain directions
about the law. Whatever I say, no doubt, must be read in
conjunction with what his Honour has to say to you at the
end of this trial.

55 It may be important really to understand some of these
fundamentals because these are the fundamentals that,
during the course of the trial, you need to use as tools

in order to resolve the differences that will in fact arise between both the Crown case and the accused's case and that these tools and these fundamentals are very important mechanisms for you to be able to filter and to understand and to comprehend the evidence. When you are looking at the evidence it is always important to take into account these fundamentals or these foundations.

His Honour has already briefly given you some directions. You may recall yesterday that he in fact gave you some directions about publicity, the fact that this matter is likely to attract significant publicity through the media. No doubt you may have already experienced some exposure to that and, no doubt, you will take into account what his Honour has said to you about the need to obviously consider that this case really has to be decided on the evidence in this Court, not by anything that the media has had to say.

So no doubt his Honour has already told you about the concerns of you not obviously taking into account matters that might be reported in the media for various reasons as his Honour has already indicated. Those reasons would include the fact that with the space and the time that the media has not all of what will occur during the course of trial will in fact be reported. It may be that only the sensational aspects of this case will be reported and, regrettably, it is the Court's experience from time to time some of the reporting is incorrect. So it is important obviously that that direction be kept in mind.

The other direction that you may recall that his Honour had given you is to not discuss matters with others, be it family, be it friends, or other work acquaintances or other persons.

Both these directions on their face appear to be very obvious ones, ones that could be easily understood and ones that do not really need a lot of further explaining.

It might, however, be important really at this stage to maybe reflect on those two directions because it is submitted to you that they give you a little bit of insight. The foundation for those directions, the rationale for those directions, if we consider them for a moment, it might assist us, it might assist us in understanding what your role is and how to approach the evidence in this particular case.

No doubt both those directions, in relation to publicity and obviously not talking to friends or acquaintances or family, are somewhat interrelated because, no doubt, as we expect there will be extensive publicity about this particular case. There are acquaintances and families. If they find that this is the case that you have been called upon to decide, they may in fact want to proffer an opinion about the case.

5 You, no doubt, would have had the experience yourself in
the workplace maybe, in social conversation, that when
there is in fact a significant case that is reported in
the media, people will express a view, express a view
10 about guilt. There is no mystery in that. You would have
experienced that in the workplace when prominent cases are
reported. People will have discussed them, people will
proffer a view. People will proffer a view, no doubt, on
what they have heard or read through the media. There may
15 be many people doing that in Sydney in this State today,
after reading the media reports. There may be people who
are reaching the conclusion: well, Mrs Folbigg is guilty.
You cannot have that many kids in the one family die of
natural causes. She must have killed them. It is too
suspicious; she did it.

20 There is no doubt that those conclusions would be
primarily based on the media reporting, the grab of a
television, the radio, or the newspaper. Most likely the
conclusion drawn merely on the basis that there are a
number of counts, that there are a number of charges of
murder and that, therefore, she is guilty.

25 Clearly the second direction that you not speak to anyone
is clearly designed so that your decision cannot be
contaminated by the opinions of those who have not heard
the detail of the evidence and to recognise the importance
of your deliberations as the jury.

30 There are some important messages that we can glean, we
can extract from those basic directions. Again, they, on
their face, appear to be obvious. Let's look at some of
the messages. It is for you and you alone to decide the
facts in this matter. His Honour gave you a direction
35 yesterday explaining to you the difference in roles of the
various persons in this Court. He is a judge as you are.
He is a judge of the law and whatever he says about the
application of law must be followed by you. You must
obviously apply the law of this State in your
40 deliberations and whatever his Honour says to you about
the law you must apply that.

45 At the end of the day no-one, no-one in this Court, can
tell you how to decide this case. It is for you and you
alone to decide the facts. It is not a matter for the
Judge; it is not a matter for the Crown or myself to tell
you what to do, to tell you that these are the facts that
you should find. It is a matter ultimately for you to
decide the facts.

50 Secondly, the decision is to be made on the evidence
before this Court. The evidence is not what the media
would seek to report in a couple of paragraphs or within a
couple of seconds. There obviously is a need to look to
55 the detail of the evidence and detail of the examination
of the individual deaths.

The individual deaths will be considered with quite a

degree of precision during the course of this trial as you would have already gathered from the Crown's opening. There will be times when the evidence will involve very complex medical issues.

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The other message that might be gleaned from looking at these basic directions is that speculation and suspicion are not enough, that these things cannot replace proof beyond reasonable doubt.

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We can, in fact, see also from these directions that there is a clear difference between a decision made on no more than a superficial basis on no more than a conclusion that she must have killed these children because you cannot have that many children die of natural causes in the one family. There is a difference between that approach and the need to look at the evidence, look at the facts, weigh them with precision, and weigh all the evidence during the course of this trial.

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It is important to reflect on those decisions for this basic reason. One must realise that there is, in fact, a very powerful effect or there is, in fact, quite a momentum by the sheer number of counts of murder in this case. However, to decide the case on this basis alone would be doing no more than those readers or listeners of media reports would be doing by reaching the conclusion that I have put to you a moment ago.

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If it were that easy, if it were that simple, if it were merely a matter of looking at the number of counts, then you might wonder why it is necessary to, in fact, occupy your time for some two months of complex evidence.

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This really highlights the burden that you carry quite distinct from someone who might read a media report or reach a conclusion on a superficial basis. This is the burden that you carry. This is the responsibility that you carry as judges in this particular case.

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It is important to take into account and to understand the very powerful nature of the mere fact of the number of deaths and the number of counts. It would be wrong, however, to decide this case on a mere formula, a mere formula that one cannot have this many deaths within the one family of natural causes.

45

It is important, therefore, to understand the powerful effect, the powerful momentum, that might create that spontaneous conclusion that a person might have by that sheer number of counts. It is important at all times to consider that particular contention, what it is that drives or fuels a conclusion based on no more than the number of deaths.

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It is important to recognise the power and momentum of that, but to consider that the decision does not stop there; that this is a matter of moving on, moving to the

detail, moving in fact to the evidence, particularly in relation to each count, which we would submit to you is the stronger foundation for looking at this particular case.

5

Now these contentions in the evidence no doubt will need to be resolved. There are some fundamentals that will assist you in resolving and reconciling these contentions. The first, no doubt, is to pay particular regard to what is called the onus and the burden of proof. Now, the Crown has briefly referred to this in his opening remarks; that we cannot just consider those at that point of time and forget about them. We need to understand that these in fact are helpful tools to assist us throughout the whole course of the trial, throughout the whole course of considering the evidence.

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The Crown has indicated and said to you that it is the Crown who bears the onus of proof. It has to prove these charges. It has to prove these charges beyond reasonable doubt.

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Both those fundamentals assist you in resolving contentions in the evidence. It is always quite important to realise that this is not a case where you weigh up the Crown's case and the accused's case and see which one you prefer. This is a matter at all times that is for the Crown to prove this case beyond reasonable doubt. It is a matter for the Crown to satisfy you in relation to each separate count that it, in fact, has proved its case.

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It is submitted that using those tools and understanding that your ultimate decision is in relation to the individual counts that you would be assisted during the course of considering the evidence. It is submitted that when you go into the consideration of those individual counts you will have quite some deep concerns about the strength of the prosecution case.

Now, there is, in fact, a difference of approach, no doubt. On the one hand, you may recall just a moment ago the Crown using the word "oversight", that the experts will look at the case in oversight. They have had the benefit of looking at all the material and they, in fact, are in a position to give a global view.

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It is the accused's case that, no doubt, whilst the Crown can submit to you that in fact a proper approach to considering the case is to look at the issues globally, it will be our case that you would need to go to the detail. You would need to go to the detail of the individual counts to look at what evidence there is in relation to those counts.

55

It is submitted that this is, in fact, the stronger foundation, that we can look at this at a superficial level. We can look at this in overview or oversight, but the strongest ground on which this case can be determined

is, in fact, looking at the detail of the individual cases, to see in fact whether the global approach fits in with what we know about the individual cases.

5 This is not a case which lends itself to a broad brush to just look at the big picture. It is important to recognise that that is not the only step. The step of then looking at the cases individually is, in fact, the most important part of your determination.

10 So, whenever you are invited to look at things globally or in oversight, that is only part of the process. You must then test that global view. You must test those global opinions in order to determine whether the individual cases are consistent with those views or with that approach.

15 That may be quite difficult to follow. Let me just give you an example of how it might arise in this particular case.

20 You would have already got an impression from the Crown as to how it approaches the case. Again, look at globally all of the evidence in relation to all of the children. 25 The Crown has made various statements to you about how you could look at the medical evidence; that you could look at the question of motive in this global way.

30 As is suggested to you, take on board what the Crown puts to you, but it might be important really to consider how does that apply. Does it fit? Does it fit with the individual assessment of the individual case?

35 When you do that, you would realise and have second thoughts about the strength of the Crown case. If, for example - this is only but one example and the fact that this is highlighted is not to suggest that it cannot be applied in relation to the other children - if one 40 considers the global view, if one considers, as my friend had indicated, this one catch-all motive, this one catch-all motive that he put to you yesterday and again today, that it is the Crown case that this accused had the following possible motives: The accused had a very low 45 threshold for stress; she was also deeply resentful at the intrusion the children had made on her own life, particularly her sleep, her ability to go to the gym her ability to socialise, you would, no doubt, recall what he in fact again said to you at the completion of his opening address.

50 It is important to consider, if that is the global view of the motive, how does it fit with what we know about the individual cases? Now, we have this evidence of the diaries and what the Crown has said to you about 55 conclusions or inferences that can be drawn from them and from that he says that you can accept that these were the motives.

5 It is important when you look at the detail of the life of the first child, Caleb, to take into account the lifestyle of both the accused and her husband and the child at that point in time to see in fact whether it fits within that global motive, within that global view, as the Crown has put to you.

10 It is submitted that when you go to the detail of the child Caleb, you will see - this is evidence that will be called in fact today through Craig Folbigg - that this couple was looking forward to the birth of this child; that they had made arrangements, preparations for the child. He will say to you that no doubt when the child was born there was quite some happiness. He will in fact, 15 I would expect, talk about the fact that this was really quite a normal time. I would expect that the evidence will also show that in fact she was not going to the gym around this time, that they had mixed very much with his own family; that in fact in the 19 days of the life of 20 this child, it was nothing other than a picture of a normal household after a child is born into it.

25 It is important to take into account that, in those circumstances, there is no suggestion of abuse, there is no suggestion that she was having difficulty coping with the child. We know, obviously, that the child did have some ailments, but the evidence would suggest that in fact it was she who took the child not to a GP, but in fact to a paediatric specialist on two occasions in that 19-day 30 period.

35 Now, my friend has described that condition as a simple condition that the child had, in fact, suffered from, but it is important obviously again to look at the detail. That might be a reference that the Crown has or a description that the Crown has given about that ailment, but it is important obviously to look at the precision and the detail of the evidence. Just because something is 40 common does not necessarily mean that it could have an impact on the death of that child.

45 Putting that to one side to me, it is important too, when you hear this evidence, to get the picture of what that relationship was at that point in time.

50 It is submitted to you that within a short period of time of Craig Folbigg's evidence there is in fact nothing about the lifestyle or in fact what was happening at this point of time which comes in fact remotely like the mental picture that the Crown has sought to put in your minds at this stage about what sort of person the accused is.

55 It is a simple example at this stage not intended to cover every situation, but to highlight, highlight the particular need, the particular need not to look at this case globally without applying, applying those submissions, those global views to the detail of the particular case.

That is the process that is suggested on behalf of the accused that you should take. This is the process that has the more stronger, the more solid foundation.

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Obviously consider the Crown case, consider the global view, but then go to the detail and see, in fact, whether it fits in.

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This is, in fact, a very simple example - one that will be highlighted to you very much at the outset of this case. Think about the mental picture that the Crown has placed in your minds about the accused. He put these motives that, in a sense, she murdered her children because she wanted to go to the gym because she was concerned about her weight. She had difficulty coping. My friend used the word "anger", anger today. Accept these from the Crown, consider them, look at them globally, but then apply them.

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Today, as I say, you will hear evidence about the life of Caleb, but ask yourself - remembering what the Crown said to you about the mental picture, about the picture - does that fit in?

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That may not be readily apparent to you now, but when this case progresses shortly you will in fact see that much of what the Crown has said to you does not fit in with the life as we know it in relation to Caleb. This is, in fact, a simple example of how really you have to move on between the buckshot approach by looking at all these pieces. You must then go through the second step and look at the individual, look at the individual case.

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It is quite clear that there is a danger because of the sheer number of counts, the danger that in fact the individual cases might be enveloped by that if no specific consideration is given to that.

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So we have the circumstance where the Crown, in fact, may put the global view, look at this evidence in relation to all of the children, and then use it almost like a domino effect to proceed to conviction with the others. Ultimately, it is expected that this is the approach that the Crown will be asking you to take in relation to that child, Caleb, again just using this as a simple example. To use these pieces of evidence globally and in fact use them to envelope the case, envelope the case against the accused in relation to the child Caleb.

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When you go through that process it is not just a matter of looking at the momentum of these global pictures, applying the detail. This example will become apparent, as I say to you, during the course of the day. It is in fact submitted to you that you will get a flavour of this today, a flavour that the life of Caleb in this house was other than normal, in the sense that she was a new mother, she was in fact coping obviously with the change in one's

lifestyle that that no doubt would bring. So we can, in fact, see the danger of these global submissions in enveloping a case like Caleb's when it has, looking at it individually, none of those hallmarks the Crown invites you to look at globally.

It is important obviously to look at the background of the lifestyle at that point in time, when you come to consider whether what the Crown says to you can be supported.

The fundamentals help you. The fundamentals help you in deciding and resolving the contentions in the evidence.

No doubt as I have indicated to you and as the Crown has, the Crown bears the onus of proof. So when you are looking at evidence it is not a matter of weighing up what the accused's case is about that, or what is the Crown's case about that, it is in fact for the Crown to prove the case. So if obviously a fact cannot be decided, it is difficult to decide, this is not a matter of weighing, it is a matter of always taking into account in the resolution of the issues before this Court that the Crown must prove the case beyond reasonable doubt. That is such an important fundamental in this case, because of this particular issue.

It is not for the accused to prove that the children died of natural causes. It is extremely important, it is extremely important, to always keep that in mind. When you are looking at the evidence and weighing up the evidence, particularly the evidence of the experts, this is not a matter where it is the accused who has to prove that these children died of natural causes. This case will be described from time to time as a circumstantial case. The Crown described it in that way yesterday. You will be given directions about what circumstantial evidence is and what underlying principles you would apply to circumstantial evidence.

No doubt circumstantial evidence is such that it requires you to put all the pieces or strands of evidence in order to determine whether the Crown can prove its case beyond reasonable doubt. However, it has this additional step that it requires you, before you can convict, to rule out any reasonable possibility of innocence.

This is a direction that his Honour will expand upon at the end of the trial, but it is an important direction. Again, it is an important direction to understand and to have in your minds at all times when you are looking at the evidence. It is important obviously to use it as a tool and as a filter and as a mechanism for resolving the connections. It is a matter for the Crown Prosecutor here to exclude any reasonable possibility of innocence. It is for the Crown to exclude any reasonable possibility that these children died of natural causes.

This is, no doubt, an extremely important tool for you to

resolve this evidence. This tool will be quite importantly used when one considers the medical evidence. In a sense, in a microcosm this is in fact what the experts will be called upon to look at. They will be called upon to look at various pieces of evidence. They will look at various symptoms, at various other matters and in fact upon that basis form an opinion.

They will also be asked whether they can exclude other factors. This may be a very common pattern in which the expert evidence is led. No doubt they will reflect on the various factors that they have in fact considered, they will refer to their opinion, but during the course of this process, this process of reasoning before they form the opinion, they will go through other factors in order to give them weight or to exclude them.

In order for the Crown to succeed in these counts, the Crown must rule out the possibility that the children died of natural causes. This is the case for the accused in its most simplest form. Again, it must be used as a tool and as a guide in looking at the evidence, not at the end of the day, but when we are considering the effect of the evidence during the course of the trial.

The case of the accused in its simplest form is that when the evidence in the individual cases is looked at critically, the Crown will not exclude the reasonable possibility that these children died of natural causes. Again, it is not a matter for the accused to prove that the children died of natural causes; it is a matter for the Crown to exclude the reasonable possibility that the children died of natural causes.

It is submitted that the medical evidence ultimately when each case is considered, that there is no medical evidence for an unnatural mechanism of death in any one of these deaths.

The Crown has referred to a number of conditions in relation to the children which will be referred to in the course of the evidence. It is submitted that there are various features, there are various observations made by the experts and by those carrying out the post-mortem, which would show that in the individual cases there is in fact evidence of the existence of potentially significant organic illnesses present in these children.

Now, the Crown has briefly referred to these. In relation to the child Caleb, he had occasion to have episodic respiratory difficulties and there was, in fact, a diagnosis of a floppy larynx.

The Crown has said to you it is a very common. The indication was that the child had recovered; that in fact this is a simple illness, one that has in fact no bearing.

Again, using the tools and the fundamentals, this is not a

matter where it is for the accused to prove that this child died of a floppy larynx. It is a matter for the Crown to prove that this death was caused by an intentional act of the accused. It is not for the accused to prove that the child died of natural causes.

These are significant organic illnesses which have been seriously considered by the experts.

In relation to the child Patrick. In relation to the ALTE, the life threatening episode, there is an issue which relates to the question whether epilepsy could be excluded against the background of possible encephalitis.

In relation to Sarah, again as the Crown has referred you to, an issue of a congested uvula, a condition where there was narrowing of the upper airways. The question will arise whether this congested uvula was such that it may have produced some upper airway obstruction.

In relation to the child Laura, there will be an issue in relation to the diagnosis of myocarditis, a cardiac condition, a condition that the experts will tell you is known to cause serious heart problems and unexpected deaths.

The Crown has submitted to you yesterday that these conditions can be readily dismissed. It is crucial in this case that this proposition be tested. The conditions, as I have indicated, have been variously described by the Crown as simple or common. It is important that this description given by the Crown not be taken at face value, to keep an open mind about the evidence at this stage and consider the significance of these particular organic conditions and consider using the fundamentals, using the tools, whether it can be excluded, whether it can be excluded as a possible cause of death.

As I have indicated in relation to Caleb, the Crown has described his illness as a simple illness. You might think that this may not appear consistent with the fact that it was necessary to take the child on two occasions not to a GP, but to a specialist paediatrician within 19 days of his life. So it is not a matter of dismissing it out of hand merely on the description that it is common or it is in fact simple, because it is important in the process that the Crown must exclude these conditions. It is for the Crown to exclude them - not on a superficial basis, but in a reasoned way; that the significance of these conditions must be considered.

Similarly, in relation to the diagnosis of myocarditis in relation to the child Laura. Again, readily dismissed by the Crown as having any bearing on this particular death. It is important, however, again to keep an open mind about the evidence, to wait in fact for the evidence to be called, to see in fact whether it can be readily dismissed as the Crown would suggest.

5 It is the case for the accused, again the accused does not have to prove this, but it is the case of the accused that these conditions are not readily dismissed. It is the case that you will hear evidence of experts who do not readily dismiss these conditions as the Crown has in his opening to you.

10 So, if you form a view from the Crown's opening that all the experts will in fact dismiss these conditions readily, then it is important to reconsider that and reconsider it in the light of the evidence, because it is submitted that the expert evidence that will be called will not indicate that all experts would readily exclude these conditions out of hand.

15 Now, in addition to the fact, again putting the case for the accused in a simple form, that the Crown cannot exclude these conditions, is the next step. Not only can they not exclude these conditions, but in fact, as the Crown has foreshadowed, none of the experts, or the pathologists who will give evidence, after extensive post-mortems, could find any positive evidence to support suffocation.

20 I will repeat that. None of the experts and particularly the pathologists who carried out the post-mortems, could find any evidence to support positively that this was suffocation.

25 As the Crown had indicated to you there are some symptoms that may be consistent with suffocation, but it is important to understand that when that evidence is called, those witnesses will also say that it is consistent with some other natural process; that those symptoms are consistent with some other natural process.

30 So in other words where there is in fact a condition that is in fact suggested by the experts as being positive evidence of suffocation, it is important obviously to consider whether it can be understood in terms of other natural processes. It is the accused's case that, despite the extensive post-mortems, particularly the extensive post-mortems in relation to Sarah or Laura, that there is in fact no positive evidence. As the Crown had indicated, there may be some aspects which could be consistent with suffocation, but these conditions may also be consistent with natural processes.

35 So the question arises here, in relation to the Crown case, whether the deaths can be attributed to suffocation in the absence of the typical signs of suffocation at autopsy.

40 Again, this is a very important area of the evidence. When one is looking at the expert evidence, look at the weight to be attached to the post-mortems.

5 You may recall that the Crown yesterday had indicated that obviously conclusions might be reached at post-mortem that may not necessarily indicate a definite conclusion, but only merely reciting the fact that these are relevant
10 issues. It is important to understand, particularly, as I say, in relation to the last two post-mortems and the post-mortem in relation to Patrick, that these post-mortems were in fact extensive. You would have no doubt expected that those experts would have in fact been
15 looking for some supportive evidence of suffocation. Again, not for factors that are just merely consistent with when there are other explanations, but you must ask yourselves the question, after listening to the evidence, are there any signs? Are there any conclusions that are
20 reached by the experts? Can they point to any specific finding or condition which in fact is the hallmark of suffocation without it having another explanation?

25 There is, in fact, one other important matter in looking at the medical evidence. This is not a matter that was not touched upon by the Crown in any great detail. When one reflects on this it makes the Crown case just all that much more difficult to understand and that much more incongruous because we, no doubt, have this mental picture
30 that the Crown has created about the motive. There will be nothing, no evidence during the course of this trial, that there was in fact a history of physical abuse to any of these children at the hands of the accused.

35 There have been detailed post-mortems. No doubt those professionals would, in fact, have been looking for evidence of recent injury; evidence of whether in fact there was old or past injury. This is an important factor to take into account, because it is submitted to you,
40 again, using this simple argument that has been put to you, we can, on the one hand, take into account what the Crown says about the big picture or the global picture but, let's see if it applies; let's see how accurately it can fit into the individual cases.

45 In a sense there is a picture the Crown has portrayed of the accused that she is a person who is prone to lose control because of the various matters he has put to you, in the sense that it has manifested, at times, with
50 anger. It is submitted to you that it is just incongruous; it just does not fit; there is, in fact, no other history of abuse. This is not a situation where people will come to court and say "I saw her even slap the child". No evidence is expected to be called about that.

55 You might ask yourselves the question: If that is going to be the evidence, how does it fit in with the mental picture the Crown has created about the accused that she is a person who readily became frustrated because she could not go to the gym or could not socialise?

You will find that, in relation to the child Sarah, again this is by way of example, there was in fact a detailed

5 post-mortem carried out. That post-mortem was carried out by a Professor Hilton. Now, Professor Hilton, at that time, was in Sydney. He was, in fact, overseeing a programme where children who were suspected of dying of SIDS were, in fact, taken to Sydney and examined.

10 He carried out this post-mortem on Sarah, knowing that there were, in fact, two previous deaths. In those circumstances, as I expect the evidence to reveal, there was, in fact, not a cursory post-mortem but a very detailed one.

15 It will be led, no doubt, that Professor Hilton does have expertise in this area, expertise in relation to SIDS. He has, in fact, commenced programmes, medical programmes, in relation to understanding SIDS. He is acknowledged as being an expert in this area.

20 So, we have the benefit, in relation to Sarah, that Professor Hilton had carried out this post-mortem. The deceased child had been brought to him for this particular purpose. His ultimate diagnosis is that this death is consistent with SIDS.

25 I might just stop there for the moment. I have about 15 minutes to go.

SHORT ADJOURNMENT

30

RESUMPTION

HIS HONOUR: There is a note from the jury which I shall
mark 1 for identification.

5

"Jury request that the media be less distracting
ie, walking in and out and chatting amongst
themselves. We feel our concentration is being
compromised and believe at this point our full
attention is essential."

10

Would the members of the news media please make a note of
that, and I would be grateful if you could pass it on to
your colleagues.

15

It is appropriate for members of the media to enter and
leave the court as the proceedings continue, of course,
and I don't think it would be appropriate to stop that
happening. I merely ask, for the jury's sake, that it be
kept to a minimum and that there be no talking in any
event. Thank you.

20

Thank you for the note, ladies and gentlemen.

25

MFI #1 JURY NOTE RE MEDIA

Yes, Mr Zahra?

30

ZAHRA: There was one other aspect of the evidence of the
autopsy in relation to Sarah that I was wishing to bring
your attention to at this stage. The Crown yesterday
referred to post-mortem findings of a scratch of about one
and a half centimetres and what were described as punctate
marks.

35

As I indicated to you prior to the adjournment, it is
critical for you to look at the evidence to see in fact
whether there is any history of abuse of the children
because, no doubt, the Crown has said to you certain
things about motive and it is submitted to you at this
early stage that you would want to look at the detail of
the evidence because it just doesn't fit in the picture
that one might have gained from the address by the Crown
and some of the physical findings.

40

45

I would expect Professor Hilton to say that he examined
these marks and that, in fact, there is no significance in
these injuries, that the scratch is a scratch that one
would expect on a child of this age. He would say that,
in relation to the punctate marks, in fact he dissected
those and found no underlying bruising. So that was a
matter that the Crown raised and left somewhat out there,
but I would expect that the evidence would indicate that
really these aren't significant injuries and that what I
said to you before the break is this very important
aspect, because there is in fact no history of abuse; that
these children otherwise appeared to be well-nourished and
well looked after.

50

55

5 These are important aspects. Again, not conclusive, but
important aspects when one looks at the question of motive
because, as we know and as the Crown has properly said to
you, it is not necessary for the Crown to prove a motive.
They have to prove the elements of the offence beyond
reasonable doubt. They don't have to prove a motive, but
one has been suggested here by the Crown and the Crown
10 case, it appears, is going to be put on the basis that you
will accept this motive as he indicated.

15 What we submit to you at this stage is that you would be
critical of that motive and you would need to look at the
detail, you would need to look at the lifestyles, you
would need to look at, obviously, the circumstances, and
it is quite highlighted in relation to the child Caleb,
for example, that, no doubt, you would use that also as a
means of looking at the lifestyle in relation to the other
20 children.

25 Now, the Crown has properly said that they do not have to
prove a motive in a sense. The way the Crown has put
their case is that this is the motive. If you don't
accept it, we don't have to prove the motive. That is
quite true. However, that doesn't mean that a question of
motive or trying to determine motive is not an important
consideration.

30 In this particular case it is important, because, in the
absence of any physical symptoms or medical signs which
conclusively indicate suffocation, and if in fact there is
no motive, or no apparent motive, or one that can't be
excluded, and there is in fact no pattern of physical
abuse, then the Crown's case becomes immeasurably weaker.

35 So, it is true that the Crown has said to you that they
don't have to prove motive, but the Crown has proffered a
motive and you would need to look at that critically and,
as I have indicated to you, it would become apparent to
40 you, even today, that that motive is very, very shaky.

45 It is submitted to you, also, that, obviously, if there
is, in fact, no motive that can be excluded, and in the
absence of any history of any other abuse, then the Crown
case becomes immeasurably weaker. It is, therefore,
important to very critically look at what the Crown tells
you about the motive. And obviously, from the Crown's
opening, we can see that he relies very heavily on the
diaries to support that motive.

50 The Crown has read to you excerpts from that diary. You
would need, obviously, to consider, when you are attaching
weight, not only the literal words that are there, but
there are a number of other factors about the diaries that
55 you might need to consider when you are trying to
determine whether they do support the inferences that the
Crown, in fact, is inviting you to draw.

In this particular case, obviously, we might start with the threshold, or a preliminary, question as to what type of reliance, what weight, you would give to a diary as a literal description of what happened and as to her true state of mind. It is a threshold question.

This is a diary. We all may have experienced what a diary is or in fact may have had a diary ourselves; may have, in fact, been privy to other persons' diaries. We draw from our experience in life and, no doubt, it may not necessarily follow that there is, in fact, a basis upon which to read every word literally as being indicative of a description of what, in fact, happened or what was, in fact, her true state of mind. So this is a rather obvious matter, an obvious issue that, firstly, it is a diary. The first step really is to attach what weight to it as in fact a literal description of, in fact, her thoughts, her state of mind and the descriptions of what, in fact, happened.

You would, no doubt, also take into account the context in which the diaries are written. You would need to consider, no doubt, and again, this is the beauty of the jury system, that you bring in your own experiences of life, you bring in your own experiences as members of the community, your collective experience, you apply commonsense.

Your experiences, no doubt, may not include experiencing the death of a child. You may not have had any exposure to that type of situation. But it may be important to understand that, if this was the context in which the diaries were written, there may be some grief reactions, there may, in fact, be some basis upon which we might understand the diaries, in the context of experiencing the deaths of the children, as going through some fairly normal human reactions - not only of grief, maybe feelings of shame, feelings of guilt, feelings of responsibility, asking the what if questions.

Now, I only put those up - not as complete answers to the diary at this stage - but, in fact, as a process of reasoning in relation to the weight to be attached to those diaries, because it is you, ultimately, who have to draw the inferences from those diaries. But I pose those issues at this stage, because it is you who have to draw on your own experience before you look at the weight of those diaries as to whether they are a literal translation of her state of mind and what, in fact, had happened.

It may be that you would need to take into account what might be really quite a wide range of human responses and reactions to the predicament that the accused is in, having children die at a very young age, as babies. You might expect, and this is not to suggest that this is in fact a conclusive answer, but these are the sorts of issues that you use, and the way the jury system operates, that you draw on your experiences in life and those

experiences, no doubt, include understanding emotions, understanding emotional reactions to various situations.

5 You may need to consider the diaries in that particular context, whether in fact there were times, as some of the excerpts might reveal very much on their face, of feelings of inadequacy.

10 These are important factors to consider in relation to the assessment of the weight to be given to the diaries. Again, one needs to be precise and one needs obviously to use your experience in looking at the diaries and the excerpts and take into account the context in which in fact they were written. And, no doubt, draw on your
15 experiences, experiences of an understanding of quite a wide range of human emotions consequent upon the death of one's own child.

20 Those types of what if questions, those feelings of guilt, or shame, responsibility. It is, no doubt, on some reflection, a valid process of reasoning, when one tries to determine the context in which these diaries are written.

25 So, overall, as I have said, the question of motive needs obviously to be looked at in detail; it needs to be looked at when one goes down to obviously looking at the evidence of the particular cases.

30 Just lastly, in relation to the medical evidence, as may already be apparent from what the Crown has said, this case raises many issues in paediatrics, forensic
35 paediatrics, that are either not clear cut, or in some cases, not completely understood. You will find this particularly so when medical evidence will touch upon the possibility of underlying vulnerability, or possible genetic links to the deaths by natural causes in infants. These are matters that the Crown has already submitted
40 upon, but it is a matter of keeping an open mind at this stage and, in fact, considering the evidence and attaching the weight to the evidence when, in fact, it is heard.

45 Can I say something else, actually, about the expert evidence and this is again an important tool to take into account when assessing the expert evidence. You would assess the expert evidence very much in the same way as you would assess all other witnesses. You will no doubt pay due regard to the opinions based on the field of
50 expertise which they have which is outside your direct knowledge. But in situations where they proffer an opinion, you would need always to look at the basis of that opinion.

55 Now, this is not a matter, because of the particular qualifications, that one needs to accept everything that the witness has to say, without, again, being critical of the evidence. You deal with their evidence in much the same way as you deal with other witnesses.

5 No doubt you will be impressed with their qualifications
and what they have to say about particular areas which are
outside your expertise, and you must give that the weight
it deserves. But, in certain situations, if, for example,
the opinion is based on a foundation, it is a finding of
fact which is your job, then it doesn't necessarily follow
that you would have to accept the evidence of the expert,
despite the qualifications of that expert.

10 Can I give you a simple example? If, for example, an
expert is called who has not examined a patient, again, as
the Crown has explained, getting the expert to give an
oversight, and that expert has been given some symptoms
15 and that expert concludes that that patient is suffering
from a cold. In other words, the expert is given a
history, he has not examined the patient, and he is told
that this person has a temperature, this person has a
runny nose, this person has some congestion and is
20 coughing, and has been unwell for a couple of days, well,
the expert, suitably qualified, might say: Well,
considering in oversight, these particular symptoms,
having not seen the patient, I can conclude that these
symptoms are consistent with influenza or consistent with
25 a cold.

30 That opinion is based on various findings, on various
histories. So if, for example, the evidence that you hear
doesn't reveal that there was any evidence about a runny
nose, or any evidence of a temperature, or any evidence of
congestion, now, despite the qualifications of an expert,
if it is based on findings of fact that you cannot find,
then obviously you must consider the opinion in that
regard, or in that context.

35 So, when you are looking at the evidence of the experts in
oversight, it is important, obviously, that there are
certain pieces of evidence and there are certain symptoms
that they might look to which may be outside of your
40 expertise, but you may find that their opinion is based on
a mixture, a mixture of observations of anatomy which
could be outside your experience, but it may be, in fact,
a combination of some factual finding; that the opinion
may in fact be founded on findings of fact.

45 Now, as has already now been said to you quite a few
times, you are the judges of the facts. It is not a
matter for the experts to make findings of facts; it is
for them to give opinions based on findings of facts that
50 you find are available. So, in a sense, the opinion would
collapse if, in fact, the foundation of facts cannot be
proved.

55 Now, that is important in the present case when we are
looking at the expert evidence because, at times, it may
not necessarily follow, for example, that they are talking
about the symptoms of myocarditis, for example, but if,
for example, they are looking at certain other factual

matters, then it may be that you would obviously need to consider whether those factual matters have, in fact, a strong foundation on which that expert opinion will be based.

5
Also, in relation to the question of inferences, again, as I have said to you, you will be asked, no doubt, as clearly the Crown has indicated in their opening, that you will be asked to draw certain inferences. That word
10 "inference" has a particular meaning at law and his Honour will give you directions about drawing inferences.

I would expect, again, whatever his Honour tells you about, this is in fact the way you should apply it, but to
15 give you some indication at this stage of what the drawing of inferences involves, that, in fact, before you draw the inference, before the Crown can ask you to draw an inference, it must be the only reasonable inference to be drawn; that the burden is on the Crown to establish that
20 it is the only reasonable inference that you would draw and, in that regard, that you would exclude other reasonable inferences.

When you are asked to draw inferences, you will ultimately
25 be given directions of law about how you apply inferences; that, in a sense, if the Crown is asking you to draw an inference, it must be the only reasonable inference to be drawn, and the burden is on the Crown to establish that it is the only reasonable inference to be drawn. And in that
30 regard one must exclude other reasonable inferences.

So, applying this process, by way of example, you may recall that there were certain matters of coincidence that
35 the Crown had indicated to you yesterday, and what I hope to do is to give you some idea of some fundamentals about how you go about the process of considering this evidence. Now, you may recall that these factors included such things as the accused was the last one to see the child,
40 she was the first person to see the child dead, it was shortly after the death, in the sense that it is suggested that the children were warm to touch, that she was in fact the only person in the house, and she had opportunity. You may recall that, in fact, he referred to those
45 particular factors and ultimately he will ask you to use that evidence in support of the Crown case.

Now, when one is looking at what can be inferred from those factors, it is important to take into account what
50 the evidence is likely to reveal. And, that is, for most of the time, the accused was the primary carer of the children. Most of the time she, in fact, stayed at home looking after the children. It was she who attended the children during the night and during the day when Craig Folbigg was, in fact, at work. And you will, in fact, I
55 understand, see, from the evidence of Craig Folbigg, that he was of the view that it was her role to tend to the child during the course of the night; that he was a heavy sleeper; and that he, in fact, was the breadwinner and, in

a sense, that it was her role to attend to the children during the course of the night.

5 So, in the context of these care arrangements, you, no
doubt, would expect that she was the most likely person,
therefore, to see the child, to be the last person to see
the child, rather, before the death, or the first person
to see the child dead, or maybe even at a time when the
10 children were, in fact, still warm and being the only
person in the house.

15 So, whilst those factors, on the face of it, might be
significant, again it involves a consideration of the
detail of the evidence; the consideration of the detail of
the context. Because, if we take into account, again, on
the basis that these are the facts that you would find,
that she is a primary caregiver, she was the person who
was tending to the children, particularly at night, then
it might not hardly come as a surprise that those factors
20 would be present.

25 So, this gives you some example of the approach, of the
approach of considering this evidence and being a judge to
dispassionately and critically look at this evidence.
Again, this is indicated just to give you some flavour of
your particular role, bearing in mind you have been given
quite a summary of the Crown case in the Crown opening.

30 So, it is important, obviously, when one looks at those
factors, that they clearly are significant, but at the
same time you need to look at all the evidence; you need
to consider that evidence in the context and weigh it up
accordingly. This is just an example of the way to
35 approach the evidence that will, in fact, be revealed to
you.

40 Lastly, my friend had something to say about the evidence
of Craig Folbigg and already had foreshadowed that Craig
Folbigg has made a number of statements, some of which are
inconsistent. And, no doubt, he has already foreshadowed
that he would expect the evidence will be revealed in that
way and has put forward a proposition that you will
45 understand what he has had to say on the basis that he
loved the accused, and I think the word that the Crown
used was "besotted"; that in a sense, you would move
quickly from the mere conflict in the evidence to conclude
that what he has to say is credible and is the truth and
can be relied on, and it is important in this case that
50 you form those views, because, no doubt, his observations
of her parenting are really crucial to the determinations
in this particular case, the incident that has been
described as throwing Sarah on to his lap and, no doubt,
the issue as to whether the child Laura was not in her bed
about 1am on the morning in which she was found dead.
55

These are significant factual matters that need to be
resolved and, no doubt, the evidence of Craig Folbigg is
extremely important in the Crown's case to establish those

facts. It is submitted to you that you would not easily
dismiss the changes in the evidence of Craig Folbigg on
the basis that he was besotted or blind in love. You
would, no doubt, need to consider his evidence, consider
5 the differences in what he has said at different points in
time, and it is submitted that these are extremely shaky
foundations. Even if, in fact, he loved the accused, may
10 have been besotted, it is a question ultimately that you
must decide, if these are facts you are going to rely on,
if these are facts that you find established to be able to
rely on them in the way the Crown invites you to, that
they must have a strong foundation and the foundation of
this evidence is the credibility of Craig Folbigg.

15 So, it is not merely a matter to dismiss the changes in
his statements over time on the basis that he was blind or
besotted; it is a matter to very seriously weigh his
evidence because the Crown is placing quite a significant
20 foundation, particularly on those two incidents, alleging
that the accused threw the child Sarah into his lap and
that the child Laura was not in her bed at 1am.

Look at that proposition that was put to you by the Crown
very critically. It is for you to determine what weight
25 you give to the evidence, not a matter for the Crown to
suggest that that is what you should do. He is entitled
to make a submission to you, but it is a matter for you to
determine what weight you give to the evidence, and it is
submitted to you, in the circumstances of the changes of
30 his evidence, that you can't readily dismiss the changes
on the basis the Crown has, in fact, suggested.

It is important, obviously, that we consider the
importance of Craig's evidence also about the lifestyle,
35 what he observed about the parenting of the accused and,
again, this is crucial evidence when one looks at the
motive that has been suggested by the Crown to see, in
fact, whether the matters that my friend had raised to you
as being possible motives can be elevated to such an
40 extent that you would use that evidence as proof.

Now, the fact that Craig made no observations of the
accused striking the children, or no observations of
45 abuse, can't be put to one side on the basis that he loved
her and was besotted, therefore, he didn't see bruises and
didn't see her strike the child. Craig Folbigg's evidence
is really quite crucial, because of this background,
again, which we say is really quite inconsistent and quite
incongruous, incongruous with the picture of the accused
50 that the Crown has painted in their opening.

Lastly, can I say that you have heard a very lengthy Crown
opening. My submissions have been relatively brief. They
have indicated to you a way that you can approach the
55 evidence and, in fact, have attempted to distill what the
accused's case is in its simplest form so you can
understand now, rather than at some later stage, what the
accused's case is.

5 But, again, in understanding the accused's case, we must
always take into account the fundamentals. It is for the
Crown to prove this case. It is for the Crown, in this
particular case, to exclude the deaths by natural causes.
10 It is not a matter, even though the case has been put to
you on the basis that it is the accused's case, that it
cannot be disproved by the Crown that these causes
attributed death, or that the children died of natural
causes. She does not bear an onus. She does not have to
15 prove that the deaths occurred by natural causes. The
onus is squarely on the Crown.

15 It is important to listen to the evidence and keep an open
mind about the evidence and consider the evidence using
these fundamentals in the resolution of the contentions in
the evidence.

20 Obviously, look at the evidence in detail and whenever
there is a suggestion to look at an overview, or globally,
just go back, go back to the detail of the individual
cases and see whether what is put globally fits in with
the individual cases.

25 Thank you for your attention. Thank you, your Honour.

30 HIS HONOUR: Ladies and gentlemen, there is a matter which
counsel forewarned me that I should have to deal with in
your absence before the first witness is called to give
evidence before you. I am proposing to do that now. I
don't think it is going to take more than five or ten
minutes, so will you please now retire and I will send for
you as soon as we are ready to start the evidence.

35 JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Crown, is it convenient to call Mr Folbigg?

5

CROWN PROSECUTOR: Yes, your Honour. I call Craig Folbigg.

<EXAMINATION ON THE VOIR DIRE

10

<CRAIG GIBSON FOLBIGG(12.30PM)
SWORN AND EXAMINED

CROWN PROSECUTOR: Q. Mr Folbigg, will you please tell the court your full name?

15

A. Craig Gibson Folbigg.

Q. And, Mr Folbigg, you are the husband of the accused, Kathleen Megan Folbigg?

20

A. I am.

Q. Are you still married to her?

A. Yes.

Q. Did you cease to live with her in 1999?

25

A. Yes.

Q. And is it the case that you have at no time since then lived with her, since 1999?

30

A. We actually got back together midway through '99 and--

Q. After you got back together, you separated again?

35

A. Yes.

Q. And you have not lived with her since then?

A. No.

Q. Is that correct?

40

A. That's correct.

Q. And I think you are engaged to be married to a young lady called Helen?

45

A. Yes.

Q. Do you wish to give evidence in this case?

A. Yes, I do.

Q. At my suggestion, did you consult with a solicitor and a barrister in relation to your giving evidence in this case?

50

A. Yes, I did.

Q. And the name of the solicitor?

55

A. Dennis Whiteman.

Q. And the name of the barrister?

A. Ian Strathdee, QC.

5 Q. And have you consulted Mr Strathdee, not just about giving evidence, but also about the possibility of your asking the judge for a certificate so that you are protected in relation to one particular aspect of your evidence?

A. Yes, that's correct.

10 Q. And, correct me if I'm wrong, but is that in relation to the fact that, at one stage, in 1999, you gave an account to the police about the circumstances of Sarah's death and omitted to mention some significant evidence?

A. That's correct.

15

Q. When you gave that account to the police that omitted that evidence, did you at that stage believe that your wife was responsible for Sarah's death?

A. No.

20

CROWN PROSECUTOR: Your Honour, I think that, unless your Honour wishes me to ask questions about any further areas, those are the questions that I wish to ask of him.

25

HIS HONOUR: Well, what is the significant evidence which was withheld from the police? Is there an easy way of informing me what the substance is?

30

CROWN PROSECUTOR: I am content to give your Honour a summary of it. He first told the police that when he had woken up at about 1.10am both his wife and his daughter Sarah were out of the room. When he came to give his second formal interview with the police, if my memory serves me correctly, he told them that Sarah had been in bed or that he wasn't sure whether or not she was in her bed. I can't remember which.

35

HIS HONOUR: Which was the incorrect version?

40

CROWN PROSECUTOR: Perhaps I might ask the witness that, your Honour, rather than give your Honour my understanding.

45

HIS HONOUR: I need to understand what the problem is, Mr Crown. You better get the evidence out.

CROWN PROSECUTOR: I can go into it in more detail.

50

HIS HONOUR: Thank you.

CROWN PROSECUTOR: Q. When you came back to the police to give your formal interview, was that on 19 April 2001?

A. No.

55

Q. Did you come to make a formal typed statement to Detective Sergeant Ryan on 19 May 1999?

A. Yes.

Q. And, in that statement, in paragraph 82, did you say this:

5 "Time had rolled on and my wife hasn't come back
to me. I have seen her out in Singleton and she
appears to be enjoying herself. I am deeply
hurt and I want her back. I believe because of
10 this I contacted Detective Ryan and told him
some things that were not true. I told him that
on the night Sarah died, Kathy and Sarah were
not in the room when I woke up at 1am. I also
said that after Laura died I heard Kathy talking
15 to herself using a different accent. I must
admit that I was hurt at the time and I said
these things to Detective Ryan, and also I was
naturally suspicious about the deaths of my
children. I loved my wife and still do. I
20 would never seriously think she has hurt my
children, but, of course, everybody around me
are saying that it is suspicious. I suppose I
told Detective Ryan those things out of spite
and because I was hurt that Kathy wouldn't come
back to me. Even so, everything that is
25 recorded in this statement is the truth, honest
to God."

Is that what you said in your statement on that day?

A. Yes.

30 Q. In effect, what you told the police, what you had
earlier said to Detective Ryan, was said out of spite and
was not true?

A. Yes.

35 Q. And was that the truth?

A. No.

HIS HONOUR: Q. No, what you secondly said to Detective
Ryan, that you had spoken in spite before; was that true?

40 A. No.

CROWN PROSECUTOR: Q. Was what you had originally told
Detective Ryan the truth?

45 A. What I originally told Detective Ryan on Thursday, 19
May 1999, in regards to Kathy and Sarah not being in the
room was the truth.

Q. Sorry, was?

50 A. Was the truth. What I recanted, where the problem
lies, and did recant on the Sunday, the 23rd, 1999, was
the lie.

Q. So, the first version you gave was the truth; the
second version that I have read to you from paragraph 82
55 was the lie?

A. Yes.

Q. And why did you tell that lie?

A. Certain things had transpired in the days between the two statements that made me feel that I was being a little bit harsh.

5 Q. On whom?

A. On Kathy. Made me feel that maybe I had judged her too harshly and basically made me feel like an absolute mongrel.

10 Q. And, at the time on the Sunday, that you made this retraction, did you think that Kathy had killed Sarah?

15 A. I didn't know what to think. By the Sunday, when I made the retraction, I didn't know what to think anymore, so, basically, what I - I had some idea that what I'd told Detective Ryan was fairly damning and by the Sunday I wasn't sure whether that was right, that I should have done that. She was my wife, she was their mother and she - there were times - I mean, she loved them. That was evident. There were times that she loved them, and I just
20 went back to that time when I went back to see Bernie Ryan.

Q. And, in the interim, in between the two parts of the interview, you had been reconciled with Kathy?

25 A. Not exactly. The recant came from an argument that stemmed on the Saturday night.

Q. With?

30 A. Kathy.

Q. Between you and Kathy?

A. Between Kathy and I.

35 CROWN PROSECUTOR: Yes, thank you. Nothing further.

HIS HONOUR: Just wait there for a moment, please.

40 Q. Is it the fact, Mr Folbigg, that you take objection to giving evidence of the first version, the untrue version, which you later recanted, on the ground that it may tend to prove that you've committed an offence against Australian law? Is that the fact? Yes or no?

A. Yes.

45 HIS HONOUR: Now, Mr Zahra, do you want to ask any questions about, first of all, the question of compellability and, secondly, about the objection.

50 ZAHRA: No, your Honour. Can I just ask one question in relation to the statement, just to clarify, in my own mind, when the retraction was made?

HIS HONOUR: My understanding is the 23rd.

55 ZAHRA: Yes, but the statement starts on the 19th. It was signed on the 23rd, which contains the retraction. My friend might be able to assist. Was it suggested that somewhere in that statement - that, in fact, it stops on

the 19th and then continues on the 23rd?

CROWN PROSECUTOR: I think that is right.

5 HIS HONOUR: I don't have a copy of the statement in front of me.

10 CROWN PROSECUTOR: We will seek to clarify that, your Honour. I think that Sergeant Ryan will be able to help us with that, and we will communicate that to my learned friend.

ZAHRA: I have nothing, your Honour.

15 HIS HONOUR: Mr Zahra, do you have any objection to my granting a certificate to Mr Folbigg?

ZAHRA: No, your Honour.

20 CROWN PROSECUTOR: Sorry, to interrupt, your Honour. If I could make a significant transcript correction. Apparently at page 12, line 50, the answer that was given was that it was the truth, but apparently in the transcript that we've got on the screen, it says "wasn't".

25 HIS HONOUR: Yes, I wasn't sure of the answer myself.

CROWN PROSECUTOR: I sought to clarify it by "was it the truth" and he said, yes, it was.

30 HIS HONOUR: That correction can be made.

35 Mr Folbigg, I am proposing to order that you have a certificate under the provisions of the Evidence Act. The certificate is preceded by my requirement to you that you do answer questions you were asked about on that topic to which you take objection to giving evidence; do you understand?

40 WITNESS: I do.

45 HIS HONOUR: You will have to give the evidence to which you take objection and you will have to give truthful answers to all questions you are asked about it. But you will then receive a certificate and the effect of the certificate will be that the evidence which you give in this Court will not be able to be used in any proceedings against you, nor will the evidence you give be able to be used as a basis of inquiries from which further evidence

50 might be obtained to use against you. Do you follow?

WITNESS: Yes.

55 HIS HONOUR: So the evidence you give will not be able to be used directly or indirectly in any proceedings against you. That will be the effect of the certificate; do you follow?

WITNESS: I do.

HIS HONOUR: We are ready for the jury then. Would you like Mr Folbigg to wait outside and come in again?

5

CROWN PROSECUTOR: Your Honour, I am reminded that section 18 requires your Honour to give certain advice to Mr Folbigg.

10 HIS HONOUR: Yes, that's true.

Mr Folbigg, this is the first topic about which the Crown Prosecutor asked you. The evidence is that you are still married to the accused, Mrs Folbigg. I realise that you have seen a solicitor and a barrister about this and have received some advice, and that, having received that advice, you want to give evidence in this case. I still have to satisfy myself that you are aware of the position in which you find yourself, namely, that you cannot be compelled to give evidence in the case in which Mrs Folbigg is the accused. You do understand that, don't you?

15

20

25

WITNESS: I do.

HIS HONOUR: And, notwithstanding that, you want to give evidence, having received the advice you have received?

30

WITNESS: I do.

HIS HONOUR: I think that discharges the obligations of the Court under section 18.

35

Mr Folbigg, would you mind stepping down just for a moment please.

CROWN PROSECUTOR: He will have to be resworn in the presence of the jury.

40

HIS HONOUR: Yes, you will be resworn later.

<WITNESS STOOD DOWN

45

<EXAMINATION ON THE VOIR DIRE CONCLUDED

IN THE PRESENCE OF THE JURY

HIS HONOUR: Thank you, ladies and gentlemen. Yes, Mr
Crown?

5

CROWN PROSECUTOR: I call Craig Folbigg.

<CRAIG GIBSON FOLBIGG(12.55PM)
SWORN AND EXAMINED

10

HIS HONOUR: Please be seated, Mr Folbigg. Stay
reasonably close to that microphone and speak a little
more slowly than you normally would. Thank you.

15

Yes, Mr Crown?

CROWN PROSECUTOR: Q. Mr Folbigg, will you please tell
the Court your full name?

20

A. Craig Gibson Folbigg.

Q. And, Mr Folbigg, do you live in the Hunter district?

A. I do.

25

Q. In 1985, did you come to meet the accused, whose name
was then Kathleen Marlborough?

A. I did.

30

Q. And did you, after a short period of time, commence a
relationship with her?

A. Yes.

35

Q. And, in January of 1986, did the accused, whom you
knew as Kathy, move in with you to your house that you
were then living at which was in Glendale?

A. Yes.

Q. Is that in Newcastle?

A. It is a suburb of Newcastle.

40

Q. And did you live together in a number of rented
houses up until the time when you became engaged in August
of 1986?

A. Yes.

45

Q. At that time, were you working at BHP and was Kathy
working in a restaurant?

A. Yes.

50

Q. And did you then together purchase a home at 36
Rawson Street, in Mayfield?

A. We did.

55

Q. And that also is a suburb of Newcastle?

A. It is.

Q. Did you move in to the house at Mayfield in May of
1987?

A. Yes.

Q. On 5 September 1987, were you and Kathy married?

A. We were.

5

Q. In 1988, did Kathy fall pregnant with your first child, Caleb?

A. Yes.

10

Q. And, at that time, were you working as a vehicle valuer at Crossroads Motors at Glendale?

A. I was.

15

Q. Mr Folbigg, do you tell the Court that your first-born child, Caleb, was born on 1 February 1989 at the Western Suburbs Hospital in Newcastle?

A. He was.

20

Q. At that time, was your general practitioner, a local doctor by the name of Dr Marley?

A. Yes.

25

Q. And was there another doctor, a Dr Davidson, who was present during the birth?

A. Yes.

30

Q. Did Kathy and the baby stay in the hospital for about five days after the birth?

A. It was about five days.

35

Q. And are you able to describe what Kathy's attitude was like to the baby whilst she was in the hospital?

A. She was happy. She didn't want to breastfeed him. She found that uncomfortable, but other than that she was happy to be a mum.

40

Q. And, when she and the baby went home, was it the practice that Caleb slept in a white bassinet on a stand in the sunroom at the front of your house?

A. Yes.

45

Q. And was that a room that adjoined the bedroom where you and Kathy slept?

A. It had a door from our room to that room.

50

Q. And did Caleb always sleep in his bassinet?

A. Yes.

Q. Was he a good sleeper?

A. He was a quiet baby. Seemed to be a good sleeper. From what I can recall.

55

Q. Now during the 19 days of his life, were you working?

A. I--

Q. A normal job?

A. Yes.

Q. And was Kathy the primary caregiver for Caleb?
A. She was.

5 Q. And, at night, are you able to tell us what the practice was as to who would feed Caleb?

A. Kathy fed Caleb.

10 Q. Are you a heavy sleeper?

A. Very much so.

15 Q. Can you tell us how heavy you are and perhaps give us some examples?

A. Well, pretty much once my eyes closed, until they open in the morning, I pretty much couldn't tell you anything that went on during the night, whether a truck came through the wall, or a bomb fell, or what, and I'm pretty much still - well, I am like that still.

20 Q. So you will sleep through just about anything?

A. Yeah.

25 Q. And did you used to sleep through the night whilst Caleb was alive when Kathy got up to feed him?

A. Yes.

30 Q. And do you know where it was that Kathy would feed Caleb at night?

A. We had a rocking chair in that room as well, while she sat in the lounge room.

35 Q. Which room was the rocking chair in?

A. The sunroom.

40 Q. The room where he slept?

A. No, I think it was in the lounge room. So she sat in there.

45 Q. Now, did you notice anything unusual about Caleb when he was drinking from the bottle?

A. He seemed to, not so much struggle, but he had this funny little noise that he used to make, he'd drink, suck like crazy, and then he'd make this - he'd be making this funny noise, and he'd have to break away and have a couple of breaths and then start sucking again. It didn't really seem normal.

50 Q. All right. So you were concerned about that?

A. I was.

55 Q. And did you discuss your concerns with Kathy?

A. I did. I - yes, I did.

60 Q. And, as a result of those discussions that you had with Kathy, did you understand that she took Caleb to see a paediatrician?

A. Yes, on - yes.

65 Q. And was that paediatrician a Dr Springthorpe?

A. It was.

Q. Did you go to see Dr Springthorpe with Caleb?

A. No, I was at work.

5

Q. Do you know how many times Kathy and Caleb saw Dr Springthorpe?

A. I'm not sure about the time that they were in the hospital after he was born, but it pretty much was just that one time.

10

Q. And after she had been to see the doctor, did she come back home and tell you something that the doctor had said?

A. She said the doctor said that he had a lazy larynx.

15

Q. Was it a lazy larynx or a floppy larynx?

A. Oh, a floppy larynx.

20

Q. Did you know what a floppy larynx was?

A. No, I didn't know what a larynx was.

Q. Could you tell us, how did Kathy seem during the 19 days that Caleb lived?

A. She was pretty happy. We were happy. We were parents and we had this gorgeous little baby. You know, we did what everybody does and make observations of whose nose he had and whose fingers he had and that sort of stuff. So, yeah, she was pretty happy.

25

30

Q. Did she appear to be handling the role of motherhood?

A. I wasn't really there much, but when I was there it seemed she was going okay.

35

Q. On Sunday, 19 February, that's the day before Caleb died--

HIS HONOUR: If you are going on to another topic, Mr Crown, it might be a suitable time.

40

LUNCHEON ADJOURNMENT

RESUMPTION

- 5 CROWN PROSECUTOR: Q. Mr Folbigg, I was just about to ask you some questions about Sunday 19 February 1989. Did you and Kathy and Caleb spend the daylight hours of that day with your brother John and his family at their home at Charlestown?
- A. We did.
- 10 Q. That's also a suburb of Newcastle?
- A. It is.
- Q. During the day, how did Caleb appear?
- 15 A. Fine.
- Q. Was he well?
- A. Yeah, he was well.
- Q. Was there any sign of anything untoward or unusual at all?
- 20 A. No, he got tired by the end of the day, but I guess most babies would have.
- Q. Did you arrive home at about 8pm?
- 25 A. It was about 8 o'clock.
- Q. If you could just speak as close as you can to the microphone?
- 30 A. Sorry.
- Q. When you arrived home was Caleb already asleep?
- A. He was.
- Q. Did Kathy change him into a cloth nappy, singlet and a yellow jumpsuit?
- 35 A. Yes.
- Q. Did she put him into his bassinet in his bedroom, the sunroom?
- 40 A. She did.
- Q. At around 10, 10.30pm that night, did you and Kathy go into the sunroom and did you see Caleb sleeping peacefully in his cot?
- 45 A. We did and I did.
- Q. At the time was he wrapped in a bunny rug with a white blanket over his body?
- 50 A. Yes.
- Q. Did you and Kathy then go to bed, leaving the door between your room and Caleb's room open?
- A. Yes.
- 55 Q. Was there a lamp in Caleb's room which was left on all night to make it easier for Kathy to get up and feed him?
- A. Yes, there was.

- Q. Now, after you went to sleep would you tell the Court what was the next thing that you remember?
- 5 A. I remember being woken by a scream, and jumping out of bed. It was more screamed words and jumping out of bed and running into Caleb's room, and Kathy was standing at the end of the bassinet, screaming.
- Q. Yes. Do you remember what she was screaming?
- 10 A. "My baby, there's something wrong with my baby".
- Q. Where was Caleb?
- A. In the bassinet.
- Q. Did you go up to the bassinet?
- 15 A. I went up to the bassinet and grabbed him out.
- Q. Was he still wrapped up in the bunny rug?
- A. Yes.
- Q. What about the blanket?
- 20 A. I can't recall.
- Q. What did you notice about Caleb when you lifted him up?
- 25 A. His lips were blue.
- Q. Were his eyes closed?
- A. His eyes were closed.
- Q. As you picked him up did you feel his skin at all?
- 30 A. Yeah.
- Q. What was it like?
- 35 A. It was warm. I put his face up to my ear.
- Q. And his face was still warm?
- A. It was warm. I couldn't hear him breathing.
- Q. You couldn't hear him breathing, so what did you do?
- 40 A. I didn't know much about CPR at the time, only what I had seen on TV. I did what I thought was CPR and I screamed at Kathy to ring the ambulance.
- Q. Did you, in effect, place your mouth over his mouth and blow into his mouth?
- 45 A. I blew into his mouth.
- Q. Did Kathy go to the telephone?
- 50 A. Yeah, she went to the phone after I screamed at her to.
- Q. Now, when you first came into the room, are you able to tell us whether Caleb was lying on his front or back or side or what?
- 55 A. On his back.
- Q. Did you hear Kathy talking on the telephone?
- A. Yeah.

Q. Did she give your address into the telephone?

A. Yeah, she told them where we were.

5 Q. What did you do with Caleb then?

A. I had him on the lounge. By that time I had gone into the loungeroom which was through another door from the sunroom. I had him on the lounge and I was blowing into his mouth.

10

Q. About ten minutes later, did some ambulance officers arrive?

A. Yeah, it was about that long.

15 Q. Sorry?

A. It was about that long.

Q. Did they then take Caleb from you and start to work on him?

20

A. Yes.

Q. After a little while, did you and Kathy stay in that room or did you go into another room?

25

A. One of the ambulance officers asked me to take Kathy into the bedroom.

Q. Why was that?

A. Well, we were very upset and we were in their way.

30

Q. After a little while, did an ambulance officer come up to you and Kathy in that other room and tell you that Caleb had passed away?

A. Yes.

35

Q. Sometime later did a police officer from Mayfield come to the house and speak to both you and Kathy?

A. Yes.

40

Q. Did you both tell him what had happened?

A. No.

Q. Sorry?

A. No.

45

Q. What happened?

A. Didn't really ask us much at all. Basically just came and told us how sorry he was.

50

Q. Later that morning did you go to the Newcastle Hospital and identify, formally identify, Caleb to a police officer?

A. I did.

55

Q. Now, did you grieve for Caleb?

A. Yes.

Q. Did Kathy grieve for Caleb?

A. Yes.

Q. At that stage, whilst you were grieving, were you told things about sudden infant death syndrome?

5 A. We were introduced to a lady from the SIDS organisation who told us about SIDS.

Q. Was there a SIDS organisation branch in the Newcastle area?

10 A. They had a house in Charlestown. It was like a parents' retreat.

Q. How did Kathy react after the death of Caleb?

A. She pretty much basically just got on with her life.

15 Q. What did she do to get on with her life?

A. She went back to work at the restaurant she had worked at.

Q. How long after Caleb's death did she do that?

20 A. I don't recall.

Q. In what other ways did she get on with her life?

25 A. Just basically lived her life without really - I fell to pieces and she didn't seem to fall to pieces.

Q. So, did she appear to you to be coping much better than you coped?

A. Definitely.

30 Q. What else did she resume doing that you weren't able to do after Caleb's death?

A. She went out a bit.

Q. To friends or what?

35 A. No, nightclubs and - friends and nightclubs.

Q. How soon after Caleb's death did she go out to nightclubs?

40 A. Pretty much as soon as she started back at work.

Q. Are you able to tell us in days, weeks or months how long after Caleb's death?

A. It would have been some - a few months.

45 Q. At some stage after Caleb's death, did you and Kathy have any conversations about having another baby?

A. I pressed her to have another baby.

Q. Is that because you wanted to have a family?

50 A. I wanted to be a dad.

Q. Did you do some improvements to your home to make it a good environment for children?

55 A. SIDS people told us what they assumed was a scenario for SIDS babies, low income, the housing, type of house and stuff, so we set about doing renovations to the house.

Q. What sorts of renovations did you do?

5 A. We recarpeted. I built new floors and we recarpeted and painted. Had new curtains and blinds - or blinds put up. The sunroom was fairly run down, a little affair, and had a door also that was openable to the driveway and my father and I bricked that up and put a big window in and lined that room, so we did that room up as well.

10 Q. Did you do that because you had been told by this lady from the SIDS organisation that there was some correlation between socioeconomic status and SIDS?

A. Yes.

15 Q. At some stage during 1989, the latter half of 1989, did you both discover that Kathy was pregnant with your second child?

A. Yes.

20 Q. Do you tell the Court that your second son, Patrick, was born at the Western Suburbs Hospital in Newcastle on 3 June 1990?

A. Yes.

25 Q. Was Dr Davidson again the doctor present at the birth?

A. He was.

30 Q. I think you also were present at both Caleb's and Patrick's births?

A. I was at both.

35 Q. When Patrick was born, for all intents and purposes, did he appear to be healthy?

A. He was wonderful.

40 Q. What was your attitude and Kathy's attitude to the birth of Patrick?

A. Oh, that day?

45 Q. Well, in the very initial stages?

A. Oh, euphoric.

50 Q. You were both euphoric?

A. Yeah.

55 Q. Did Kathy again stay at the hospital for about five days?

A. She stayed - yeah, I'm fairly sure she stayed that many days.

Q. Sorry?

A. She didn't come home straightaway.

Q. Again, did she not want to breastfeed and was Patrick given formula in a bottle?

A. He was.

Q. When Patrick came home with Kathy from the hospital, did he sleep in a cot in a bedroom off the dining room?

A. Yes, he did.

Q. Was that a different room to the room that Caleb had slept in?

A. It was further down the house.

5

Q. Because of what had happened to Caleb, were you somewhat nervous about Patrick?

A. I was very nervous. We had had some conversations with the SIDS people and they couldn't tell us what SIDS meant or why these little babies die and I hadn't really spent much time with Caleb at all, so I quit my job and stayed home.

10

Q. Did you stay home essentially so as to be with Patrick?

15

A. Basically.

Q. Did Patrick, in the first few months, appear to be well?

20

A. Yeah, he was a great little bloke.

Q. Did he sleep well?

A. Slept well.

25

Q. Feed well?

A. Fed well.

Q. Again, at night-time, even though you weren't working, was it Kathy who would get up to Patrick?

30

A. Yes.

Q. You were still generally fast asleep when that happened?

35

A. Yeah.

Q. Do you know in which room she would feed Patrick at night?

A. The lounge room or his room.

40

Q. After about three months, had you got some confidence in Patrick to the extent that you decided to go back to work?

45

A. I had been approached and offered a job at a dealership in Newcastle and life was going really well and Pat was going really super well and Kathy was going well. I guess we weren't really doing it tough because at that stage we owned our home and our car and didn't owe anybody money, except for our renovations, and basically figured I couldn't stay home forever. It was a good job, so I took the job.

50

Q. That was as a workshop controller at a Holden dealer in Newcastle?

A. It was.

55

Q. During those first three months that you were home, what was Kathy's attitude to motherhood like?

A. Pretty good. She was happy being a mum, enjoying it,

didn't really to me appear to be having any dramas with it.

5 Q. I would like to ask you questions about the evening of Wednesday, 17 October 1990. By this stage had you gone back to work?

A. I had been in the job for three days.

10 Q. So, it had been three days that Kathleen had not had your assistance full-time with Patrick?

A. Yes.

15 Q. That evening, the evening of the 17th, did Kathy put Patrick into his cot at about 8.30?

A. Yes.

Q. Was he wearing a nappy, pilchers, singlet and pyjamas?

A. Yes.

20 Q. At about 10.30, did you go into Patrick's room and see him in his cot?

A. I did.

25 Q. Was he lying on his front, his back, his side?

A. He was laying on his back.

Q. Was he covered with a sheet and a blanket?

A. He had a sheet and a blanket over him.

30 Q. Did you kiss him good night and go to bed with Kathy?

A. I did.

35 Q. Again, was it the usual practice in your household to leave a lamp on in his room to assist Kathy if she got up to him during the night?

A. Yes.

40 Q. At that stage, was he still being fed at night?

A. He was still being fed at night.

45 Q. What was the next thing that you remember, going now into the early hours of the morning of Thursday, 18 October 1990?

50 A. I was woken by this blood-curdling scream and I ran down to Pat's room and you went through the door and Pat's cot was behind the door, so if you went in you had to shut the door to get to his cot. It was only a little room. I ran in and Kathy was standing at the end of the cot screaming.

55 Q. What sort of a cot was it?

A. It was a wooden cot with - I can't recall who gave it to us, but we had it given to us. It was a wooden cot.

Q. Was it the sort of cot that has one side that goes up and down?

A. It had a side - the side facing out was the side that you could lift up and down.

- Q. When you heard this blood-curdling scream and ran into Patrick's room, was the railing on the cot in the up position or the down position?
- 5 A. It was up.
- Q. Where was Patrick?
- A. Laying on his back in the cot.
- 10 Q. And the covers?
- A. Didn't have them on him.
- Q. Where were the covers?
- 15 A. Down towards the end of the bed.
- Q. Did you notice that his eyes were closed?
- A. He had his eyes closed. Looked like he was asleep.
- 20 Q. Do you remember what it was that Kathy was screaming?
- A. She wasn't actually screaming any words. She was just screaming.
- Q. Did you pick up Patrick?
- 25 A. I grabbed him up out of his bed.
- Q. What did you notice about him?
- A. When I picked him up I screamed to Kathy to ring the ambulance, and I had Pat in my arms and I heard this little noise. it was like "ah- ooh. ooh. ooh" and I thought oh. God. he's breathing.
- 30 Q. Coming from Patrick?
- A. Coming from Pat, and I put him on the floor and started to do CPR on him and they told me, the SIDS people had told me when you do CPR on a baby you have to put your mouth over their mouth and their nose.
- 35 Q. Did you notice anything about his skin colour?
- A. He was warm. He was pink.
- 40 Q. Did you continue doing CPR for some time until the ambulance officers arrived?
- A. By that time I had him in the bedroom. Kathy was on the phone trying to explain to them where we were. Then eventually they came bowling in and they grabbed him off me and they were putting masks on him and stuff and they made a decision to take him straight up to the hospital.
- 45 Q. Did you and Kathy go in the ambulance to the hospital with Patrick?
- 50 A. We went up in the ambulance.
- Q. Was that to the Mater Hospital Casualty Section?
- A. It was.
- 55 Q. At the hospital did the staff there continue the treatment of Patrick?
- A. They swamped him. There were people came from

everywhere on to this little fellow. They had machines on him, beeper machines and everything.

5 Q. A couple of hours after you had arrived at the hospital?

A. It was more like - it was close to dawn. I recall it was close to dawn and I was near the bed.

10 Q. Sorry?

A. I was standing near the bed where they were working on him and all of a sudden his little eyes just shot open.

15 Q. And he regained consciousness?

A. Yeah.

Q. What did he seem like after that?

A. He seemed fine. Groggy sort of - like he had been through hell, but he seemed fine.

20 Q. That was the Thursday morning?

A. That was the Thursday morning.

Q. On the Friday night did something happen to Patrick?

25 A. Well--

Q. Could you just answer that yes or no?

A. Yes.

30 Q. Was it the day after or a week after?

A. It was the Friday night after the Thursday.

Q. So, it was literally the next day?

A. The next day.

35 Q. So that next day, the Friday, on Friday night, were you nursing Patrick at one stage?

A. I was.

40 Q. And what happened?

A. All of a sudden he just went really, really stiff in my arms and his eyes rolled into the back of his head and then he started to shake.

45 Q. Did it appear to you as though he was having a fit?

A. I didn't know what a fit was, but he wasn't right.

Q. Did the hospital staff immediately take over?

50 A. They hooked in big time. Got straight on to him and called a lady down from upstairs and she came down and as soon as she saw him she said, "He's having a fit".

Q. Over the next few days, were there a lot of tests done on Patrick?

55 A. Lots of tests.

Q. At some stage, were you told that Patrick suffered from epilepsy?

A. Dr Wilkinson, who was taking care of Pat by that

stage, informed us that it seemed to him that Patrick was epileptic.

5 Q. That was still at the Mater Hospital in Newcastle?
A. It was.

10 Q. Over the following two months, was Patrick in and out of the hospital a lot suffering from similar types of fits or seizures as the one that he had had in your arms on that Friday?
A. Yes.

15 Q. On 21 November, that was about a month later, were you informed that Patrick had been diagnosed as being blind?
A. Yes.

20 Q. After Patrick had been diagnosed as epileptic, after he and you and Kathy came home, was the situation at home any more difficult for Kathy than it had been prior to this event?
A. It was very difficult.

25 Q. Why was that?
A. She had this little fellow that she had to work out his - do his medication, on top of all the normal mum stuff. Feeding him, bathing him, teaching him things. Then she also had the Royal Blind Society were involved as well, so she could - they could try to keep him on track for his age development, so she had a huge amount of stuff
30 to do.

35 Q. Are you able to tell us how she coped with all of that?
A. Not very well.

40 Q. What was it that you saw or observed or she said that led you to think that, what sorts of things happened to show that she wasn't coping very well?
A. She sort of would lose her temper a bit.

45 Q. With whom?
A. With me and Pat, get frustrated.

50 Q. How would she show it, her frustration?
A. Just, she used to sort of go "grrr, grrr, grrr". You would just have to be there. She used to just have this cranky way of trying to express she was cranky.

55 Q. Like a growl?
A. Like a growl.

HIS HONOUR: Q. You are holding your forearms out with your fists clenched and moving them up and down?
A. Yeah.

CROWN PROSECUTOR: Q. Can you describe any other ways to us in which she showed that she wasn't coping very well?
A. She would leave Pat with people, other people, so she

could just get away.

Q. Who would she leave Pat with?

5 A. At the time I knew that she was leaving Pat with my sister, Carol, and I have since -- I didn't know at the time, but I since found out she was leaving him also with our neighbour.

Q. What was her name?

10 A. Dianne.

Q. Carol, your sister, is also known as Kaz?

A. Kaz.

15 Q. Are you able to tell us how often it was that she would appear to growl in an angry way?

A. Every time she got angry.

Q. How often was that, daily, weekly?

20 A. Daily.

Q. Daily?

A. Yeah.

25 Q. At some stage after Patrick had come home from the hospital, did you find an A5 size diary in a bedside table next to where Kathy slept?

A. It was on the bedside table.

30 Q. Was that a diary that you had seen before?

A. I had seen Kathy writing in that diary.

Q. Was it a diary with a brown-red cover?

35 A. I had seen her writing in that diary and other diaries.

Q. On one particular occasion, did you open it up and read some entries in it?

40 A. I did.

Q. What did you learn from reading those entries?

45 A. I read one entry where Kathy told her diary that she wasn't coping. It was all too much drama. That -- me and Pat -- would be better off without her; that I could bring Pat up with my family and do it better than she could and that she was going to work out some means and ways that she could leave and leave me with Pat.

Q. Would you have a look at this document (shown).

50 Firstly, are you able to tell us if that's the diary?

A. This isn't the diary that I read that entry in.

Q. Could I have that back please? (Diary returned to Crown Prosecutor.) Now, when you read that entry or those entries, what effect did that have on you?

55 A. Well, it shocked me, ended up upsetting me.

Q. How did you feel about Kathy at that time?

A. I loved her.

Q. Can you elaborate on that?

A. I loved her.

5

Q. Did you tell your sister, Carol, about what you had read?

A. Oh, my sister, Carol, has always been my - most times, like my mum, so I rang Carol and asked Carol if she would come over and have a talk with Kathy.

10

Q. Did your sister, Carol, come over and sit down with Kathy and you and did the three of you discuss the fact that Kathy couldn't just leave?

15

A. Yes, we did.

Q. Or she ought not to just leave?

A. She ought not to leave.

20

Q. And after a discussion, did Kathy agree to stay in the home and try to work things out?

A. She did. Carol told Kathy that she would help her.

25

Q. Did, in fact, your sister, Carol, spend a fair bit of time at your home helping Kathy, particularly with Patrick?

A. Yes, and at Carol's place as well.

30

Q. Minding Patrick at Carol's place?

A. Well, Kathy and Pat would go over there and spend time there.

35

Q. I would like to now take you to 13 February 1991, that being a Wednesday. At about 6am, did you get up and get dressed to go to work?

A. I did.

40

Q. Did Kathy also get out of bed and attend to Patrick who was awake already?

A. She did.

45

Q. Did you sit with Patrick and have your breakfast?

A. Sat at the dining table and had a cup of coffee and Pat had a piece of toast.

50

Q. When you left that morning, how did Kathy appear?

A. I say the same as usual, but I really don't know whether I could say - whether I really took a huge amount of notice.

55

Q. Certainly there was nothing unusual that you noticed?

A. No.

Q. Is that right?

A. That's right.

Q. At about 10am that morning, were you at work and did you receive a telephone call?

5 A. I did. I was and I did.

Q. Would you tell us about that phone call?

10 A. It was morning tea time. I was making a cup of coffee for the fellow that worked with me as well and one of the girls came out and told me I was wanted on the phone. I just walked over to my desk and picked the phone up and it was Kathy. She was screaming down the phone.

Q. What did she scream?

15 A. She screamed, "It's happened again" and I said, "What's happened again - a fit or something?" And she said, "I need you. Come home." So I hung up the phone.

Q. Before you hung up, did you tell her to do anything?

20 A. "Have you rung the ambulance?" She said, "Yes, yes, I have rung the ambulance."

Q. Did you say that you were coming straight home?

25 A. Yes, I had said I was coming straight home.

Q. Did you drive straight home?

A. I did. The shortest route I could.

Q. Sorry?

30 A. The shortest way I could.

Q. Did you estimate how long it would have taken you when you hung up from the phone call and when you arrived at your home?

35 A. It took me about five to seven minutes.

Q. As you were driving down your street, did you see an ambulance?

40 A. I came around the corner and my house was three houses down from the corner and I could see an ambulance coming up from the other end of the street we lived in and I could see them going over all the traffic blockage things and I remember thinking, "What the hell are they doing?", and I just drove straight up on to my front yard.

45

Q. Did you run into the house?

A. I ran into the house.

Q. Was your sister, Carol, and Kathy there?

50 A. Carol and Kathy were in the lounge room. Kathy was crying, Carol was crying. Carol had her arms around Kathy.

Q. Did you go into Patrick's bedroom?

55 A. I raced into Pat's room and - yeah.

Q. Where was he?

A. He was laying in his bed.

- Q. In his cot?
A. In his cot.
- 5 Q. Was the railing in the up or down position?
A. The railing was up.
- Q. Was he on his front, his back, or his side?
A. On his back.
- 10 Q. Blankets?
A. Don't recall.
- Q. Did you reach down and lift him up?
15 A. Scooped him out and I put him on the lounge and started to do CPR on him.
- Q. Did you notice anything about his body, his colour?
A. He was floppy and he was warm, but his lips were blue.
- 20 Q. Again, did you blow in his mouth and nose?
A. I did.
- Q. A short time later, did the ambulance officers come
25 into the house?
A. They weren't very far behind me. They raced in and just took him straight off me.
- Q. Did they put him into the ambulance and take him to
30 the Mater Hospital?
A. Yes, they did.
- Q. Again, did you and Kathy go in the ambulance with
35 Patrick to the hospital?
A. Yes.
- Q. A short time after arriving at the hospital, did Dr
40 Wilkinson come and tell you and Kathy that Patrick had died?
A. Yes.
- Q. A couple of days later, did you speak to Kathy about
45 what had happened to Patrick?
A. I asked her what happened.
- Q. What did she say?
A. She said she just went in and checked on him and found him how he was and the rest I knew.
- 50 Q. Did she say when she had put him in the bed, or anything like that?
A. We didn't really talk about it any further. Kathy had a way of just cutting conversations off.
- 55 Q. Were you told anything by any of the doctors about why they thought Patrick had died?
A. Dr Wilkinson told us that he thought that he may have died of an epileptic fit that he hadn't overcome.

Q. Were you satisfied with that?

A. No.

5 Q. Why not?

A. Because we got him back after the Christmas episodes and he had been going really, really well. Hadn't missed a beat. He was on his Tegretol and stuff like that and he was going really well and he was a great little kid. He had so much courage it wasn't funny and it didn't matter what sort of came on him or what he had to put up with he really hooked in and had a go.

15 Q. Now, how did Patrick's death affect you and Kathy?

A. Devastated me. Devastated Kath.

Q. Was there any difference in the way that you grieved?

A. A huge amount of difference.

20 Q. Could you explain that to us?

A. The world pretty much stopped for me. I lost my job. Didn't really sort of see any sunshine in any situation or anything like that and sort of went into myself, spent a lot of time in my garage, pretty much kept away from a lot of people, and that's how I am, and Kath just gets on with things. I wouldn't say that she just forgot the little fellow, but we packed all his stuff up and packed it away, changed the room, just tried to get on with life. We had a neighbour that had a little fellow, Simon, and I used to go and steal Simon.

Q. Did Kathy get on with her life?

A. Yeah.

35 Q. How did she get on with her life?

A. She just went back to being herself, happy-go-lucky, I suppose.

Q. Did she work?

40 A. She got a job at BabyCo at Kotara.

Q. What sort of a place was BabyCo?

A. It is a retail store for baby gear.

45 Q. When did she get the job at BabyCo?

A. It would have been probably early '90 - no, it was 1991.

Q. How long after Patrick's death?

50 A. Three or four months.

Q. Were there any arguments between you about your differences in grieving?

A. Constantly.

55

Q. Could you explain that?

A. She would rip it into me because all I wanted to do was dig a big black hole and bury myself in it - not get

on with life, face the world, do anything. Pretty much that's what I got told.

Q. Did she socialise?

5 A. We socialised with friends. We went out to nightclubs.

Q. Together?

10 A. Together. Went dancing. We bought another house.

Q. Why did you buy another house?

A. Because Kathy didn't want to live at Mayfield any more.

15 Q. Did you want to go to the nightclubs?

A. It was never really an urgent, important thing to me. It was something to do. Basically, at the time I think I just went because if I didn't go she'd go anyway.

20 Q. In late 1991, did Kathy tell you that she wanted to have another baby?

A. Yes, we were living in our house at Thornton at that time.

25 Q. Where's Thornton?

A. It is just short of Maitland in the Hunter Valley.

Q. What was your reaction when she told you that she wanted to have another baby?

30 A. I told her that I didn't want to have another baby.

Q. Did you tell her why?

35 A. I told her there were things I didn't ever want to see or ever want to hear again.

Q. What was Kathy's reaction to your response?

40 A. Kathy told me that it was a waste of time us being married if we weren't going to have a family, that the only reason you are married is to have a family. If we weren't going to have a family, then she'd leave.

Q. How did you feel about Kathy at that stage?

45 A. Well, that made me cranky, but I loved her. We had made the decision to move on with our lives together and how I love her.

Q. So, did you eventually agree to try and have another baby?

50 A. I asked her to give me time to think about it. She gave me a week. So I had a think about it and we did talk through that week about it and I came back to her with a yes.

55 Q. When you say it was a yes, were there any conditions that you attached to it?

A. I told her that I believed that we should get the SIDS people involved.

Q. Did you get the SIDS people involved?

5 A. Had a talk to them, asked for their help. They told us that about all they could do for us was offer us a sleep apnoea monitor, and we were to call them when the baby was born and they would hand one over.

Q. In about February 1992, did Kathy become pregnant again?

10 A. Yeah.

Q. Was that with your third child, your first daughter, Sarah?

A. Sarah.

15 Q. Do you tell the Court that Sarah was born at the John Hunter Hospital on 14 October 1992?

A. She was.

Q. Were you again present at Sarah's birth?

20 A. I was.

Q. Was your sister, Carol, also present?

A. Carol was.

25 Q. When she was born, did Sarah appear to be a happy baby?

A. She was--

Q. And a healthy baby?

30 A. Yeah, very happy, very healthy.

Q. Did Kathy and Sarah stay in the hospital for a couple of days and did they then come home to your house at Thornton?

35 A. They did.

Q. Again, was Sarah not breastfed, but given formula in a bottle?

40 A. Sarah was on formula.

Q. For the first two or three months, did Sarah sleep in a crib in your bedroom right next to your bed?

A. Right next to Kathy's side of the bed.

45 Q. What do you mean by a crib?

A. My sister, Carol, loaned it to us. It was a little wooden affair which you put a lock in to stop it rocking. Yeah.

50 Q. So, it is a wooden sleeping rocker?

A. Yeah.

Q. Were you lent an apnoea blanket from the SIDS organisation?

55 A. We were.

Q. At what stage did they lend that to you?

A. About two days after Sarah was born.

- Q. Was that the kind that the child just lay on without any leads?
A. Without any attachments to the baby, yes.
- 5 Q. How did Sarah sleep?
A. She snored, but she slept well.
- 10 Q. Could you hear her snoring?
A. Yes, little tiny bubby snores.
- Q. Did the snoring ever cause you any concern?
A. No.
- 15 Q. And the apnoea blanket, would that sound an alarm if the blanket failed to detect any movement of the baby for a set period?
A. Yes.
- 20 Q. Did the machine go off?
A. Regularly.
- Q. A lot?
A. Yeah, regularly.
- 25 Q. When you say regularly?
A. All she had to do was hold her breath or roll over or squinch herself or stretch. Whatever she did, the machine went off.
- 30 Q. Was she attached to it or just at night or during the day as well?
A. I don't know about the day. I was at work, but of a night she was.
- 35 Q. When it went off at night I suppose some of the time you were asleep?
A. The majority of the time. You would hear the beep. You would go to - Kathy would always get up to go and check on her. We were fairly naive about it. Nobody really instructed either Kathy or I as to the use of the machine, other than what was written on the box. Nobody ever instructed us as to babies and such, so yeah - well, yeah, I would sometimes get up or Kathy would get up.
- 40 Q. Would you always wake up when the alarm went off?
A. No.
- 45 Q. How did you know that it had gone off if you didn't wake up?
A. I would ask Kath the next morning. You know, because if she looked stuffed or tired or something and she said, "The bloody thing went off all night".
- 50 Q. So, would the monitor go off almost every night?
A. Yes.
- 55 Q. Some of the time you heard it; some of the time you

didn't?

A. Yes.

Q. When you did hear it, did it cause anxiety?

5 A. Yes.

Q. On any of the occasions that you were awoken by the monitor, was there any cause for concern about Sarah that you were aware of?

10 A. No.

Q. Were they all false alarms?

A. Seemed to be.

15 Q. On any occasions that Kathy told you the next morning that the alarm had gone off, did she ever tell you that she had had any cause for concern about the alarm going off?

20 A. No. No, never.

Q. Did it appear to you, from what she said to you, that they had all been false alarms?

A. Yes.

25 Q. What was Kathy's attitude to the use of the monitor?

A. She hated it.

Q. What did she say?

30 A. She hated it.

Q. Anything else?

A. "Bloody thing. Throw it out the window. Do we have to use it?" That sort of stuff.

35 Q. What was your attitude to her questions about whether you had to use it?

A. "We had to. Of course we do."

40 Q. So, during how much of Sarah's life was it that Kathy wanted to abandon the monitor and you insisted on it being used?

A. Every other day.

Q. Over what period of time?

45 A. Nine months.

Q. Was that the full nine months--

A. The machine was--

50 Q. --of Sarah's life?

A. The machine was - had been stopped being used.

Q. I'm sorry. During the time that you had the machine, was that Kathy's attitude to the machine?

55 A. Yes.

Q. And during all the time that you had the machine, was that your attitude to the machine?

A. No.

Q. What was your attitude to the machine?

A. It was irritating, but it was comforting.

5

Q. Do you know from anything that she said to you whether or not she was using it during the day?

A. No.

10

Q. When Sarah was about two-and-a-half-months old, did Kathy go back to work at BabyCo on Saturdays and Sundays?

A. Yes.

15

Q. Did she tell you why she wanted to go to work at BabyCo?

A. She was sick of being broke, sick of being stuck at home.

20

Q. Sick of being broke and sick of being stuck at home?

A. Yes.

25

HIS HONOUR: Let me know when you are going to change the subject because I want to take just a five-minute adjournment to give the Court reporters a rest.

CROWN PROSECUTOR: Yes, your Honour.

30

Q. On those days when she wasn't to work at the weekends at BabyCo, did you look after Sarah?

A. At first I did, yes.

35

Q. Then did you start working at the weekends at a place called Teasdale's in Singleton?

A. I did.

40

Q. After you were working at the weekends and Kathy was also working at the weekends, did Sarah get looked after by a number of other people?

A. I worked Saturday mornings, 8 until 1 at that time, so there were other people who looked after Sarah on those mornings.

45

Q. Did that include relatives, like your sister and your nephew?

A. Carol, which is Kaz; Dave, my nephew, David, and his fiance.

50

Q. And also some friends?

A. Some other friends.

55

Q. After a while, did that become difficult to arrange and did you, in fact, start to bring Sarah to work on Saturdays?

A. I started to take her to work.

Q. By this stage, would you tell us how was Kathy reacting to motherhood?

5 A. Well, she enjoyed it but she didn't - there were times that she did enjoy it and things that she was doing as a mum that she did enjoy; other stuff about it that she didn't enjoy. It would seem like the weekend was her escape.

10 Q. Can you give us some examples of her attitude to motherhood?

15 A. She, she was a very rigid, regimented type of person, and so times were always a factor, so if you went beyond the boundaries of those times, it was very hard for me because working in Singleton was an hour away and it was very hard for me because I was that much further and much longer, and so you would come home and if you got home late that was tough for you, the baby was going to bed at 8, 8.30, and that was it. So she just got sort of like harder about things.

20 Q. Did you notice anything at this stage about Kathy's attitude to Sarah?

A. Got very frustrated with her.

25 Q. How would she show that frustration?

A. She would - she had that growl. The growl would happen from time to time. She would become very domineering towards Sarah.

30 Q. What was her attitude to other people looking after Sarah?

A. Didn't seem to bother her. |

35 Q. Did she do it a lot?

A. A huge amount of time.

Q. Now, at some stage did Kathy finish her job at BabyCo?

40 A. I recall - we, Robert Newitt, Carol's husband, adored Sarah, and Robert castigated Kathy over the fact that she was missing so much of Sarah's life.

Q. In mid 1993 did Kathy quit her job at BabyCo?

A. She did.

45 SHORT ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour, just before the jury
comes in, literally ten seconds, we have got an ambulance
officer here, who is now working in the Northern
Territory. He has been waiting to give evidence for a
10 day. I would like to interpose him at 10 o'clock tomorrow
morning, if your Honour would permit us to, so he is not
here over the weekend.

HIS HONOUR: Do you mind if the Crown does that, Mr
15 Zahra?

ZAHRA: Of course not, your Honour.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Officer, would you ask Mr Folbigg to come
in, please.

5

(The witness returned to the courtroom.)

10 CROWN PROSECUTOR: Q. Mr Folbigg, I would like to take
you now to Sunday, 29 August 1993, that being the day
before Sarah died. At that time, was Sarah suffering from
a runny nose?

A. She had been. I don't recall if she was that day.

15 Q. And how sick had she been?

A. Just a cold.

Q. Just a cold?

A. (Witness nodded yes.)

20 Q. During that day, did you and Kathy take Sarah to
Nobby's Beach in Newcastle?

A. We did.

25 Q. Did she play at the beach?

A. Played in the sand and just sea gulls.

Q. And was she behaving normally?

A. Yeah, yep.

30 Q. Running around?

A. Well - no, well, she could stand up, but she couldn't
walk.

35 Q. Did she appear to be perfectly normal and happy to
you?

A. Yeah.

40 Q. And did you then go to your brother John's house for
a visit?

A. We did.

Q. And after John's house, did you go to a park at East
Maitland where Sarah played at the equipment?

45 A. Played on the swings and the seesaw and roundabout
and stuff, and she crawled around the grass.

Q. From your point of view, had you had a good day?

A. I had a top day.

50 Q. Did she appear to have a good day?

A. She had a top day.

Q. When you got home, what was Kathy like?

55 A. Yeah, pretty, pretty much normal. Tired.

Q. Now, later that afternoon, what happened to Kathy's
attitude or manner?

5 A. Went downhill. We - Sarah loved a bath, so I recall running her a bath and having a bath and getting her in her PJs. We had dinner and then Kathy took - Sarah was all wound up from the day, I suppose, and I had a tendency to wind her up, and Kathy took her to put her to sleep, to bed, and that's when it all went pretty ordinary after that.

10 Q. When you say pretty ordinary, what do you mean?
A. I was in the lounge room watching TV and I could hear Kathy in the bedroom with Sarah. I could hear Sarah crying and grumbling, and I could hear Kathy patting Sarah to try to comfort her. And I heard Kathy growl, that growl, and I went up to the bedroom and Kathy was on the bed - she had Sarah pinned to her.

15 Q. When you say "pinned to her", what do you mean?
A. In a bear hug, one arm bear hug, and with her other arm she was (witness indicated) patting her on the bum and she--

20 Q. The motion that you've described there, is it more than just a pat?
A. (Witness nodded yes).

25 Q. Could you describe to us in words?
A. You could hear it.

30 Q. Was it fairly hard?
A. (Witness indicated). About that loud.

35 CROWN PROSECUTOR: Might the record show that he has just demonstrated with his own hand on his thigh how hard Sarah was being patted.

HIS HONOUR: Yes.

40 CROWN PROSECUTOR: Q. Now, by this stage, was Sarah still sleeping in your bedroom?
A. She was in our bedroom, but in a single bed that we had in the bottom - at the bottom of our bed.

45 Q. So, was it just an ordinary, single, innerspring mattress bed?
A. Yes, ensemble.

Q. And was she still using the apnoea blanket?
A. No.

50 Q. When had you ceased to use the apnoea blanket?
A. When we got the bed for her, which was only a matter of days.

55 Q. Are you able to say how many days before this particular night it was that you'd ceased to use the apnoea blanket?
A. Two to three days.

Q. And why had you stopped to use the apnoea blanket?

5 A. There was - well, Kathy was reluctant to keep using the blanket. Sarah was fine and had never really gave us any dramas, and there was the possibility that this innerspring mattress wouldn't feed information down to the monitor's mat.

Q. So, did you use the opportunity of Sarah moving to a bed to stop using the apnoea monitor?

10 A. Yes.

Q. And that was two to three nights prior to this night that we are talking about now?

15 A. Yes.

Q. You say that you heard the growling noise. You were sitting in which room?

A. The lounge room.

20 Q. And were Kathy and Sarah in your bedroom?

A. They were.

Q. Was the door open or closed?

25 A. Open.

Q. Did you go into the bedroom?

A. I walked up the hallway to the bedroom door.

30 Q. And would you tell the Court what happened?

A. I told Kathy to mellow out. She told me to go away.

Q. Could you tell us exactly what she said, if you can remember?

35 A. She told me to "Fuck off", that everything was under control, and I said to her, "Well, you know, for Christ's sake, it's World War III between the two of you every time this kid's got to go to the bedroom. If she doesn't want to go to sleep, why make her go to sleep?" She told me just to get out. She'd go to sleep if she said she would.

40 Q. Did you then go back into the lounge room?

A. I went into the lounge room and sat on the lounge.

45 Q. Could you hear what was happening in the bedroom?

A. I could still hear Sarah was upset and I heard footsteps coming down the hallway and Kathy came through the archway from the hallway into the lounge room and walked to about, roughly two or three steps short of me, and threw Sarah at me.

50 Q. Did she literally throw Sarah at you?

A. Threw Sarah at me and said, "You fucking deal with her".

55 Q. Did you have to catch Sarah?

A. I caught her.

Q. Had you ever seen Kathy do something like this before?

A. Nothing like that.

5 Q. What happened then?

A. She stormed off, back up to the bedroom. I cuddled and nursed Sarah on the lounge to stop her crying. She played with the paper that I had next to me on the lounge, snuggled into me and eventually went to sleep.

10

Q. Did you put her into her own bed in your bedroom at about 10.30 or 11 o'clock that night?

A. It was around that time.

15

Q. And did you put a sheet and a blanket over her?

A. The - because she was a fairly tossed-and-turned type of kid, yes, I did put a blanket and a sheet over her.

20

Q. And did you place her on her back?

A. I put her on her back.

Q. Did you then get into your bed where Kathy was?

A. I went into bed and--

25

Q. And turned the light off?

A. I turned the light off and went to sleep.

Q. What was the next thing that happened?

A. I woke up.

30

Q. Do you know what time it was?

A. I do. I woke up. It was ten past one.

35

Q. How did you know that?

A. Because we had a clock in the bed.

Q. What sort of clock?

A. Digital; red digital clock.

40

Q. Sorry?

A. A red digital clock.

Q. Did it light up?

A. It lit up.

45

Q. And was it an electric one?

A. Electric.

50

Q. And it was 1.10?

A. 1.10.

Q. And did you look around the room at all?

A. I looked around the room. I was sort of half asleep, half awake. Kathy wasn't in the bed; that was obvious. I
55 looked down at Sarah's bed. Sarah wasn't in the bed. I looked to the doorway where the door was closed. You could see the light around the door. So I figured that Kathy must have been outside, attending to Sarah, or

looking after her.

Q. Could you see the light under the door?

5

A. I could see the light around the door.

Q. Around the door. At that stage, was Sarah still being fed at night?

A. Yes.

10 Q. And when Sarah was being fed at night, was it again Kathy who would feed her?

A. Yes.

15 Q. And would she feed her in that room where you could see the light?

A. No, that - that - that door led to the hallway and she would either feed her in, in her room, or in the lounge room.

20 Q. When you say in her room--

A. In Sarah's room.

Q. And did you keep a light on all night?

25

A. Not normally at that stage, no.

Q. Might I approach, your Honour?

HIS HONOUR: Mr Zahra, you may also approach, if you wish.

30

(Counsel approached.)

CROWN PROSECUTOR: Q. Mr Folbigg, I show you a plan. Firstly, is that a plan that you've drawn?

35

A. It is.

Q. And is that a plan that you have drawn of your home at 9 Dover Close, Thornton?

40

A. 9 Dower Close.

Q. That's D-O-W-E-R?

A. It is.

45 Q. And have you attempted, as accurately as you can, to show the layout of the rooms?

A. I have.

Q. And is the bedroom where you and Kathy and Sarah slept shown in the top right-hand corner?

50

A. Yes, it is.

Q. And have you drawn, in that bedroom, where the main bed was, that you and Kathy used?

A. Yes.

55

Q. Have you also drawn a single bed in a corner of the room which was the bed that Sarah slept on?

A. I have.

Q. And have you marked where there were some pillows that were placed on the floor in case the baby fell out of bed?

5 A. Yes.

Q. In other words, the pillows were not on the bed, they were on the floor?

10 A. They were on the floor.

Q. And have you also marked on that plan where the light switch was for that room?

A. I have.

15 Q. The room next to it was Sarah's room?

A. It was.

Q. And you've shown basically all the other rooms in the house?

20 A. Uh-huh. Yes.

CROWN PROSECUTOR: I tender that, your Honour.

25 ZAHRA: I have no objection.

HIS HONOUR: The plan of the house at 9 Dower Close, Thornton, is exhibit B.

30 EXHIBIT #B PLAN OF HOUSE AT 9 DOWER CLOSE, THORNTON, TENDERED, ADMITTED WITHOUT OBJECTION

35 CROWN PROSECUTOR: Your Honour, we will provide individual copies of that to the jurors in due course. We don't have them available at the moment. I wonder if they could have a quick look at the original and perhaps tomorrow morning at 10 o'clock we will provide them with their own copies.

40 HIS HONOUR: Yes. Officer, will you pass that exhibit to the jury, please?

(Exhibit B shown to the jury.)

45 CROWN PROSECUTOR: Q. Now, you have told the Court, when you woke at 1.10, that Kathy wasn't in bed and Sarah was not in her bed either, and the door was closed and you were able to see the light around the door?

A. Yes.

50 Q. Do you know where the light was coming from?

A. I assumed it was either the hallway light or the vanity light.

55 Q. The vanity being on the opposite side of the hall?

A. Opposite the bedroom door.

Q. I just show you this. Your bedroom is here and the vanity area is there (indicated)?

A. Yes.

Q. Was there any light in the room from outside?

5 A. There was - we had a venetian blind and there was a street light directly outside the house, and the light used to like flood the room, like light it up.

Q. At night-time?

10 A. At night.

Q. So, there was a fair amount of light in your bedroom?

A. There certainly was.

Q. From outside?

15 A. Yes.

Q. And you were able to see the bedroom reasonably well at night?

20 A. Yes.

Q. And I take it that there was nothing unusual about Kathy and Sarah not being in the bedroom at night?

A. No.

25 Q. You assumed, you've told us, that they were out, with Kathy feeding Sarah?

A. Yes.

Q. So did you go back to sleep?

30 A. I did.

Q. What was the next thing that happened?

A. I was awoken by Kathy's blood-curdling scream.

35 Q. Do you know what time it was?

A. Not at that stage. I sat bolt upright in bed. The light was on in the room. Kathy was standing at the door, with one hand on the door, as if she was holding the door open, screaming. I jumped up out of bed and Sarah was laying on her bed. I, I raced over to Sarah. I grabbed her off the bed, and she was all floppy and I - I turned around and put her on my bed and Kathy was sitting in the hallway just outside the door at that stage by then, screaming and crying, with her knees up under her chin, just crying and--

45 Q. When you were woken up by this scream, where was Sarah?

50 A. Laying on her bed.

Q. Did she have any covers on her?

A. No covers on her.

55 Q. Was she on her back or her front or her side?

A. She was laying on her back. Her little legs were straight and her little arms were alongside of her.

Q. When you lifted her up and placed her on the floor,

were you able to say whether or not she was warm to the touch?

A. She was warm.

5 Q. And was she breathing?

A. No.

Q. How could you tell?

10 A. I put my ear to her mouth and listened as hard as I could.

Q. What did you do then?

15 A. I screamed at Kathy to ring an ambulance and started to do CPR.

Q. Did you again breathe into her mouth and nose?

A. I was breathing in her mouth and her nose, and I was depressing her chest. I was trying to do all that.

20 Q. Might I approach again, your Honour?

HIS HONOUR: Yes. You too, Mr Zahra, if you wish.

25 CROWN PROSECUTOR: Q. What I would like you to do on this plan, using this red pen, would you draw a circle where Kathy was standing when you first woke up to hear her screaming.

A. (Witness complied).

30 Q. You have drawn a circle right next to the architrave of the door of your bedroom, is that right?

A. Yes.

35 CROWN PROSECUTOR: Might I show your Honour that and my learned friend?

HIS HONOUR: Yes, I see that.

40 CROWN PROSECUTOR: Might I hold it up for the jury?

HIS HONOUR: Yes, please.

45 CROWN PROSECUTOR: Q. Apart from breathing into her mouth and nose, did you do anything else to try and revive her?

A. I was pressing on her little chest.

Q. By this stage, had you had any instruction in CPR?

50 A. Basic stuff. Nothing super serious.

Q. Who had given you that?

A. I read about it.

Q. What was Kathy doing during this time?

55 A. She - she'd rung the ambulance and she was - she'd run outside to wait for the ambulance.

Q. And at a certain stage did a female ambulance officer

come into the house?

5 A. This poor girl came in, and she ran into the room and saw me and what I was doing, and she said "Oh, for God's sake, don't stop", and she said to Kathy, "Help him." And she raced back out to ring her colleagues because she was on her own in the ambulance, and so she rang them and then she came in and she took over from me, breathing with a bag thing on Sarah's face.

10 Q. And about five or ten minutes later, did some other ambulance officers arrive and start treating Sarah?

A. They did.

15 Q. Would you have a look at these photographs? Might I approach again?

HIS HONOUR: Yes, you too, Mr Zahra, if you wish.

20 CROWN PROSECUTOR: Q. It is only necessary for me to show you two. Do these two photographs (shown) show Sarah's bed in your bedroom?

A. They do.

25 Q. Perhaps if I can show you another one - before I do that, you notice that the pillows are at the end of the bed rather than on the side?

A. I pushed all the pillows out of the way because I was falling over them, trying to help her.

30 Q. And this third photograph (shown), does that show your and Kathy's double bed?

A. It does.

35 Q. And what's that red thing I'm pointing to now--
A. That's the clock.

Q. --the digital clock?

A. Yes.

40 CROWN PROSECUTOR: I tender those three photographs, your Honour.

ZAHRA: I have no objection, your Honour.

45 HIS HONOUR: Are those photographs marked in any way, Mr Crown?

CROWN PROSECUTOR: No, they are not, your Honour.

50 HIS HONOUR: We will have them numbered exhibit C, 1, 2 and 3.

EXHIBIT #C THREE PHOTOGRAPHS OF SARAH'S BED TENDERED,
ADMITTED WITHOUT OBJECTION

55

HIS HONOUR: Mr Crown, and Mr Zahra, those photographs are all exhibit C, but I have written "1", "2", and "3" on the backs respectively.

CROWN PROSECUTOR: Thank you, your Honour. If the jury might see those.

5 (Exhibit C shown to the jury.)

CROWN PROSECUTOR: Q. When the second lot of ambulance officers came, did Kathy and you go and sit in the lounge room?

10 A. Yes.

Q. And after a while, did an ambulance officer come and tell you both that Sarah had died?

15 A. Yes.

Q. Did you telephone your sister and your brother?

A. Yeah. Yes.

20 Q. Did the ambulance officers bring Sarah out to you and give you an opportunity to nurse her?

A. Yes.

25 Q. At some stage later that morning, did a uniformed police officer come to your home and speak to Kathy and you?

A. They were detectives turned up and a fellow with cameras and things.

30 Q. Did they speak to both of you?

A. One fellow took Kathy into one room and another fellow took me into the dining room.

35 Q. And did you formally identify Sarah to one of the police officers?

A. I did.

40 Q. Could you tell us how did you and how did Kathy react to the death of Sarah?

A. They took her away.

45 Q. Sorry?

A. They took her away, and that was that. Pretty much just get back on with things.

50 Q. How did you grieve and how did she grieve? How did they differ?

A. Kathy went back to work at BabyCo and I was working at Teasdale's and they were really supportive, and we rented our house out and moved to Singleton.

55 Q. Did you both grieve in the same way or in different ways?

A. I pretty much did the same thing that I'd always done, except this time I sunk myself into my job. You learn as you go on. And pretty much hooked into my job big time.

Q. And Kathy?

5 A. Kathy, at first, hid herself away from the world, didn't really want to do anything. When we moved to Singleton, we were only up there a short while and that's when she got the job back at BabyCo and that prompted us to move back down to Newcastle. I think at that stage we had only been up in Singleton for two months and we moved back down and the people we had rented the house at Thornton to were relations.

10 Q. Did you ever speak to Kathy about what had happened that morning that Sarah died?

A. I tried to. I tried to bring up the fact that when I woke up they weren't in the room, what had happened.

15 Q. Well, was there one particular conversation that you had a couple of days after Sarah died?

A. Yes.

20 Q. And would you tell us about that conversation?

A. Well, I - I asked her, you know, what had happened and she said, "Oh, I got up and went to the toilet. I came back, turned the light on, found her. That was that. The rest, you know.

25 Q. Sorry, what was the last bit?

A. The rest you know.

30 Q. Did you have any further discussions?

A. You couldn't really talk much about--

Q. Why was that?

A. She wouldn't talk to you.

35 Q. How would she react when you tried to talk about it?

A. She wouldn't talk about the kids. She never mentioned their names again, wouldn't talk about it.

40 Q. All right. And were you told that an autopsy was conducted on Sarah by Professor John Hilton?

A. We were. The Glebe Coroner's Office contacted us and made an appointment for us to go down and meet him.

45 Q. And did you go and see Professor Hilton?

A. We did.

Q. Both of you?

A. We were accompanied by my sister, Kaz, and her husband, Robert.

50 Q. So there were four of you?

A. Four of us went.

55 Q. And did Professor Hilton give you an explanation for Sarah's death?

A. He - he said to me that he couldn't tell us why she wasn't running around in that office at that time, laughing and giggling, that he couldn't find any reason she wasn't there, and when pressed even further, said to

me that, it just seemed like a terrible, terrible case of bad luck and that - not to let it - if our desire were to be parents, that we wouldn't let that stand in our way.

5 Q. How did your relationship with Kathy progress after Sarah's death?

A. Fell to pieces.

10 Q. Did it fall to pieces straight away, or only after a while?

A. We - we moved back down from - it didn't - it was a while.

15 Q. And you told us that you moved back to Newcastle, that she got the job at BabyCo?

A. We moved back and we moved back into a room of our house that my nephew was renting.

20 Q. When you say "back", you mean back to Singleton?

A. Back to Thornton.

Q. Back to Thornton, and at some stage did you move to Singleton?

25 A. We moved to Singleton after Sarah had died.

Q. Yes. At some stage, in 1995, which was nearly two years later, were you still grieving for Sarah?

A. Very much so.

30 Q. And what about Kathy?

A. Not that I could see.

Q. And did she give you an ultimatum?

35 A. Things weren't going all that well between us and we had this new house at Glendale and I had a little car that I was rebuilding and I pretty much spent - either I was at work or in the shed and didn't really pay much attention to her and we - it was pretty ordinary and Kathy said that I needed to go and see a grief counsellor and if I didn't

40 she'd leave me.

Q. At some stage, did she actually move out of the home where you were living?

45 A. She did.

Q. For how long?

A. The first time she moved out, she was gone probably about six to eight weeks. And then, at my insistence, she came home.

50 Q. Did you go and see a counsellor?

A. I did.

55 Q. And did that help you deal with the grief?

A. It came - I - I understood more what I was going through.

Q. And did you just have one separation or more than

one?

A. We had more than one.

5 Q. And what was she doing with her life, in terms of socialising and just general living?

A. She had a little flat at Lambton and she had formed a fairly strong friendship with my eldest sister, Sherry, and they were going to Weightwatchers together and the gym together and going out to the nightclubs and dancing and what have you, together. So she was pretty much getting on with things.

10 Q. And at a certain stage, did you ask Kathy to move to Singleton to resume your marriage?

15 A. We - well, I think I constantly brought it up and I'd moved to Singleton by that stage and rented a flat and Kathy came up on one weekend and we had some great discussions over it and she decided that she would find someone to take over her flat and move up.

20 Q. And did she move into a house with you at Singleton?

A. Yes, we rented a house in Aida Street.

25 Q. Did she get a job at Retravision?

A. She did.

Q. And did you later, in '95, purchase your own home at Singleton?

30 A. We did.

Q. And did you move into that in about January 1996?

A. We did.

35 CROWN PROSECUTOR: Perhaps that is a suitable time, your Honour.

40 HIS HONOUR: Ladies and gentlemen, we will end today's proceedings there. I am not going to say this at the end of every day, but I want to remind you about the things I have told you, about getting away from the courthouse and about not being about the buildings in the evenings or in the afternoons or in the mornings, and about avoiding the influence of anybody else, not discussing this case with anybody else but your fellow jurors, but I won't labour the point. I think you understand it well enough by now.

45 I bid you a very good afternoon. Will you go with the Sheriff's officer. We will see you at 10 in the morning.

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Folbigg, you may step down and you are
free to leave the courtroom, if you wish.

5

<WITNESS STOOD DOWN

HIS HONOUR: I want to thank the representatives of the
news media about being so good about complying with the
jury's request. It doesn't bother me if you come and go,
I shut it out, but it is apparently a distraction to them,
and your cooperation is very much appreciated. 10 o'clock
then.

10

ADJOURNED PART-HEARD TO THURSDAY 3 APRIL 2003

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D3

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

THIRD DAY: THURSDAY 3 APRIL 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: Are you ready for the jury, Mr Crown?

CROWN PROSECUTOR: Yes, thank you.

20 HIS HONOUR: May we have the jury?

Mr Crown, just in relation to Mr Folbigg's evidence on the topic that we were discussing yesterday, may I leave it to the Crown to draft the certificate under section 128? I
25 imagine that after his evidence is complete, the transcript will be taken out of the relevant parts of it and annexed to such a certificate. I will execute it.

30 CROWN PROSECUTOR: Thank you.

HIS HONOUR: Thank you, Mr Crown.

35 CROWN PROSECUTOR: My instructing solicitor has already drafted one, your Honour.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Good morning, ladies and gentlemen.

5 Yes, Mr Crown?

CROWN PROSECUTOR: Your Honour, I would seek to intervene
in Mr Folbigg's evidence two ambulance officers. The main
reason is that one of them comes from the Northern
10 Territory and we'd like to enable him to get back there
before the weekend. They will be very short. I think
they might be five minutes each.

HIS HONOUR: You don't mind that being done, Mr Zahra?

15 ZAHRA: Not at all.

HIS HONOUR: Let that be done then.

20 CROWN PROSECUTOR: I call David Hopkins.

Your Honour, yesterday, I said I was going to give the
jury a copy of the plan of the Folbigg house at Thornton.
I have got copies here now and I might make them
25 available. The only thing is that the photocopies have cut
off the address, so perhaps when it has been given to the
jury I will just read out the address and they can write
it on themselves.

30 <DAVID WILLIAM HOPKINS(10.15AM)
SWORN AND EXAMINED

CROWN PROSECUTOR: Q. I might add that Mr Hopkins' and
Mr Baines' evidence at this stage relates only to Caleb.

35 If I could give the jury these photocopies, and I have a
copy for your Honour.

(Copies distributed to the jury.)

40 HIS HONOUR: Ladies and gentlemen, it is not going to
produce any difficulty for you, but, as the Crown
Prosecutor mentioned, one strip from the top edge of the
original has been cut off. It doesn't appear in your copy
45 and all it says from left to right is "window" and then
there is a verandah with steps and you can just see the
bottom of that configuration right at the top in the
middle of your photocopy. And then in that space at the
top right there is the notation 9 Dover Close, Thornton.

50 CROWN PROSECUTOR: It is, in fact, Dower Close, D-O-W-E-R.

HIS HONOUR: Thank you. Dower Close, Thornton. And you
will see that the photocopy contains something which the
original does not; namely, the repeat of that address in
55 the top left of the photocopy. Otherwise they are
identical.

CROWN PROSECUTOR: That exhibit relates to Mr Folbigg's evidence concerning Sarah. It doesn't relate to these two ambulance officers' evidence.

5

HIS HONOUR: Yes. You will see the notation "Sarah's room" and "Sarah's bed" there, ladies and gentlemen.

CROWN PROSECUTOR: Q. Mr Hopkins, will you please tell the Court--

10

HIS HONOUR: In one other respect, the exhibit was given back to Mr Folbigg, you will remember, and he was asked to denote on it, by drawing a circle in red, the position the accused was in at a particular point of time, and he has done that. You won't find a copy of that notation on your copy of exhibit B. It is on the original though.

15

Yes, Mr Crown?

20

CROWN PROSECUTOR: Q. Mr Hopkins, will you please tell the Court your full name and your place of work?

A. My name is David William Hopkins. I currently am employed by the ambulance service in New South Wales at Hamilton station.

25

Q. And were you employed as a paramedic on 1 October 1999 - sorry, 1989?

A. At that stage I was--

30

Q. Sorry, I withdraw that question. Were you employed by the ambulance service in 1989?

A. I was.

35

Q. On the morning of 20 February 1989, were you working as an ambulance officer at the Hamilton Ambulance Station?

A. I was.

40

Q. And were you rostered on duty, together with Mr Dick Baines?

A. I was.

Q. At about 2.55am, did you and Mr Baines respond to a call to attend 36 Rawson Street, Mayfield?

45

A. Yes, that's correct.

Q. And was that in relation to a baby who was not breathing?

A. Yes.

50

Q. Did you arrive at the house at 2.59?

A. We did.

Q. Did you go inside the house and see a young man and a young woman who both appeared to be very upset?

55

A. Yes, that's what we saw.

Q. Would you tell the Court what happened when you were

in the house?

A. You may have to excuse my lack of memory in some respects of my evidence.

5 Q. Do you have a statement that you've made?

A. I do.

Q. Would you like to refer to your statement?

10 A. That'd probably be the best way to go.

Q. With your Honour's permission.

15 A. We arrived at the house at 2.59am that morning. I can't remember what the house looked like or what exactly happened when we got there. I remember walking inside the house and seeing a young man, young woman, who appeared
20 upset. Dick either went into a room and gathered the baby or the woman brought the baby to Dick and I in a room which appeared to be the lounge room. I saw a very young baby dressed in light clothing. It was laid down on the lounge room floor in the supine position.

Q. That means on her back?

25 A. That's correct. Near the entrance of the house, near the front door.

I removed the baby's upper clothing and established that the patient was in a state of cardiac arrest, that is, it was unconscious, not breathing and pulseless. I noted that the patient was warm to touch, was pale around the
30 mouth and lips. Dick, my partner, cleared the patient's airway. I have noted in my report that the patient's airway was obstructed and I cannot remember exactly what had obstructed the airway. I assume that there must have been saliva or fluid in the airway which needed to be
35 clear prior to Dick inserting a Guedel's airway.

Q. Is that a tube that enables you to use a bag to assist breathing?

40 A. Not as such. It's a--

Q. What is it?

45 A. It's a curved plastic tube which travels from the lips to the aura pharynx. That's just basically the back of the mouth and holds the tongue out of the way, which facilitates a clearer airway by holding the tongue out of the way. My partner inserted the Guedel's airway. I cannot categorically state what obstructed the airway. Maybe Dick can clarify this.

50 Q. A short time later did some other ambulance officers arrive?

A. Yes, they did.

55 Q. And did you continue resuscitation attempts until it became clear that it was not possible to resuscitate the baby?

A. Yes, that's correct. We continued resuscitation attempts, including expired air resuscitation, external

cardiac massage, and once the paramedics arrived, they did an electrocardiograph tracing and--

5 Q. Various measures were adopted?
A. That's correct.

10 Q. Now, would you have a look at this document, please? Is that a report which you and Mr Baines filled out after this particular ambulance call?
A. Yes.

15 Q. And is that the standard form of ambulance report that's filled out for all emergency calls?
A. It is.

Q. And on that document, on the first page, towards the top, have you written the time out?
A. Yes.

20 Q. The time that you arrived at the location?
A. Yes.

25 Q. The time that you departed from the location?
A. Yes.

Q. And the time that you arrived at the destination, namely the hospital?
A. Yes.

30 Q. Under "history", have you written "sudden infant death syndrome"?
A. Yes.

35 Q. On what basis did you write that? Why did you write that?
A. I wrote that on the physical examination, the signs and symptoms which we observed once we got there, and the medical history elicited from the parents.

40 Q. And by that, do you mean that you were told that the child was perfectly well?
A. As I stated earlier, my recollections are hazy. It was 14 years ago, but I did ask a couple of questions and the baby was well in the immediate hours prior, but I
45 can't speak for a previous medical history in anything prior to that.

50 Q. Are you able to say from which parent you got the history?
A. No.

55 Q. And have you also written under "history" "warm to touch"?
A. That's correct.

CROWN PROSECUTOR: I tender that, your Honour.

ZAHRA: No objection.

CROWN PROSECUTOR: I have copies of that for the jury and a working copy for your Honour.

5 HIS HONOUR: The ambulance report will be exhibit D.

EXHIBIT #D AMBULANCE REPORT TENDERED, ADMITTED WITHOUT OBJECTION

10 CROWN PROSECUTOR: The jury will see the times written towards the top of the first page. Time out 2.55, location 2.59, depart 3.38, destination 3.48.

<CROSS-EXAMINATION

15

ZAHRA: Q. The ambulance report was prepared on 20 February, the day of the attendance at this house?

A. That's correct.

20

Q. Did you prepare the report; is that your handwriting?

A. I did.

Q. You indicated in your statement that you have some memory of attending this particular house?

25

A. Yes.

Q. You have some recollection of seeing a young man and a young woman who appeared to be upset?

A. That's correct.

30

Q. And were they crying?

A. Yes.

35

Q. You note in your statement - in fact, you read it just a short time ago - that you have some recollection of either your partner, Dick, going into a room and gathering the baby or a woman who brought the baby to your partner?

A. That's correct.

40

Q. Can you assist: What is your recollection as to her involvement with the child at this time?

A. It's just too hazy to make a statement in evidence.

45

Q. Is it sufficient to say that you put in the statement, when you made it, that there was some recollection of the woman holding the baby at one stage, or--

50

CROWN PROSECUTOR: I don't mind if it is read to him.

ZAHRA: Q. This sentence in your statement: "Dick either went into the room and gathered the baby or the woman brought the baby to Dick and I in a room which appeared to be a lounge room"?

55

A. That's right. Either of those two things happened, but I can't recall which.

Q. But you have some recollection of the woman with the

child?

A. Yes.

5 Q. In relation to the demeanour of the young man and the young woman, you also note - this is at paragraph 7 of your statement you have in front of you - that at this time the young man and woman appeared totally distraught?

A. That's correct. Yes, that's correct.

10 Q. You, in fact, still have a copy of your report with you?

A. I do.

15 Q. Do you see on the first page under the heading, "Examination"?

A. Yes.

20 Q. There is a note there that the airway was obstructed?

A. Yes.

20 Q. And that's consistent with evidence you have read from your statement here today?

A. Yes.

25 Q. You note, on the second page, under the heading of "treatment" - do you see where "airway" is?

A. Yes, I see that.

30 Q. And you have "1" that the suction was performed?

A. That's correct.

Q. And under that, you have "oral airway"?

A. Yes.

35 Q. Do you have any further memory about that part of the process of treatment of the child?

A. Not - I do recall that part of - of the - of our association with the patient on the night fairly well, yes.

40 Q. But what about that part of the process? Do you recall what it was that was obstructing the airway?

45 A. No. I can only assume, from what I've written in that statement, it would have been fluid or saliva. I would have - I should imagine I would have made a note if it was a solid.

Q. How would the determination be made that there was some obstruction? How would that be ascertained?

50 A. Well, basically, if there's a foreign body in the mouth, it has to be cleared, so that when you're putting air or oxygen into the patient, that it's not pushed down into the airway to occlude the airway. A foreign body would include fluid. It could be saliva, phlegm, vomit.
55 It could be solid. You know, it's just whatever's there has to come out.

Q. Is that ascertained by a physical observation of the

mouth?

A. Physical and manual.

Q. But what was removed is unknown?

5 A. I'm assuming it was a bodily fluid, possibly saliva. The resuscitation was done in a supine position, therefore, anything in the mouth will gravitate to the airway, which creates some very bad complications for the patient.

10

Q. You've been taken to that part of your report under the heading of "history" where you make the notation of "sudden infant death syndrome"?

A. Yes.

15

Q. In fact, in evidence, in answer to the Crown's questions, you entered that history on the basis of physical signs and symptoms?

A. Yes.

20

Q. Do you recall what they were, what the symptoms were, that led you to that conclusion?

25

A. Basically, the patient was still warm. It was a recent event, recent catastrophic event. The baby was pale, pulseless, not breathing. Apparently, healthy in the recent, recent hours prior to it going to bed, so on my previous experience and the history elicited from one or both of the parents, it was an educated judgment that, all things considered, that may be an appropriate provisional diagnosis.

30

Q. So far as the notations that you made in the report under the heading of "examination", there are diagrams there of a human body, front and back?

35

A. Yes.

Q. And part of the process of your report involves noting whether there were any signs of abuse or physical injuries?

40

A. Yes.

Q. And there would be an examination for that purpose of the child?

45

A. That's correct.

Q. And you would be looking for any signs of trauma or bruising?

A. Yes.

50

Q. Anything of that nature?

A. Yes.

Q. And you examined the child's body?

55

A. Yes.

Q. And, in fact, there was no evidence of any trauma, bruising, any marks, scratches, or anything like that?

A. No.

Q. Particularly around the face; there was no other marking that you saw around the face?

5

A. No, the baby was just pale.

Q. That is something you look for?

A. That's correct.

<RE-EXAMINATION

10

CROWN PROSECUTOR: Q. You were asked questions about the mother holding the baby; do you recall that?

A. I do.

15

Q. Did you also put this in your statement, page 3, paragraph 9: "I also encouraged the young woman who I presumed was the mother of the baby to hold the baby"?

A. Yes.

20

Q. Do you recall doing that?

A. No.

25

Q. You were asked questions by my learned friend about obstruction of airways and you said that airways can be obstructed by a foreign body or bodies and that that includes fluid, saliva and phlegm?

A. That's correct.

30

Q. If there was any solid foreign body that was obstructing the airways that you noticed, you would surely have mentioned that in your report?

A. That's correct.

35

Q. So, can we take it, from the fact that there is no mention of it, that there was no solid, foreign body that you found?

A. Yes, you can take it.

40

Q. If there was anything other than saliva or phlegm or fluid, would you have noted it on the report?

A. I would.

45

Q. Can we take it from the fact that there is no mention of any particular substance that there would only have been saliva, fluid or phlegm?

A. You can.

CROWN PROSECUTOR: Thank you, your Honour.

50

HIS HONOUR: Would you like Mr Hopkins to be excused, Mr Crown?

CROWN PROSECUTOR: Yes, your Honour.

55

HIS HONOUR: Mr Hopkins, you may step down. You are excused from further attendance.

<WITNESS RETIRED AND EXCUSED

CROWN PROSECUTOR: I call Richard Baines.

<RICHARD ANTHONY BAINES(10.40AM)
5 SWORN AND EXAMINED

CROWN PROSECUTOR: Q. Mr Baines, is your full name
Richard Anthony Baines?

10 A. That's correct.

Q. And Mr Baines, between 1974 and 1997, were you
employed by the New South Wales ambulance service?

A. That's correct.

15 Q. I think you're now a businessman?

A. A private medic.

Q. A private medic?

20 A. Yes.

Q. On 29 February 1989, did you and ambulance officer,
David Hopkins, attend, in response to an emergency call,
at 36 Rawson Street, Mayfield, at about 2.59am?

25 A. That's correct.

Q. And when you arrived there, did you attend to a
patient who was a baby that you now know was Caleb
Folbigg?

30 A. Yes, that's correct.

Q. And do you say that when you first saw the baby there
was no respiration, the baby was pale and was warm to the
touch?

35 A. Yes.

Q. Do you also say that there was no pulse and the blood
pressure was nil?

A. That's correct.

40 Q. Upon an examination of the child, did you say that
there was no apparent observable external injury to the
child?

A. That's also correct.

45 Q. I think you, together with Mr Hopkins, filled out an
ambulance report?

A. Yes.

<CROSS-EXAMINATION

50 ZAHRA: Q. Do you have any recollection of attending
this house on this night?

A. My memory has faded. It has been quite some time.

55 Q. You were assisted by looking at the ambulance report?

A. Yes.

Q. Might the witness have a copy of that report?

HIS HONOUR: Yes, the witness may be handed exhibit D.

5 ZAHRA: Q. (Shown exhibit D) That report was prepared by ambulance officer Hopkins?

A. Yes, that's correct.

10 Q. You have seen that in recent times?

A. Yes.

15 Q. When that report is prepared, do you also sign the report?

A. Yes.

20 Q. So, I presume, at this time, at the time of signing it, you examined the accuracy of that report?

A. Yes, we're both responsible for the facts.

25 Q. And under the heading of "examination", there is a diagram there of a human body, both the front and back?

A. Yes.

30 Q. If you had observed any trauma, even the most slightest bruise--

A. Yes--

35 Q. --you would have made a note on those diagrams?

A. Yes, we would have.

40 Q. And the fact that there is no notation at all on that diagram would suggest that there was no observation?

A. No.

45 Q. The marks that are in that diagram are the common marks in the report?

A. Yes.

50 Q. In fact there's been nothing added to that diagram?

A. That's correct.

<NO RE-EXAMINATION

<WITNESS RETIRED AND EXCUSED

55 CROWN PROSECUTOR: I thank your Honour for that indulgence. If we could now recall Craig Folbigg to continue his evidence.

<CRAIG GIBSON FOLBIGG(10.45AM)
RECALLED, ON FORMER OATH

CROWN PROSECUTOR: Q. Mr Folbigg, just for the record, please, your full name?

A. Craig Gibson Folbigg.

60 Q. Now, Mr Folbigg, I'd like to go back to just one aspect of your evidence to ask you something further about something that you told the Court yesterday. It relates

to the evidence that you gave about waking up to find Sarah in her bed deceased. If I could just reiterate a little bit of what you'd said, you said you'd woken up at 1.10, gone back to sleep, and then you said that you
5 didn't know at the time what time it was that you woke up again. Did you find out subsequently what time it was?
A. I looked at the clock on the bedhead and when I spun around with Sarah in my arms and put her on the bed--

10 Q. And what time was it?
A. 1.30.

Q. Now, you were woken at 1.30 by your wife standing at the doorway, screaming?
15 A. Correct.

Q. You looked over towards Sarah and you described to the Court yesterday how she was lying. Is there anything unusual about the way in which she was lying?
20 A. It was different than how you would have expected she was lying if she was asleep.

Q. Had you ever seen her lying asleep like that before?
A. I had. She used to lie like all bobbies, she - body
25 all over the place, arm up behind her head. That sort of stuff.

Q. Listen to my question. I said had you ever seen her sleeping in that position before?
30 A. Not the position I saw her in at that time.

Q. With his Honour's permission, what I would like you to do is to come down in front of the jury box and to lie down on the carpet and demonstrate yourself how Sarah was
35 lying when you first saw her on her bed.

HIS HONOUR: Q. Yes, please do that.
A. (Witness complied).

40 CROWN PROSECUTOR: Might I approach, your Honour?

Q. All right. Now you're just lying with your feet straight and your arms straight by your side?
45 A. Correct.

Q. Would you demonstrate the ways in which Sarah would normally sleep?
A. (Witness complied).

50 Q. You are lying with your arm up and out, one arm up and out. The legs up, the legs out. Any other way?
A. Oh, she did like this, sort of crunched up.

55 Q. Thank you. I would now like to go back to where you finished off yesterday. You told the Court that you moved to Singleton, that Kathy had got a job at Retravision, that you'd purchased a home together with Kathy at Singleton, and I think you told us that that was at 8

Millard Close at Singleton?

A. Correct, correct.

5 Q. Now, after you bought the house and moved into the house in January of 1996, how was your life with Kathy?

A. Good. It was - we had a really nice house and we had good jobs, good friends. It was a lot of fun.

10 Q. And was Kathy going to the gym?

A. She was attending the gym at that stage.

Q. And what was her mood like at around that time?

A. She was - she seemed happy.

15 Q. After you'd moved into the new house, later that year, still 1996, was there anything that Kathy said to you about having another child?

20 A. We'd - we'd settled into the house and it was around the May, some time round the May, Kathy said that everything was wonderful and we had a great house and both had good jobs and life was fun and the thing she saw that would round that right off was being - was having another baby.

25 Q. What was your reaction to that?

30 A. I was shocked. I expressed to Kathy that I - at that stage in our lives I thought that we'd already talked about parenthood and how it wasn't going to be a factor for us, hence the reason we bought the house that we bought, went into a huge amount of debt to get that house, relied on both our wages, and that was just going to be us, we were going to work, pay the house off, maybe save up, do some trips, stuff like that. Kids just weren't going to be a factor.

35 Q. What did you say to Kathy when she suggested having another child?

A. No.

40 Q. And what was her reaction to that?

45 A. She wasn't happy about that. I got basically a copy-book repeat of the Sarah incident; what was the use of being married if we weren't going to be a family. It was wonderful to see me as a dad. That was - the best time of our life was when we were parents, that sort of stuff.

Q. Was this just one conversation or many conversations?

50 A. It was many conversations.

Q. And during most of those conversations, what was your attitude?

A. No.

55 Q. And did you discuss it with Kathy?

A. I discussed with Kathy my reluctance to be a parent again.

Q. Did she discuss with your her desire to be a mother again?

A. Yes.

5 Q. And, for quite a while, was your attitude "no"?

A. It was a negative.

Q. Did you change that attitude?

10 A. Eventually, in an effort to throw up her own block towards what ended up being inevitable, I threw by Kathy that it couldn't be that easy. You know, you can't just, can't have a baby, come home, play happy families, not with what we'd been through and we'd need to find people who would be there to help us and people who could assist
15 us with that.

Q. So, why did you say that?

20 A. Basically because I knew I'd get - that would get the heat off me.

Q. Why would it get the heat off you?

A. It would stop her bringing it up over and over and over.

25 Q. Why is that?

A. Because I threw the ball in her court, and, you know, go out, find these people and then we'll talk about it, if there's anything that can be there to help us.

30 Q. And what happened after that?

A. It was a couple of weeks had passed from that and Kathy asked me if I'd got in touch with Professor Hilton, who was one of the people I'd mentioned that we should talk to. I said, "No, I thought you were doing that".
35 And she said "Well, you're the one who wants to talk to these people, why haven't you done it?" So I - eventually I rang Professor Hilton.

40 Q. Can you describe the effect on you of these conversations?

A. It distressed me, it depressed me, it worried me. When--

45 Q. How often was she bringing it up?

A. It was a few times a week.

Q. And what was her manner towards you about this?

50 A. Well, when the conversations would arise, she would be casual and loving and friendly about it. She - she knew what buttons to push.

Q. And what buttons were they?

55 A. Parenthood, being a dad, the fun of babies, having bobbies around.

Q. You said that several weeks later you asked her if she had been in contact with these people and she said it was for you to do because you were the one who wanted it?

A. Yes.

Q. So, what happened after that?

5 A. In that conversation - I recall in that conversation,
when I said to Kathy that it wasn't just that easy, just
to have a baby and bring it home. There was something
Kathy said at the time that I overlooked, and actually
10 told her to wake up to herself, that it was irrelevant,
and that was that we were - when I was expressing my
reluctance to having a baby because of what had gone on
before, Kathy had said that that wouldn't happen again, we
were more mature, more patient people, and, like, older
and wiser. So I rang Dr Hilton--

15 Q. How did you respond to her when she said that it
wouldn't happen again because you were more mature, older
and wiser?

A. I told her to wake up to herself, what the hell did
20 that have to do with it. Nobody had been able to tell
what happened to our babies, other than at one instance
SIDS, and nobody could tell us what SIDS was.

Q. What happened after that?

25 A. I rang Professor Hilton. He gave me a phone number
for a Dr Chris Seton.

Q. And did you get in touch with Dr Chris Seton at the
Westmead Children's Hospital?

30 A. I rang Dr Seton at the Reid Sleep Studies Unit at the
Westmead Hospital and we had a meeting with him.

Q. We, being you and Kathy?

A. Kathy and I.

35 Q. And during this meeting, what did Dr Seton explain to
you?

A. Dr Seton explained to us the nature of the Reid Sleep
40 Studies Unit, what they concentrated on, and what they
specialised in. They - he explained to us the sleep
studies that they carried out on newborns and periodic
times from newborn, coronometrics, sleep apnoea machines.

Q. That's a type of monitor?

45 A. It's a monitor.

Q. I think I earlier called it coronometrics, but it's
actually coronometrics?

A. Coronometrics. And he welcomed us into the study, into
50 the assistance program. He wished us luck and said that
if we were - when we became pregnant, to give him a call
and let him know the time frame we were talking, and we'd
go from there.

55 Q. Of course, you told Dr Seton your history of having
already lost three babies?

A. Dr Seton already knew of us. We did fill in some
gaps that he was not aware of.

Q. Now, armed with the information that Dr Seton had given you, did you and Kathy commence trying to have another baby?

A. We did.

5

Q. And, in November of 1996, did Kathy discover that she was pregnant?

A. Yes, she did.

10 Q. And did you inform Dr Seton, at some stage before Laura was born?

A. I typed up a letter and sent it down to him, informing him that we were pregnant and going to be parents, and asking for his assistance and whether it was still available.

15

Q. And did he let you know that you and Kathy and your baby were to be accepted into his program at the hospital?

A. Yes, he did.

20

Q. Do you tell the Court that on 7 August 1997 Laura was born at the Singleton hospital?

A. She was.

25 Q. And, again, you were present at the birth?

A. I was.

Q. And I think the doctor who delivered her was a Dr David Sanders?

30

A. Yes.

Q. When Laura was born, did she appear to be perfectly healthy?

A. Yes, she did. She got good - I can't remember the words--

35

Q. Apgars scores?

A. Apgars and everything.

40 Q. And, initially, did Kathy breastfeed Laura?

A. She did. Singleton Hospital have a fairly - not heavy-handed, but they're fairly stringent on - and they believe in that, and they spoke at length with Kath, and Kath gave it a go and it worked fairly well.

45

Q. When you took Laura home to your address at Millard Close in Singleton, did Laura sleep in a bassinet in your bedroom right next to your bed?

A. She did.

50

Q. And when she was about a week or ten days old, did you take Laura to the Westmead Children's Hospital?

A. We took her down, yes.

55 Q. And over a three or four-day period, was she an in-patient at the hospital in order for extensive tests and sleep studies to be carried out?

A. She was, yeah. The--

Q. And were you told that all of those tests and studies showed that there was absolutely no abnormality?

A. Yes.

5

Q. And whilst you were at the hospital, did you attend classes on CPR?

A. We attended classes on CPR and the operation of the corometrics monitor.

10

Q. And you were lent a corometrics monitor by the hospital?

A. We were.

15

Q. And told how to use it?

A. Yes.

Q. How to put it on to the baby?

20

A. How to put it on, how to respond to the baby in the event of an alarm. The machine told you if the alarm was false or actually - sorry, it wasn't the machine told you that. The machine told you whether it was a heart alarm, a breathing alarm, or a misalarm.

25

Q. A heart alarm, a breathing alarm or?

A. A miss, like a glitch in the machine.

Q. There was heart alarm, breathing alarm and false alarm?

30

A. Yes.

Q. And the machine had sensors which were placed on Laura's chest and torso?

35

A. Yes.

Q. And plugged into the monitor?

A. Plugged into the monitor.

40

Q. And the monitor recorded all of her breathing and her heart functions?

A. Yes.

45

Q. And when you left the hospital, did you and Kathy take this machine home with Laura to use when she was asleep?

A. Yes, we were instructed that she was to have it plugged on to her whenever she was asleep.

50

Q. When you say "whenever she was asleep", is that literally whenever she was asleep, or just at night?

A. Whenever she was asleep.

55

Q. Was there also a facility on this monitor for the data that it recorded to be downloaded via a telephone modem to the Westmead Children's Hospital?

A. Yes, it had a memory in it.

Q. And were you given instruction on how to do a

download?

A. Yes, we - the modem came with the machine, the wiring came with it, and we were told how to plug it in and dial through.

5

Q. How often were you told to do a download?

A. At first it was - the very first time it was one week after, and then it went to fortnightly.

10 Q. Now, were you also given instructions about what to write if the machine alarm sounded?

A. We - we were taught how to respond to Laura. We were to - because the machine would pick up everything, and so we were taught to - that if the machine went off, how to touch her gently, so as not to arouse her too much, just to check whether you get a movement by touching her eyelashes or such. And then to write down what we found when we got in there.

20 Q. Were you given some sort of record sheet?

A. It was like a daily diary sheet thing.

Q. And was that only to be filled in if there was an alarm or to be filled in every time you used the machine?

25 A. When there was an alarm.

Q. Now, did Kathy and you use the machine every time Laura went to sleep?

30 A. When I was home of a night, yes. It came to my attention that Kathy wasn't using the machine through the day.

Q. How did that come to your attention?

35 A. I was doing the downloads and I would come home at the appropriate time that Westmead had told us and hook it all up and dial through for the download and I was reading the diaries, the day diaries, and I noticed that there was some significant amounts of time which were missing, which were daytime, from the diary.

40

Q. Missing from the diaries or missing from the downloads?

A. Both.

45 Q. Did you speak to Kathy about that?

A. I did. I--

Q. Sorry, before I ask you that, was this right from the very beginning or was it after a period?

50 A. It was after a bit of time.

Q. After how long?

A. Probably two or three months.

55 Q. And did you speak to Kathy when you found out?

A. I got really cranky about it and asked Kathy, you know, why aren't you plugging Laura in of a day and Kathy said "Well, I keep my eye on her and she'll be fine". You

know, "I keep my eye on her, I put her down for a sleep and I just check on her and she's fine". I said "Well, that's not what they told us" and, you know, "You're going to go and do something, if this thing happens, it happens pretty quickly". And she told me it wasn't me at home putting up with the machine, and it was driving her mental, and she just wanted to have a normal baby. And I said "Well, she's not normal. Until they tell us she's normal, she's not normal."

10

Q. Did you have many false alarms?

15

A. Oh, we had a fair few. There was one night we had a huge amount. It transpired at the end of the day, of the night. In the early hours of the morning we discovered why. It was because we put the lower - the breathing button that stuck to Laura was too low on her body, but that was a terrible night.

20

Q. Were you present, whenever the alarm went off? Was there ever an occasion when Laura appeared not to be breathing?

A. No.

25

Q. Was there ever any occasion when the alarm went off when you were in any way concerned, after you had been able to look at her properly, that she was in any sort of respiratory distress or physical distress at all?

A. No, never.

30

Q. So, is this the case: That every time the alarm went off it turned out to be a false alarm?

A. It was a nuisance.

35

Q. Is that correct, that every time it went off, it was a false alarm?

A. Yes.

40

Q. Would you have a look at this document (shown)? Have you seen those sheets before?

A. Yes, I have.

45

Q. Do they appear to be the record that you've told us about that would be written up by you and Kathy every time there was an alarm?

A. This is them.

50

Q. And is your handwriting and her handwriting in that document?

A. Predominantly Kathy's. Occasionally mine.

55

CROWN PROSECUTOR: Might that be marked for identification?

MFI #2 COROMETRICS MONITOR RECORDS

55

HIS HONOUR: Ladies and gentlemen, let me just tell you something about this system we have of marking documents and things, as we say, for identification. We do it so

that, if the same document or things are referred to later on in the trial, we know that it is the one that was dealt with on the earlier occasion. For example, something might be shown to one witness and then later on to another witness and you know, by reference to the MFI number, as we call it, that it is the same thing that is being spoken about.

Sometimes documents which are marked for identification come into evidence; sometimes they don't. That depends on a number of things, including whether they are admissible in evidence, and the way the barristers wish to run the case, but for the moment those documents are not evidence. They are simply marked for identification.

Yes, Mr Crown?

CROWN PROSECUTOR: Q. Where the alarm went off at night, would you or Kathy or both of you generally get up to see how Laura was?

A. A large amount of the time we'd both get up and a large amount of the time Kathy would say "Don't bother, it's all right. I'll do it".

Q. And would she get up?

A. She would get up.

Q. And on those occasions that she got up, would she tell you anything afterwards?

A. No.

Q. Would she say whether it was a false alarm or not?

A. Oh, yeah, yeah - sorry, yeah, occasionally she'd tell me it was false, or it was a breath one, but she was fine or whatever.

Q. Laura was born in August 1997. You have told us it was after, I think you said two or three months, that Kathy stopped using the monitor all the time during the day. By March of 1998, when Laura was about seven months, had the situation changed at all?

A. I couldn't talk to Kathy - about every time we talked about it she'd just go off her head, tell me it wasn't me who had to put up with it and all that sort of stuff. I was very worried about it and - so, I wrote a letter to Dr Seton and asked Dr Seton if he would speak to her..

Q. Why did you do that?

A. Because I couldn't, and I had to sleep next to her and he didn't have to sleep next to her, and he could give her what for and tell her that she had to do it.

Q. Would you have a look at this letter (shown)? Is that the letter that you sent to Dr Seton's clinic?

A. That is it.

Q. Now, it is addressed to somebody called Margaret?

A. Margaret Tanner.

Q. Who was Margaret Tanner?

A. Margaret Tanner was our contact lady at the sleep studies unit, who took the downloads.

5

Q. So, she was the one who was actually doing the reading of the downloads?

A. She was.

10

Q. And was she your first point of contact at the sleep studies centre?

A. Every time.

15

CROWN PROSECUTOR: I tender that.

ZAHRA: No objection.

20

HIS HONOUR: The letter from Mr Folbigg to Margaret Tanner is exhibit E.

EXHIBIT #E LETTER TO MARGARET TANNER FROM MR FOLBIGG OF 18/03/98 TENDERED, ADMITTED WITHOUT OBJECTION

25

CROWN PROSECUTOR: Your Honour, I thought I would ask Mr Folbigg to read it.

HIS HONOUR: Yes.

30

CROWN PROSECUTOR: Q. That's dated 18 March 1998?

A. Yes.

Q. Could you read the letter, please?

35

A.

"Dear Margaret,

40

I hope this letter finds you well. Kathy, Laura and I are fine. Laura is going great guns now that she has shaken all the little bugs she had. She is in the process of learning to crawl at the moment and does not like it one bit. "Why crawl when mum or dad can carry me or get things for me?", I bet that's what she thinks. We had Pixie photos done and I hope you don't mind but I have sent you one. I'm sorry it isn't any bigger, but at least it won't get bent in the mail.

45

50

Our last report on Laura's sleep studies was very good and I was pleased to see that Chris wanted the home monitoring to continue.

55

I personally find the flashing lights of the machine comforting, although the alarms are frightening as you are totally unaware of what awaits you when you get to Laura. Happily so far all has been fine.

5 Strangely though, I feel that Kathy finds it all tedious and frustrating and would probably rather not use it at all, merely entrusting Laura's survival to fate. You would think that after all she had been through as a mother she of all people would be more diligent with the monitoring.

10 Is it necessary that Laura be monitored through her daytime sleeping as I'm more than sure that Kathy does not do this. Have you noticed this on the downloads?

15 I'm sorry if I sound paranoid, but with every passing day I fall that much further in love with this child and truly could not bear her not being a part of my life.

20 We will be seeing Chris Seton in May some time and I am preparing a list of questions to bring up in our discussion with him then.

25 Anyway, I didn't mean for this letter to be anything more than a hello and a thank you, once again, for all your help so far. I look forward to talking to you on our next download.

30 Sincerely yours,
Craig, Kathy and Laura."

Q. And you have signed it "Craig" down the bottom?
A. I have.

35 Q. Mr Folbigg, when Laura was about three-months old, did you move her into her own bedroom adjacent to your bedroom?
A. We did.

40 Q. And did she initially sleep in a cot in that room?
A. She did.

45 Q. At a certain stage, did Margaret at the sleep clinic suggest that you could now return the corometrics monitor?
A. At the visit in May with Dr Seton he expressed how happy he was with Laura and how, if we felt that we wanted to keep the monitor for some more time, we could.

50 Q. Laura, of course, was nine months of age then?
A. Laura was about nine months of age. We kept the monitor at home with us and Laura's first birthday came around and we had a party and Margaret Tanner came up for the party and Margaret told me again at the party that they were cool with us keeping the machine, but by
55 December that changed.

Q. So by December '98, she was 16 months old?

A. Yes.

5 Q. And did the hospital then say that they wanted the monitor back?

A. They asked for the monitor back. The sleep studies unit wanted the monitor back. They had babies that were in more need of them than Laura.

10 Q. So you ceased using it around about December '98?

A. We used it a little bit spasmodically till we went away to Melbourne for Christmas. We took the machine to Melbourne, but didn't use it.

15 Q. Apart from the corometrics monitor that you've told us about, did you also have an audio monitor installed in your house?

A. We had a listening - Fischer Price listening monitor.

20 Q. Is that something that is plugged into a power point near where the baby's bed is?

A. Yes, the base station.

25 Q. The base station is near the baby and the other station, is that a portable one or a fixed one?

A. You could have it either. Well, it was portable, predominantly, battery-operated, but you could plug it into the wall to save the batteries.

30 Q. And that would enable an adult to hear any sound at all that came from the baby's room?

A. Yep, any sound.

35 Q. And was that used much?

A. It was on all the time.

Q. Some of the time? Some of the time during Laura's life?

40 A. All of the time.

Q. All of the time?

A. All of the time.

45 Q. Is this the case: That most of the time Kathy was the primary caregiver for Laura?

A. She was.

Q. You were working at that time?

50 A. I was working.

Q. How many days a week?

A. Five and a half days.

Q. And was Kathy doing most of the housework?

55 A. Yes.

Q. And are you able to say how Kathy appeared to cope with motherhood?

A. She - she was - she was happy being a mum, but she wasn't - it's hard to say.

Q. Could you explain what you mean by that?

5 A. She would get frustrated, cranky, yet she did the mum things as well.

Q. How often would she get cranky and frustrated?

10 A. Every day.

Q. And what sort of things would make her cranky and frustrated?

A. Me, Laura not doing what she was told.

15 Q. Is this right from the beginning or after a certain age?

A. Oh, after - it sort of kind of - when Laura started walking and carrying on, yeah, that's when it started to get worse.

20

Q. And when was that?

A. After she was about 11 months old.

25 Q. And the situation, as it appeared to you, with Kathy, was it static or was it, like, always the same, was it worse or getting better or what?

30 A. It was getting worse. Our relationship had fairly much packed it in. We were pretty much both living for Laura, or so I thought. Most of the time we slept in separate rooms. Towards the end of Laura's life we were in separate rooms, probably more for - by choice.

Q. So, is it that the situation between the two of you had badly deteriorated?

35 A. Yeah, I used to say to people I lived with my daughter's mother. That was the basis of our relationship. It was cordial, it was polite if you keep your mouth shut, didn't aggravate her or intimidate her. You pretty much got left alone.

40

Q. And what would aggravate her and intimidate her?

A. If you showed displeasure at the things that she was doing with her life.

45 Q. Like what?

A. Her nights out with the girls, her - the frequency of her going to the gym. Other than that, basically all she wanted to do was lay around watching videos.

50 Q. So, during the last few months of Laura's life, how often was she going out with the girls at night?

A. It sort of was more, more like once a month, but towards the end of Laura's life it nearly got to be a weekly thing.

55

Q. And how often was she going to the gym towards the end of Laura's life?

A. Daily, and whatever nights that she could. She used

to take Laura to the gym.

Q. In early February 1999, did Kathy start back at work at Retravisision?

5 A. They had some holiday - people going on holidays and stuff, and they asked Kathy if she would fill in when those people weren't there.

Q. At a certain stage, did Kathy give you a letter about your relationship?

10 A. She did.

Q. Could you have a look at this letter? (Shown.) Is that a letter which she gave you?

15 A. It is.

Q. And did you type a letter intending to give it to her in reply?

20 A. After I got--

Q. After you received that letter?

A. After I received this letter and we had a huge conversation about the letter, I typed a letter, but never gave it to her.

Q. Would you have a look at this typed letter? (Shown.) Is that the typed letter?

25 A. This is the letter that I typed to Kathy.

Q. Just to clarify, you never gave her that letter, did you?

30 A. I never gave it to her, no.

Q. Did you type that letter on the same day as you were given the handwritten letter or a different day?

35 A. It was some days later.

Q. What's the date that you typed the letter?

40 A. I typed this letter on 17 February 1999.

Q. That was about a fortnight before Laura's death?

A. It was.

Q. So, it would have been a couple of days, two or three days before that, that you were given the handwritten letter by Kathy?

45 A. Yes.

CROWN PROSECUTOR: Your Honour, might they both be marked for identification?

50

HIS HONOUR: Yes. The handwritten letter referred to is marked 3 for identification and the typed draft is marked 4 for identification.

55

MFI #3 HANDWRITTEN LETTER

MFI #4 TYPED LETTER

CROWN PROSECUTOR: Q. Now, basically, in the handwritten letter, did Kathy tell you that she, in effect, wanted to break up your marriage?

5 A. She did.

Q. And in the typewritten letter that you didn't give her, did you state what your views were at that time?

10 A. I did.

Q. And was that basically that you thought that there were lots of ways in which you could reinvigorate your marriage so that it could be retrieved?

15 A. Yes.

Q. And you have told us that there were many hours of discussion in between the two letters?

A. Only one discussion.

20 Q. A discussion of many hours?

A. The night I got the letter from Kathy.

Q. Was it about those same topics?

25 A. It was about what she had written.

Q. Did she communicate any decision to you, after she gave you the letter, and before Laura's death, about whether or not she still wanted to finish your marriage?

30 A. She said she'd give it a go.

Q. When did she tell you that?

A. That night. She said a lot of other things too that come from that letter.

35 Q. I'm sorry?

A. She said a lot of other things too that came out of that letter.

40 Q. Are they relative to--

A. It is.

Q. Relevant to this case?

A. Very relevant.

45 Q. Could you tell us what they were?

A. In the letter she stated that she was going to leave me for the reasons that she stated and that she would take Laura and she would leave Laura wherever she felt fit, where she thought Laura would be safe, until she returned. I told her that she could pack her bags and go at any time she liked, but she was not taking that child out of that house. That was Laura's home and I was her dad. And I told her that every time she left me, she devastated me and that if she did it this time, she wouldn't only devastate me by the loss of her, but by taking Laura. And she said to me, "I will not walk out of this house and leave that child", and I said "Well, you have a problem". And she said "I will not ever have anybody tell me I'm no

better than my mother" and so I said, "Well, you better - we better sit down and work this out".

5 Q. Was there anything said by her during any of your discussions about getting time to herself?

A. Yes.

Q. What did she say?

10 A. She expressed to me part of her problem was that she never had enough time - I was always cranky about her leaving Laura with her friends when she went to the gym and stuff, and would I try to get home - if I didn't like the fact that Laura was getting left places, would I try to get home from work on time, so that I could watch Laura
15 so that she could visit the gym, because they had started some new gym type classes that she was interested in pursuing. So I said I would do the best that I could.

20 Q. Now, was it around that time that you changed Laura's bed and she started sleeping in a single bed in her room?

A. Yes.

25 CROWN PROSECUTOR: Your Honour, that brings us to a new topic and that might be a suitable time.

HIS HONOUR: Yes, we will take the morning tea adjournment, ladies and gentlemen.

IN THE ABSENCE OF THE JURY

HIS HONOUR: You may step down, Mr Folbigg. It won't be
a long adjournment - about 20 minutes or so.

5

SHORT ADJOURNMENT

10

RESUMPTION

5 HIS HONOUR: Ladies and gentlemen, I said to you earlier
this week that I would give you some advance notice about
other days that we would be taking off. As you already
know, we shall be adjourning at 4 o'clock this afternoon
and resuming on Monday, 7 April. You may assume that we
shall take off the following Friday afternoon, 11 April.
10 If you want to make a note of that, you can rely on that.
I will not change it, so that you can make your
arrangements accordingly.

15 We shall resume on the following Monday, 14 April. That
is Easter week, so we will not be sitting in any event on
the Friday. That will be Good Friday. It is possible
that we may adjourn a little early on the Thursday. I
will see how the progress of the trial is at that stage.

20 Now, the following week has Easter Monday and Anzac Day on
the Friday. So it was going to be a three-day week.
Something else has been brought to my notice that makes it
inappropriate for the Court to sit on Tuesday, 22 April.
So that the week immediately after Easter is going to be a
two-day week.

25 When I adjourn at some time on Thursday, 17 April, it will
be to 10 o'clock on the following Wednesday, 23 April. We
shall sit on the Thursday, the twenty-fourth.

30 There is another long weekend because ANZAC Day is the
holiday on the Friday of that week. That will take us to
Monday, 28 April. I can tell you now that I cannot sit on
Friday 2 May.

35 That is as far as I think I need to take the advance
indications at the moment. If you are unclear about any
of these matters send me a note by all means. I think you
have taken your notes. You can rely on these things that
I am saying to you now. I will not change these
40 arrangements.

CROWN PROSECUTOR: Q. I would like to now take you to
the few days before Laura's death on 1 March 1999.
45 Firstly, on Friday, 26 February 1999, on that night, did
Kathy go out on one of her girls' night out?
A. She did.

Q. Did you have any discussion about it?
A. No. It - well, I remember driving home. It was about
50 5.30 in the afternoon and Kathy was getting ready to go
out. It was just pointless really at that stage of life to
say anything about it.

Q. You looked after Laura when she went out?
55 A. I did.

Q. And the following morning?
A. On the Saturday?

Q. Did you work on that Saturday morning?

5 A. Yeah, I got up at 6 as always, got Laura up and we had breakfast together and mucked about, played around the house. I got ready for work. I went in to wake Kathy up to look after Laura.

Q. Yes?

10 A. It was about quarter to 8 or so and I asked Kathy if she would get up because I had to go to work. She said, "Just let her run around the house, she'll be all right." I said, "You couldn't do that, just let a baby run around the house alone." She said, "Okay, I'll get up." I left and went to work.

15

Q. You came home around lunchtime?

A. I got home just after 12 o'clock.

20 Q. That afternoon were you planning to go out to a mini classic car show?

A. I had my car entered in a classic car display downtown, so I went home to get the car. I asked Kathy if she wanted to come. She had hired a stack of videos and said she was quite comfortable staying home and why didn't I go on my own. So I asked her if I could take Laura and she said, "No, there'd be too many people down there. She'll get all grumpy. You'll bring her home and I'll have to deal with her."

30 Q. So, did you go to the show on your own?

A. I went to the show on my own.

Q. About what time did you get home?

35 A. About 2.30 I got home from the show, wound up. I got home. Kathy was laying on the lounge watching videos. Laura was laying around in the family room watching "Dumbo" or something on tape. So I asked Kathy if she wanted to go for a drive into Newcastle with me in the car and she said she'd rather not, basically said that it was my interest, my hobby, not hers. So I asked if I could take Laura. It was a lovely day, nice, sunny, blue day. I figured it would probably be good for Laura to be out instead of laying around the house. She asked me what time I thought I'd get home. I told her I thought probably around dinner time, or such. She said, "No, you can't take Laura. She'll be too tired when you get her home. Just go on your own." So I did.

45

Q. So, did you go to Newcastle?

50 A. I went for a drive into Newcastle, yes.

Q. What time did you get home?

55 A. I was driving home. I was fairly urgent going home because it was late. It was about ten to eight when I got home. The reason I remember that is because it was pretty important to me to get home to spend some time with Laura.

Q. What time did Laura normally go to bed in February?

A. 8.30.

Q. So, you got home about 40 minutes before her usual bed time?

5 A. Yes.

Q. So, this was two days before Laura died?

A. Yes, it was.

10 Q. When you got home, was Laura up?

A. No, Laura was in bed.

Q. What happened?

15 A. I asked Kathy, when I walked in, I said, "Where's Laura?" Kathy said, "She's in bed." I said, "What's she doing in bed? It's only 8 o'clock." Kathy said, "Laura was tired" so she put her to bed. She was tired and Kathy was tired as well, so she went to bed. I walked into the hallway to kiss her good night. Kathy said, "Don't you
20 wake her" or words to that effect. I said, "Well, I just want to give her a kiss good night." I said, "I'll try not to." She said, "You better not want to."

Q. Did you go into Laura's room?

25 A. I went in and gave Laura a kiss.

Q. After you left Laura's room?

A. I went back down to the lounge room and watched TV.

30 Q. Now, that brings us to the following day which was Sunday 28 February 1999?

A. Yes.

Q. This being the day before Laura's death?

35 A. Yes.

Q. Did you wake up at about 6 o'clock in the morning?

40 A. From years back it's a habit to get up around that time. I still do. Got up around 6am. Snuck down the hallway so as to not wake Laura. About 6.30, Laura did the usual "Dad, Dad, Dad" down the hallway. So I went to get her, made her breakfast, a couple of bits of toast, gave her her bottle. We just bummed around the house. It would have been 8 or 9, yeah, about 8 or 9, Kathy got up,
45 came down to the lounge room.

Q. At that stage you were sleeping in separate bedrooms?

50 A. We were. No, I'm sorry. We had resumed sleeping in the same room. Kathy came down to the lounge room and asked what did I think we were going to do that day. And I had said, "I don't know. I was going to look into the yard, do a bit of work around the house and such. Why?" She said she'd like to go for a drive somewhere because she was sick of being stuck in the house. I said to her,
55 "Well, that's your problem - not mine. I had a day out yesterday. I want to be at home today." I said to her, "Why don't you ring some of your friends and try to organise a barbecue or get together here or something?"

- Q. Did she then go and make a phone call?
A. She rang - she made some phone calls.
- 5 Q. Did she come back to you a little while later?
A. She came back out and said that some friends of ours, Dean and Tanya Schmidt, were going to come over for a barbecue about lunchtime. So we went down to Woolies or Big W to do some shopping, get some stuff for a barbecue.
10 So we went down to Woolies and then we visited some friends who had just opened up a new business, had a bit of a visit with them, went back home and started to get ready for our friends to turn up.
- 15 Q. All right. Now, your friends were Dean and Tanya?
A. Yes.
- Q. What was their surname?
A. Schmidt, S-C-H-M-I-D-T.
- 20 Q. Did they come over to your house at lunchtime?
A. They did.
- Q. With their children?
25 A. They had their three kids with them: Nicholas, Nathan and their baby, their new baby, Sarah.
- Q. Just, in very broad detail, what did they and you do during the day, just in very broad detail?
30 A. Broad detail, Dean and I watched Nicholas and Sarah swimming in the pool.
- Q. Was that a pool at your place?
A. Yes, a swimming pool in the backyard; inground pool.
35 Dean and I stood over them. I videoed what was going on. Tanya, the two younger kids, were outside the pool area, mucking around. We were just talking, talking and watching the kids.
- 40 Q. What was Laura like that day?
A. Full of beans.
- Q. Was she running around?
A. Heaps and heaps.
- 45 Q. Swimming?
A. Swimming in the pool, laughing, screaming.
- Q. Playing with the other kids?
50 A. Playing with Nicholas flat-out, yeah.
- Q. Did you notice anything about the relationship on that day between Kathy and Laura?
A. It seemed odd to me and I brought it up with Kathy
55 after.
- Q. What did you notice before you brought it up with Kathy?

A. Virtually from when Kathy got up, her and Laura had nothing to do with each other.

Q. Was that unusual?

5 A. Yes.

Q. When you say they had nothing to do with each other, did it appear to you that they were avoiding contact?

10

A. It seemed that they were avoiding contact.

Q. Later that day, after Dean and Tanya had left your home, did you speak to Kathy about that?

15

A. I did, I brought it up. I asked Kathy what was going on.

Q. Yes?

20

A. I said to her - she said, "What do you mean?" I said, "What's going on between you and Laura? You know, you haven't been near her all day. The kid's kept away from you. Every time you have gone to go near her she's just come running to me." Kathy said, "Oh, she's got the shits with me." I said, "How does a baby have the shits with its mother?" Kathy said, "It's probably over what I did to her last night." I said, "Well, what did you do to her?" Kathy said, "I lost it with her." I said, "What do you mean you lost it with her?" Kathy said that Laura was following her around the house, behind her "Mum, Mum, Mum", whinging and moaning. Kathy said, "What?" She spun around to tell her to piss off or something and Laura was fairly close up behind her and when she spun around she knocked Laura over and she said, "I screamed at her" and then I looked down and saw Laura laying on the ground in like an emotional wreck. So Kathy said that she had sat down with Laura because at that stage Kathy was upset that she had upset Laura and she said, "I settled her down and put her to bed. Then you came home, and I went to bed as well." And I just said to her, "Good on you." I couldn't believe it. Anyway--

35

40

Q. Did she relate that in any way to when you had come home at about ten to eight the previous night?

A. She told me that that was all just before I got home.

45

Q. All right. Now, did anything else happen on that day?

50

A. We - I bathed Laura. We gave her some dinner. I don't think Kathy and I were hungry that night. We gave Laura some dinner. We were watching TV and we were playing with her. The three of us were playing. We were playing hide and seek. Then Kathy put Laura to bed and she went to bed and then eventually I went to bed.

Q. Now I would like to take you to Monday, 1 March 1999. Did you wake up as usual at about 6am?

55

A. I did.

Q. At a certain stage did you hear Laura awake?

A. About twenty past six.

Q. Did you go and get her and together watch the morning news on TV?

A. We did.

5 Q. You made Laura breakfast?

A. Yes, gave her a piece of toast, yep.

Q. What time did Kath get up?

10 A. Kath got up about - it would have been probably a quarter to seven.

Q. What sort of mood was Laura in that morning?

15 A. Laura was very clingy, very subdued, whinging, when I started to go about my normal daily things, which obviously to Laura - it seemed obvious to me that Laura picked up that I was going to get ready for work, and such.

Q. That you were what?

20 A. Going to get ready for work. Laura got really agitated and upset. She came into my room and she was jumping up and down on the bed and I got her off the bed and she ran up the hallway crying. I went out. Kathy was losing patience with her. I heard--

25

Q. With Laura?

A. With Laura. I had heard Kathy growl. I didn't know what they were doing at the time. I wasn't in the room. I heard Kathy growl.

30

Q. In the same way you described yesterday?

35 A. Yes. I walked down the hallway to see what was happening because that alarmed me. I went down and Kathy had Laura in the highchair and she had both of Laura's hands pinned under her hand on the deck of the highchair and she was trying to feed her cereal.

Q. Was she force-feeding her?

40 A. Force-feeding her. Laura was twisting her head everywhere and whinging. I said to Kathy, "For Christ's sake, she's a bloody baby. If she doesn't want to have breakfast, don't bother trying to make her."

Q. Was Laura still in the highchair?

45 A. She was still in the highchair. I just started sort of into the dining room. Kathy told me to "Fuck off". Laura would have breakfast if she said she would. I said, "You're just unreal." I actually swore. I said, "You're fucking unreal Kathy. I just can't figure this out."

50

Q. Was there anything that Kathy said about the effect that you have on Laura?

55 A. "She's only like this when you're around. You do this to her. You mollycoddle her and sook her up too much." I said to Kathy - I recall saying to Kathy, "It's better than having her cry." Kathy grabbed Laura and just pulled her out of the highchair and plonked her on the ground and said, "Go to your fucking father." Laura started to come

towards me and - at that time Laura was crossing the floor towards me and I heard this guttural growl and Kathy scream.

5 Q. Can you tell us what it sounded like?

A. Oh, "grrh", and Kathy screamed, "I can't handle her when she's like this" and she had both her arms in the air and Laura fell to the ground and Laura was crying and I just scooped Laura up and tore off down to the bedroom.

10

Q. How was Laura crying?

A. She was hysterical, shaking and sobbing. I took her down to the bedroom and sat on the bed with her in my lap. I was rocking her and trying to settle her down. "Mummies and daddies argue. It doesn't mean they don't love you" and all that stuff. Kathy came to the door and said, "Give me that baby." And I said, "Just fuck off." She said, "You give me that baby and get ready for work. Get out. You do this. This is your fault" and she grabbed Laura by the arm. I had Laura in my lap. I said, "Kath, just let her go. Just leave her. Piss off. You look like you're going to punch somebody." She said, "If I'm going to punch anybody I'd punch you. Just give me that bloody baby." So I let Laura go, followed her down the hallway.

25

She told me to bugger off and get ready for work. So I went in - I had a shower. I got dressed for work. I was listening intensely down the house. I walked down the house to see how everybody was. Kathy met me at the breakfast bar, which was just short of the family room. You could see from the breakfast bar through the door into the family room. She said, "Look, she's fine now. She is just watching TV."

35

She had Laura sitting on Laura's little banana lounge. She was eating dry cereal, just watching "Tele Tubby". Kath said, "She's fine. She's only like this when you're around. Blah, blah, blah. Just go to work". So I did.

40

Q. You gave evidence, I think, that it was before Sarah died that Kathleen's growling would happen on a daily basis?

A. It was--

45

Q. What about in the months before Laura died?

A. Same deal, yeah.

50

Q. Was it on an almost daily basis?

A. Daily.

OBJECTION (LEADING).

55

A. I could never understand--

Q. Just answer my questions. How often would it happen?

A. Daily.

Q. What sorts of things would cause her to growl like that?

5 A. Her frustrations at Laura not having dinner at the right time or going to bed when Kathy wanted her to go to bed, things I did, my attitude.

Q. Did you then leave the house and go to work?

A. I went to work.

10 Q. Where were you working at this stage?

A. I was still working for Teasdale's in Singleton.

Q. At about 8.30 that morning did the phone ring?

15 A. It did. I answered the phone. I had a line that comes straight through into my desk. You don't need to go through our receptionist. I answered the phone. It was Kathy. It seemed odd to me considering how the morning had gone. She was - she had a lilt in her voice. She was very chipper. The words were very loving. She said, "Hi
20 sweetheart, it's me." I said, "Yes, what do you want?" She said, "I just wanted to ring you to have a talk. I think when you get home we have to have a talk about our life, us."

25 Q. Did she say anything about what had happened earlier that morning?

A. She said she wanted to apologise for the morning for having lost her temper and I had said, "Well, you know, you can't go on like that. It's not healthy."

30

HIS HONOUR: A bit slower please.

WITNESS: Sorry.

35 A. So she said when I got home that night she'd like to have a talk about things because it basically boiled down to her and I having different parenting methods and I said, "Well, what do you mean?" She said, "Well, you're
40 too soft on her. You let her get away with too much. You sook her up too much. And that's why she's how she is."

CROWN PROSECUTOR: Q. Did you ask her anything about Laura?

45 A. I asked how Laura was. She said she was fine. She was watching TV. They had gotten ready; they were about to go to the gym. I asked her if Laura was fine would she bring her in at morning tea so I could see her and Kathy said she didn't know what she was going to be doing, but she would see how she'd go. I said, "No. If you say
50 Laura's fine and you're fine come in and have morning tea with me." That was the end of the phone call.

Q. Did she agree to that?

55 A. She said she would. That was the end of that phone call.

Q. Did she say if she was going to go anywhere before she came to see you at morning tea time?

A. Only to the gym.

Q. Was that something that she usually did in the mornings?

5 A. Every day.

Q. Would she take Laura with her?

A. Yes, every day.

10 Q. What would she do with Laura whilst she was working out at the gym?

A. The gym had a little cordoned off corner that they call the pig pen and all the little bobbies, people's kids went in there and they were baby-sat by a woman, Kerry something.

15 Q. Now, did Kathy and Laura come to your workplace?

A. They did.

20 Q. About what time?

A. It was probably around 10.30 they came. Kathy walked down across the road and I saw them coming and she put Laura down at the gate and Laura ran down the car yard. I was busy at my desk. Kathy came up the stairs to my office and opened the door and plonked Laura in and said, "There you go. Go and talk to your dad." Then Kathy went out and made a cup of coffee, just whizzed a cup of coffee into me. She sat and talked to the girl that worked with me. Laura sat and talked to me in my office, drawing pictures and things.

25 Q. How long did they stay at your office?

A. It was around about an hour.

35 Q. So, was it about 11.30 that they left?

A. It was around 11.30.

Q. Whilst Laura was at the office playing in your presence, how did she seem?

40 A. Fine, happy.

Q. Was she active?

A. Active, giggly. Sat on my lap on my desk. Drew all over my desk and drew me pictures.

45

Q. At about 11.30, did Kath say something to you?

A. She came to the door, opened the door and said, "I better get buggerlugs home. She's due for a sleep." I said, "Okay, no worries."

50

We walked out of the office. Kathy started to walk off. Laura wouldn't go with her. So Laura - you couldn't really tell whether she was mucking about or what, so Kathy was walking away saying, "I'll go without you. I'll go without you."

55

I picked up Laura and walked out to the gate. When we got to the gate, I gave them both a kiss goodbye. They went

5 across the road to the car. Kathy - the car was opposite the car yard and Kathy went to the back left door, which is where the baby seat was, and put Laura in. Oh, they waved, and she put Laura in the baby seat and walked around the car to the driver's door, got in, drove off. That was the last I saw Laura alive.

10 Q. A little while later, somewhere around lunchtime on that same day, did an employee, a fellow employee of Teasdale's come into your office and tell you something?

A. Basically not very long after Kathy and Laura left, I took a phone call from my nephew, Daniel, and we were talking on the phone, catching up on things.

15 Q. About what time would that have been?

20 A. That would have been about 25 to 12 that I took the call, and it was close to 12 o'clock when the young fellow that worked in our spare parts department broke through, or bolted into the office, and virtually screamed at me that I had to hang up; I had to go to the hospital; something was wrong with Laura. So I hung up on my nephew and I raced out and got into the car that I was driving.

25 Q. Did you go to the Singleton Hospital?

A. I raced down to the Singleton Hospital.

30 Q. At the hospital, did a member of staff take you to an area where you saw Kathy?

A. I was - I was led down the corridor by a lady. We went downstairs. I was asking her what was wrong. She said she couldn't tell me.

35 When we got downstairs, I could hear Kathy crying. We went into a waiting room and Kathy was being comforted by a nurse. I said to Kathy, "Where's Laura?" Kathy just pointed to the door and I went in the door and there were ambulance officers and a doctor, and Laura was laying on a bed or thing, and the doctor was packing up, and I screamed at him, "You can't stop. What are you doing? You can't stop." And he said, "I'm sorry, Mr Folbigg, but she's gone." And that was that.

40 Q. Did Kathy say anything to you before you went in to the room where you saw Laura?

45 A. I don't remember.

50 Q. Did Kathy say anything to you at some stage around that time about ringing you?

55 A. I went - I recall - a nurse grabbed me and dragged me out of the room, out to where Kathy was and Kathy said, "I called you. Where were you? Why didn't you come home? I called you." And I said, "I didn't get any phone call" and she was crying and I was crying. All I wanted to do was go back inside to Laura and I asked Kathy, "What happened?" She said, "Oh, I just went in and she was just laying there."

Q. Did she say something about what happened on the way

home?

A. It was a little while later, when, I suppose, the realisation of what is happening settles you a little bit.

5 Q. What did she say to you?

A. She said on the way home she left work and she drove home and Laura fell asleep while she was driving home, which was two and a half kilometres up the road and when she got home she just grabbed Laura out of the car, walked
10 up the hallway, took her shoes off. Got into Laura's bedroom and laid Laura down on her bed and then went out to play with the dog, cleaned up the verandah and hang the washing out. Then she said she had the listening monitor with her and she heard Laura cough and splutter, but
15 didn't check on her straightaway. It wasn't until she had finished doing what she was doing that she then went in to check on her and found Laura and then raced her out to the kitchen, to the breakfast bar and started to perform CPR on her and ring me and the ambulance.

20

Q. Did she say how long after she had heard Laura coughing and spluttering she had gone in to check Laura?

A. She said five or ten minutes.

25 Q. Did you formally identify Laura's body to Detective Bernie Ryan?

A. I did.

30 Q. Did you both go home that night?

A. Eventually we were allowed to have our house back. It was some time in the afternoon, about 5 or 5.30. My mother and father and brothers and sisters had come up to Singleton by that stage. My mum and dad came home with us.

35

Q. You have told us about the conversations that you had at the hospital with Kathy. She told you that she had heard Laura coughing and spluttering on the monitor?

A. That was the little walkabout monitor.

40

Q. You have told us that?

A. Yes.

45 Q. Now, when you got home--

A. When I got home--

Q. After the house had been given back to you, do you remember seeing the remote part, the hand piece, of the monitor?

A. When I got home, or we got home, it struck me as odd that day that the hand piece for the monitor, which was the part you could carry around or plug in, was still in the family room, plugged into the wall in the corner of the family room, and Laura's--

55

Q. Why did that strike you as odd?

A. Because Kathy had told me at the hospital that she had heard Laura cough and splutter via the monitor, whilst she

was outside hanging clothes on the line, which - which that yard, where the clothesline was, was not attached to the family room. It was separate and divided.

5 Q. From the yard where the clothesline was, would one be able to hear the monitor where it was situated?
A. No.

10 Q. Would you have a look at these two photographs (shown). They are numbered 20 and 21. Do those two photographs show the monitor where it was located on that afternoon when you came back to your house after Laura had died?
A. Yes, it does.

15 EXHIBIT #F TWO PHOTOGRAPHS NUMBERED 20 AND 21, PLUS CAPTIONS, TENDERED, ADMITTED WITHOUT OBJECTION. SHOWN TO JURY.

20 Q. Was that location that the monitor is in, in those two photographs, the usual location when the monitor was being charge or unused?
A. Yes.

25 Q. Now, that night, the night after you got back from the hospital, did you and Kathy do anything at your home?
A. We started to pack up all of Laura's things, her toys, that were spread through the house, and put them in Laura's room.

30 Q. What happened to Laura's things?
A. Over the ensuing weeks, after Laura's funeral, Kathy started to give them all away, or some of them away.

35 Q. Did anything happen to her photographs?
A. Every photo of every child that was out, and there wasn't a great deal of photos of other kids out anyway, but every photo was packed away as well.

40 Q. By whom?
A. Kathy.

45 Q. When did Kathy take down the photographs of all of your children?
A. That night.

Q. When you say "that night", which night?
A. The night that Laura died.

50 Q. How did you react to the death of Laura?
A. I was angry, I was devastated, but I recall mostly I was angry, and I didn't know who to be angry at, or why to be angry, other than not having her.

55 Q. How did Kathy react to the death of Laura?
A. She was - she cried on cue. That's all I can say.

Q. Did she resume her normal life?

A. She did.

Q. Did she go back to work?

5 A. She didn't go back to work straightaway but, within weeks, was there.

Q. Did she resume going back to the gym?

A. The next Monday.

10 Q. Did she resume going out with her girlfriends?

A. Some time after that.

15 Q. About three or four weeks after Laura's death, did Kathy say something to you, or did you say something to her, and did you have a discussion, about what was happening between the two of you?

20 A. She told me that I was going to dig a big black hole and bury myself in it, and that she wasn't going to go with that, or cope with that. I was, by that stage, on antidepressants. I was, I thought, trying to tough it out and brave it out, but she told me that it wasn't acceptable to her that I would do that with my life, and we actually went away to her sister's place. I asked her nephew in Melbourne if he would accept all of Laura's
25 belongings, furniture and stuff, because I didn't want to just throw it away.

Q. What happened to your relationship with Kathy after Laura's death?

30 A. It fell to pieces even more than it was.

Q. At a certain stage did Kathy move out of your matrimonial home?

35 A. She did.

Q. How long after Laura's death did that happen?

A. Six weeks or so.

40 Q. Did she move into a flat in Andrew Street, Singleton?

A. She did.

Q. Did you understand that that was the end of your marriage at that stage?

45 A. Well, she pretty much said it was, and she said that she couldn't deal with her own grief and she certainly wasn't going to be prepared to carry me and let me pull her down, and that she just wanted to only be concerned for herself and not have to be concerned for anybody else.

50 Q. Did you have any discussion with her about property of hers that she had left in your matrimonial home?

55 A. It was some time, weeks after, after she left, that I decided I would tidy up a fair bit, so I set about and I found stuff that her mother and father, sorry her step-parents, had given her. I found personal items of hers. I found diaries and such.

Q. Hold on. Before you did that, did you have a

discussion with her at some stage about what she wanted done with the stuff that she had left?

A. Yes.

5 Q. What did she say?

A. I could throw it in the bin. She didn't want it.

Q. When did she say that to you?

A. That would have been early May.

10

Q. At some stage did you go through her stuff with a view to throwing out anything that was not needed?

A. Well, I thought that I would sort it all out and throw away the stuff that was - like books that I knew she had read and stuff, and the china painting stuff that her stepmother had given her I thought I would pack away for her, and I came across a diary.

15

Q. All right. Now, where did you come across this diary?

20

A. It was in one of her bedside tables.

Q. Was it underneath anything or was it just on top or what?

A. It was in the drawer. There wasn't a lot in the drawer. Bobby pins, hair clips and stuff like that. The odd book that she had read.

25

Q. Had you seen that diary before you found it in her bedside table?

30

A. Years before. Some time back.

Q. Had you seen her writing in it?

A. Years before. Some time back.

35

Q. When you found it, did you read some of it?

A. I did.

Q. How did it affect you when you read the parts that you did read?

40

A. It made me want to vomit.

Q. Prior to that time, prior to finding this diary, had you at any stage thought that your wife Kathleen may have killed your children?

45

A. I'd tried to think of that. After Sarah died and the 1.10, ten past one thing, and I had nowhere to go with that, I had had the odd suspicion, but was always thwarted with it, or had nowhere to take it.

50

It was really hard to get your brain around it. You would start to think, God, did she do this and, honestly, it would make you want to vomit just thinking about it. You just couldn't get your head around it.

55

Q. Did you discuss any suspicions with anyone?

A. No.

Q. Why not?

A. I talked to people after the death of my children and I was, I guess, waiting for people to say something to me. It was too horrible to think of. I really didn't like thinking it, so you didn't think it.

5

Q. Now, when you read this diary, you have told us that you felt sick. Did you decide that you would do something with the diary?

A. I didn't know what to do with the diary. It frightened me. It worried me. It sickened me, and so I rang Detective Bernie Ryan.

Q. He was stationed where?

15

A. Singleton Police Station.

Q. Initially you spoke to Detective Bernie Ryan on the phone?

A. I did ask Bernie Ryan if I could see him.

20

Q. Did you take him the diary?

A. No. Eventually I did. When Bernie Ryan and I met he wouldn't take the diary from me unless I delivered it to him at the police station.

25

Q. So, your first conversation with Bernie Ryan--

A. Was at my home.

Q. --was at your home?

30

A. Yes. By that time, having read what I read, the thing about the monitor and Laura's little shoes out on the Futon, stuff that was running through my head, previous doubts, fears - so I asked Bernie Ryan a question--

Q. Well, if I could just ask you to pause there.

35 Firstly, you mentioned something about Laura's shoes?

A. Yes.

Q. Could you explain that to us?

40

OBJECTION.

CROWN PROSECUTOR: I will come back to that later.

45 Q. When you first saw Detective Ryan at your home - firstly, do you remember which date it was?

A. It was a Wednesday night.

Q. Now, did you at some stage after that go to the police station and commence a statement?

50

A. I first met Bernie Ryan on 13 May and on 19 May I went to make a statement.

Q. When you went to make the statement, that was at the police station on 19 May?

55

A. It was.

Q. Did you take the diary with you that you had found?

A. I did.

Q. On that occasion did you give an account to Detective Ryan orally about the circumstances of Sarah's death?

A. I did.

5

Q. Did you tell him about having woken up at around 1.10?

OBJECTION. QUESTION WITHDRAWN.

10 Q. Did you tell the truth to Detective Ryan?

A. I did.

Q. Did you do part of a statement in writing with Detective Ryan on that occasion?

15 A. I did.

Q. Did that part of the statement that you did on 19 May include any reference to the circumstances of Sarah's death?

20 A. It did.

Q. On the 19th?

A. On the 19th.

25 Q. Did you tell the truth in that statement?

A. I did.

OBJECTION.

30 ZAHRA: There is a matter that needs to be raised about this.

HIS HONOUR: Members of the jury, I will deal with this now, because I have to deal with it in your absence.

35

CROWN PROSECUTOR: I might be able to forestall that. I withdraw the question at this stage.

QUESTION WITHDRAWN

40

Q. After you had been to the police station on 19 May, did you have any further contact with Kathy?

45 A. I went on Saturday evening, Saturday afternoon, to Kathy's flat, where she was living. I had bought some takeaway on my way and I was eating that when I got there, and Kathy was getting ready to go out and - she was going to a ball.

50 Q. Just pause there. Did you tell Kathy at any stage that you had been to see the police?

A. No.

Q. Subsequently, did you tell Kathy that you had been to see the police?

55 A. Eventually, that night, I did.

Q. At some stage after you had told Kathy that you had been to see the police, did she come back to your

matrimonial home?

A. She did.

Q. When was that?

5 A. Well, basically, the next day, from the next day onwards, we started to have more friendlier contact and then eventually about mid June she moved back home.

Q. So, it wasn't that she moved back straightaway?

10

OBJECTION. LEADING. QUESTION WITHDRAWN.

Q. When you told Kathy that you had been to the police, did you mention the diary at all?

15

A. Yes, I did.

Q. What did you tell her about the diary?

20 A. I told her that I had found her diary. Had some pretty horrible things written in it, and that I gave it to Bernie.

Q. Did she say anything to you about that?

25 A. She said things like "What written in it?" And I said - well, I remembered a couple of excerpts, and I said "Oh, there was that thing about being your father's daughter" and--

OBJECTION.

30 Q. Was there a discussion about things that were in the diary?

A. There was.

Q. The next time that you saw her after that was when?

35

A. Sunday night after.

Q. Had her attitude towards you changed then?

A. Yes.

40

Q. In what way had it changed?

A. She was friendlier.

Q. Did it continue to be friendly for some time after that?

45

A. It did.

Q. How long after that did she move back into your matrimonial home?

50

A. It was about a month.

Q. Would you have a look at this please (shown diary)? Is that the diary that you found in her bedside table?

A. That is the diary.

55

CROWN PROSECUTOR: I tender that.

ZAHRA: Might that be marked for identification? I have a matter to raise.

MFI #5 DIARY OF KATHLEEN FOLBIGG.

5 Q. At some stage did Kathy and you have a final separation?

A. We did.

10 Q. When did that happen?

A. It was in June 2000.

15 Q. Have you been separated since then?

A. Ever since.

15 Q. After she left for the final time, did you find some other things which you gave to Detective Sergeant Ryan?

A. From time to time I found stuff that I handed straight to, or took to, Detective Ryan.

20 Q. Now, you referred to the statement that you made to Sergeant Ryan on 19 May 1999?

A. Yes.

25 Q. And you have told the Court that that was only part of the statement?

A. It was only a part of the statement.

Q. When did you go back to finish that statement off?

A. On the Sunday, the 23rd.

30 Q. The 23rd of May?

A. 23rd of May.

Q. So, it was four days later?

35 A. Four days later. Time constraints work-wise.

Q. When you completed that statement, did it contain any further information about the circumstances of Sarah's death?

40 A. I changed things.

Q. When you changed things, did you tell the police the truth or not?

45 OBJECTION.

JURY EXCUSED

IN THE ABSENCE OF THE JURY AND THE WITNESS

ZAHRA: Can I flag the objection? It might make things a little easier.

5

As my friend knows, this is a matter that goes to the issue of credibility. My friend needs to seek leave under the procedure under section 192, or, if my friend is cross-examining, under section 38. My friend needs to seek leave.

10

This is an issue we will raise in cross-examination. Ultimately my friend will be able to re-examine. I have no objection to him broaching this at the present time.

15

The Evidence Act makes it clear. As counsel assisting your Honour, these are matters for leave.

Can I indicate that I have no objection to my friend asking these questions. I can indicate, as my friend would probably be aware, that I will be cross-examining about the sequence of making the statements, and my friend ordinarily would be able to re-examine in this area, but there are threshold issues of leave that your Honour needs to decide.

20

25

HIS HONOUR: I take it from what you say that you will not be opposing the grant of leave.

30

ZAHRA: No. In an endeavour to assist the Court. It is a matter that your Honour has to determine.

HIS HONOUR: I do not know whether leave is needed. Is this really a matter that goes only to credibility, or is it something that goes to the fact?

35

ZAHRA: It goes purely to credit.

CROWN PROSECUTOR: It certainly does go to credibility. The reason why I was leading it was really to explain the path that this witness took in disclosing material, including documents and his version, to the police.

40

HIS HONOUR: I understand what you are doing and why you are doing it. My only question is whether section 192 applies to it. It is relevant to the witness' credibility, but is it not relevant only to the witness' credibility?

45

ZAHRA: But it also is cross-examination. That is the other issue. In a sense, it is cross-examining him about the sequence and addressing issues of the truth.

50

HIS HONOUR: What am I doing then? Am I entertaining an application for leave to cross-examine?

55

ZAHRA: Yes. I think section 38 or section 192.

CROWN PROSECUTOR: I do not intend to seek leave to cross-examine.

5 HIS HONOUR: Where does that leave us? Are you going to ask the questions without seeking leave to cross-examine?

10 CROWN PROSECUTOR: I think it is probably best if I do not pursue it further at this stage. I am sure my learned friend will, in cross-examination, raise it. I can give him any opportunity to explain in re-examination.

HIS HONOUR: That seems to set the pattern of the way it is going to be dealt with.

15 LUNCHEON ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Ready for the jury, Mr Crown?

CROWN PROSECUTOR: No, your Honour. There are two issues
that arise for your Honour's determination and I have
10 delayed them until this stage. If I might raise them now?

HIS HONOUR: Do you think it will take long. I just want
to let the jury know what is happening.

15 CROWN PROSECUTOR: It might take half an hour, your
Honour.

HIS HONOUR: Officer, could you tell the jury that there
is going to be a delay, perhaps, of up to half an hour.
Yes, Mr Crown?

20 CROWN PROSECUTOR: Does your Honour have a copy of Mr
Folbigg's main statement, dated 19 May 1999, and, of
course, the second part of it was done after that.

25 HIS HONOUR: Yes.

CROWN PROSECUTOR: Your Honour, it is another statement.
It is the statement of 28 June 2001, from paragraph 12.
It just says that the day before Laura died they had this
30 barbecue, "Laura played in the pool, appeared to be very
well. I recorded video footage of Laura." We would wish
to have the video played. We would wish to tender the
video after he has identified it.

35 Your Honour, in effect, suggested that the Crown ought not
to open on it, which I didn't, but it has now reached the
stage where we would request your Honour--

40 HIS HONOUR: No objection was taken to the tender of the
video. The objection that was being taken was to the
evidence about what diagnostic conclusions could be drawn
from the video.

45 CROWN PROSECUTOR: Yes.

HIS HONOUR: Have I misunderstood that, Mr Zahra?

50 ZAHRA: Your Honour may recall that in my argument I was
also talking about the prejudicial, probative effect of
the video, and your Honour may recall my submissions that,
in a sense, the emotion that is attracted to watching the
child from the video was a weighing factor in obviously
the assessment of not only whether the doctor's evidence
was to be admitted, but that was in fact directed
55 generally--

HIS HONOUR: I was much more impressed with your other
point, I must say, Mr Zahra, and perhaps I have overlooked

or given insufficient weight to the point you now wish to make. What then is the likely, unfair prejudice that will result to your client if the jury sees the video?

5 ZAHRA: Your Honour, I can't articulate it any further than what I did the other day.

HIS HONOUR: Repeat it, please.

10 ZAHRA: Your Honour may recall that what I indicated was that the prejudicial effect would be that intended emotional reaction of a person seeing that particular video, and the impact that that might have upon them, accepting obviously that jurors must act impartially in
15 their assessment of the evidence, but because of the particular quality of the evidence, in the sense of seeing the young child, that the emotional impact upon a juror may be such that it has a significant prejudicial effect in that sense.

20 Your Honour may recall that I had indicated that the prejudicial effect, combined with the emotional effect, was something that your Honour obviously had alerted the jury panel to; in other words, that these were significant
25 emotional issues that may, in fact, detract from a juror's ability to decide the case. And these are very real issues, and obviously the rationale behind your Honour's invitation to the jury panel, that this case does have these dimensions and these dimensions may, in fact, affect
30 someone's ability to impartially decide the case.

It is that issue, which is sought to be argued, that this does impact upon those thoughts and those emotions and may impact - it has the potential to impact - on the impartial
35 reasoning of a juror. They are my submissions, your Honour.

HIS HONOUR: Thank you, Mr Zahra.

40 FOR JUDGMENT ON ADMISSIBILITY OF VIDEO OF 28/02/99 SEE SEPARATE TRANSCRIPT

CROWN PROSECUTOR: If your Honour pleases.

45 The next matter is, your Honour, the entry in one of the diaries that "I'm my father's daughter". I would like to tender both diaries through Mr Folbigg and to give the jury photocopies of the handwritten diaries and copies of the printed extracts, so that, whilst they have got time
50 in the jury room over the next few weeks, they will have an opportunity to read the diaries properly themselves, and it does take a considerable amount of time, and it is something that they can conveniently do during the times that we don't require them in the courtroom.

55 So that raises two issues. Firstly, whether the entry "I am my father's daughter" ought to remain in the diary and we would submit that, prima facie, it ought to because

there is nothing of any consequence that flows from it; just from the entry itself.

5 But the second issue that arises is whether the Crown ought to be able to lead any evidence at all in relation to what the accused may have meant about that.

10 Now, I am not sure whether your Honour has given a final ruling on this point or not. I don't want to cavil with your Honour's ruling if your Honour has given a final ruling on the admissibility.

15 HIS HONOUR: No objection has been taken to that. The matter that I was asked to deal with before your opening was whether you should open on an extract from the interview between the accused and the police.

20 Of course, that passage was concerned with an explanation of the meaning of the expression "I am my father's daughter". I did not consider it appropriate to give reasons at the time and I do not propose to do so, but it will suffice for me now to say that, having performed a balance under section 137 of the Evidence Act, I consider that the probative value of the evidence did not outweigh
25 the risk of unfair prejudice to the accused.

30 Now that did not touch any diary entry and I was not given to understand that objection would be taken to the tender of any diary entry. Indeed, throughout the preliminaries for these proceedings, everything has proceeded on the basis that the diary entries go in, and this is the first indication I have heard directly myself, or directly through the Chief Judge, that any objection is to be taken to any part of the entries in the diaries.
35

CROWN PROSECUTOR: Your Honour, the reason why it arises now is that I would wish to ask Mr Folbigg to give evidence that, during the course of the early years of their marriage, the accused found out details about her natural parents and one of the things that she found out was that her father had killed her mother, and I wish to elicit that evidence from him, and I also wish to tender both diaries, as I have said. So, I understand that there is an objection, at least to the former. I am not sure
40 whether there is to the latter.
45

HIS HONOUR: I think really the whole matter should have been taken together, rather than being dealt with piecemeal, as it was.
50

ZAHRA: Your Honour, that was my understanding. In fact, when there was this discussion earlier in the week, that in, a sense, the diary and the record of interview are intertwined in the same issue.
55

HIS HONOUR: I don't know that they are intertwined.

ZAHRA: They do raise the issue, probably obliquely.

5 HIS HONOUR: If you remember, Mr Zahra, when I gave my ruling, without reasons, the Crown Prosecutor asked me whether he should open on the diary and I told him that I could not answer that question because I did not know what other evidence there might be touching upon the subject.

10 ZAHRA: Your Honour, there is no objection to the tender of the diary. There are some brief excerpts there that we have already discussed and there is an issue about whether they should be included or not, but these are only minor matters that we would resolve between us. But the most significant and the only real issue is in relation to this excerpt, which I was of the understanding of, when we were
15 discussing it the other day, that it was really quite intertwined.

20 HIS HONOUR: Well, you are objecting then to any evidence through Mr Folbigg of the meaning of the expression "I am my father's daughter".

25 ZAHRA: Yes. To leave it, even if it were to be left alone, if your Honour obviously decides that it is not to be admitted, it is quite oblique and would only cause the jury to speculate, in other words, even ultimately, if your Honour decides to exclude the evidence on a balance under section 137, it then remains really of no value and it may cause the jury to speculate as to what it might
30 mean.

HIS HONOUR: I think I should like to know precisely what evidence it is that I am now being asked to exclude.

35 ZAHRA: Yes, your Honour.

CROWN PROSECUTOR: Might I call Mr Folbigg to give evidence on the voir dire?

40 HIS HONOUR: Is it not in the statement anywhere?

CROWN PROSECUTOR: It is, your Honour, but I think it would be preferable to give the oral evidence.

45 HIS HONOUR: Very well. Officer, would you ask Mr Folbigg to come in, please?

<EXAMINATION ON VOIR DIRE

50 <CRAIG GIBSON FOLBIGG(2.20PM)
ON FORMER OATH

CROWN PROSECUTOR: Q. Mr Folbigg, early on in your marriage, did you assist Kathleen to make inquiries about her natural parents?

55 A. I did.

Q. And as a result of those inquiries, did Kathleen find out some details about her natural father and her natural

mother?

A. She did.

5 Q. And what did she find out about her natural father and mother that you were aware of?

A. She found out that her father had murdered her mother, had stabbed her 27 times, I think, from memory.

10 Q. And the circumstances?

A. She found out that her mother had walked out on her father and her, and was living with friends, and going out and seeing other people and stuff like that, and that her father had taken exception to it, waited for her one night and pleaded with her to come home to him and the baby, and, when she refused, he stabbed her to death.

15 Q. Did she find out much else about her natural father?

A. Found out his name, his age at the time that that event occurred, found out what - what he was doing at - for a job at the time and basically the events surrounding her subsequently being placed in an orphanage.

20 Q. And, to your knowledge, after her mother died, did she ever have any contact with her father?

25 A. To my knowledge, no.

30 Q. Now, there is an entry in the diary that you have already referred to in passing, where she wrote "I'm my father's daughter"?

A. Yes.

35 Q. Did you discuss that with her at any stage?

A. I did - I don't recall when I discussed it. I do recall discussing it with her.

40 Q. Was it after you found it in the diary?

A. It was after I found it written.

45 Q. And before you gave the diary to the police, or after?

A. I don't recall.

50 Q. All right. Would you tell us what was said during this discussion?

A. I referred to the entry and asked her what she meant by the entry, because I - I wanted to know and she said to me that he was, in her eyes, a loser and she was a loser as well.

55 Q. Did she say anything about what she meant by "a loser"?

A. No.

60 Q. Did she say anything else about the entry?

A. No.

65 Q. To your knowledge, apart from what you've already told us, did she know anything else about her father?

5 A. We had met her maternal mother's sisters and
brother-in-laws and stuff, and family, and there was a -
there was a couple who, when that event first occurred,
had taken Kathy in as a baby and had looked after her for
10 some time until they gave her over to the youth and
community affairs, or whatever bureau it was at the time.
And that man told Kathy that he had spent a lot of time
with Thomas Brittain in his life and that Thomas Brittain
was a henchman for Robert Trimboli and that he was the man
15 that went around getting all the money from the people who
owed him money and that if they didn't pay he roughed them
up or broke their legs or knee capped them or such.

15 CROWN PROSECUTOR: Thank you, your Honour.

ZAHRA: Your Honour, I am at a disadvantage in a sense
that just before Mr Folbigg has entered the witness box we
were unaware of the evidence about to be led and it
20 raises, obviously, some issues of the conversation of my
client.

HIS HONOUR: This is evidence you are objecting to.

25 ZAHRA: Yes, but without instructions, this is fresh
evidence, I am in some short-term difficulty.

HIS HONOUR: I don't know that I need to invite you to
ask any questions. All I am doing at the moment is
informing myself of what the evidence is to which you are
30 taking objection. I need to ask you if you object to all
of it or some of it and, if so, what.

ZAHRA: For that purpose, I have no cross-examination.

35 <EXAMINATION ON VOIR DIRE CONCLUDED

HIS HONOUR: Do you want five minutes?

40 ZAHRA: I would appreciate that, your Honour. It is
likely I won't have any cross-examination, but for more
abundant caution.

HIS HONOUR: I follow that.

45 Mr Folbigg, would you mind waiting outside for us, please?

(The witness left the courtroom.)

50 HIS HONOUR: Mr Zahra, I will leave the bench for a short
period of time. Will you send me a message when you are
ready?

ZAHRA: Yes, it won't take long, your Honour.

55 SHORT ADJOURNMENT

CROWN PROSECUTOR: Your Honour, I just wanted to place on
the record that I would not be seeking to lead the

evidence about her discovering that her father worked with Mr Trimboli.

5 HIS HONOUR: I expected that that's what you would say, Mr Crown. I realised that there was a passage in another document which you weren't pressing of the same kind.

CROWN PROSECUTOR: Yes, your Honour.

10 HIS HONOUR: Well, there are two bits of evidence really. The first is, Mr Zahra, what I might call the full explanation about the father, and the other one which comprises the accused's answer to Mr Folbigg's question to her about what she meant by the entry in the diary. Are
15 you objecting to both of those?

ZAHRA: Yes, your Honour.

20 HIS HONOUR: Well, what do you want to say?

ZAHRA: Your Honour, I have made submissions--

HIS HONOUR: I suppose, your submission on Mr Folbigg's evidence of what they found out about your client's father and mother is not different in substance from the material
25 I have already dealt with.

ZAHRA: Yes.

30 HIS HONOUR: I understand your submissions about that. You needn't say anymore about that. What about the direct question about what the entry meant?

ZAHRA: Well, your Honour is referring to "he was a loser and I am a loser as well". Yes, we would be objecting to
35 that also.

HIS HONOUR: I understand that. Do you want to say
40 anything else about it?

ZAHRA: Well, your Honour--

HIS HONOUR: Assume, for the sake of argument, that the first part to which you object is rejected.
45

ZAHRA: Your Honour, if I seem a little guarded it is because, obviously, this has just been led and there has not been a lot of time to consider it, because I am trying to reflect on what the Crown had indicated initially on
50 what was the purpose of leading this evidence. There were issues of anger and control, and I just don't know how far the Crown wants to use this evidence, or what it means.

HIS HONOUR: It might be fairer to invite the Crown to
55 say something about it.

ZAHRA: I am just trying to recollect my friend's submissions about the need to bring this in. I think he

also wanted to argue that it related to issues about control and anger.

5 HIS HONOUR: Mr Crown, don't assume that Mr Zahra or I understand everything that you have said about this before, but, first of all, tell me whether my
10 understanding of the evidence is a reasonable one for us to base our debate upon; namely, that there are really two portions of the evidence pressed: the one dealing with what was discovered about the accused's father and mother; and the other being the accused's response to the direct question about the meaning of the diary entry. Is it fair enough to proceed on that basis?

15 CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: Well, how do you propose to use this evidence?

20 CROWN PROSECUTOR: Your Honour, the Crown seeks to lead it as evidence of what the accused meant when she wrote that entry in the diary.

25 HIS HONOUR: I better have a look at it, I suppose. Where is it?

CROWN PROSECUTOR: Does your Honour have the extracts?

30 HIS HONOUR: Yes, I have them here. I will just have it turned up.

CROWN PROSECUTOR: It is 14 October.

35 HIS HONOUR: Yes, I have it here.

CROWN PROSECUTOR: 1996, on page 2.

HIS HONOUR: Yes.

40 CROWN PROSECUTOR: What she says is - this is when she is trying to get pregnant with Laura:

45 "Children thing still isn't happening ... I'll have it with the next one."

Now, we submit that there are two principal areas of significance to that entry. The first is that she is acknowledging that her mistakes and terrible thinking in the past were connected to losing her temper and doing something of a similar nature to what her father had done. But the second part is that tied in with that is the fact that she had a very negative attitude of losing her temper and being frustrated with her children in the past.

55 But then she states the second significance is that she now believes that she is not like that, that she now lets things happen, and she goes with the flow, and if she gets another chance with another child that's an attitude that

5 she will adopt, and it will give her a chance to make good the mistakes and terrible thinking of the past, and give some meaning to what's happened in the past, the meaning being that she has learnt and grown from the terrible thinking of the past.

10 Now, the centrepiece of that is the sentence, "Obviously I'm my father's daughter" because it links all of that together and gives the whole thing meaning, and the meaning that the Crown would point to can only be understood by the jury if they know that her father killed her mother in anger.

15 HIS HONOUR: I see. So, if the reference to the father killing the mother goes out, you will not tender the evidence of the diary entry at all.

20 CROWN PROSECUTOR: No, I would, your Honour, because there is still an acknowledgment of losing her temper and being frustrated in the past, so we would still seek to lead it, but it deprives it of its most cogent part, and we submit that it places an unrealistically benign--

25 HIS HONOUR: I think everybody in the Court understands that since what is happening is happening in the absence of the jury none of this is to go any further.

Yes, Mr Crown?

30 CROWN PROSECUTOR: It gives a very benign sort of appearance to this entry, whereas really it is an admission by her that, like her father, she has lost her temper to the extent of forming an intention to kill.

35 HIS HONOUR: Yes, I follow that. Thank you.

40 My view about there being evidence that the accused's father stabbed her mother to death remains as it was, namely that the risk of misuse of the evidence is so great that I doubt whether any direction can obviate it.

45 I am still of the view, notwithstanding the probative value of the evidence as explained by the Crown, and I acknowledge that that is substantial, it does not outweigh the danger of unfair prejudice. I do not propose to admit any evidence which would tend to show that the accused's father murdered her mother.

50 Gentlemen, two difficulties arise it seems to me. The first is that there is quite a discrete piece of evidence, namely Mr Folbigg's evidence of what the accused told him when he asked her what she meant by the expression in the diary entry. That named her father as a loser, but did not explain why. Well, one can say more than that it did not explain why; she did not offer further explanation why, though asked.

55 The question arises whether that ought to go before the

jury.

5 The second problem is, if it does not, whether the original part of the diary entry giving rise to these problems ought to go before the jury. I am just wondering whether the accused's answer is, in the circumstances, misleading, though literally true and correct.

10 I will hear what you have to say about these things, Mr Zahra.

15 ZAHRA: Firstly, can I just refer to the diary entry? Clearly we can't argue that the phrase or the sentence starting "but I think losing my temper ..." we can't argue that that should be taken out. It is the five words, "Obviously I'm my father's daughter" are the words that we object to. When one thinks about that and thinks about what my friend's submissions are as to what use he wants to make of it, in the absence of those five words, what he wants to argue is not frustrated by the removal of those five words.

25 CROWN PROSECUTOR: Your Honour, I might be able to forestall any debate about it. I think that, with the evidence excluded, as your Honour has ruled, that the response that she gave to her husband is implacably neutral. "He's a loser. I'm a loser." What does that mean? It could mean anything. It could mean nothing. It doesn't seem to add much to the Crown case.

30 And those words "obviously I'm my father's daughter" could cause a jury to speculate, which they ought not to do, and I think it would be preferable for those words to be whited out or blacked out from the diary, and I would not seek to lead the evidence from Mr Folbigg about being a loser.

40 HIS HONOUR: All right then. I don't have to decide that one.

Mr Crown, you will be tendering the original diary pages, won't you?

45 CROWN PROSECUTOR: I was going to tender the original diary, but what I was going to do is to give the jury photocopies of the original diary. That will obviously have to be done tomorrow and we can white out or black out those particular words.

50 If the jury is going to have access to the original diary, then some arrangement will have to be made to make it impossible for them to read those words, which might be difficult. It might be better--

55 HIS HONOUR: Well, perhaps the diary can be marked and a good quality copy can become the exhibit and the 12 further good quality copies can go to the jury, if that's what you want.

CROWN PROSECUTOR: I am content for that, your Honour.

5 HIS HONOUR: Now, at the end of the case, the question may arise whether the jury should see any part of the original diary. If that happens, then we will deal with it then, but there are ways of managing it.

10 Very well, then, all this evidence falls and the Crown will arrange for copies of the diary of 14 October 1996 to be prepared, which omits the expression "obviously I'm my father's daughter". Thank you, Mr Crown.

15 Do you want to say anything to Mr Folbigg before we resume?

CROWN PROSECUTOR: Yes, I will, your Honour.

20 ZAHRA: Your Honour, can I ask my friend also to remind Mr Folbigg, because there have been some references also to this in evidence and somewhat unresponsive to my friend's questions, so maybe he should be warned generally that this is an issue which should not be introduced by him, not only in examination-in-chief no doubt, but also
25 in cross-examination.

HIS HONOUR: Yes. I will leave the Bench for a moment.

30 CROWN PROSECUTOR: That can be done now. Perhaps it should be noted also that I did not read that when I opened to the jury.

35 HIS HONOUR: I understand that, thank you. And I did note it at the time.

(The witness entered the courtroom.)

40 HIS HONOUR: Mr Crown, are you going to reach the video in this next session?

CROWN PROSECUTOR: Yes, your Honour.

45 HIS HONOUR: You told me that the video goes on to deal with other--

CROWN PROSECUTOR: No, it doesn't, your Honour. It is just all on its own.

50 HIS HONOUR: Thank you.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Thank you, ladies and gentlemen, for your understanding and patience. Now we are ready to resume.

5

Yes, Mr Crown?

10

CROWN PROSECUTOR: Your Honour, there are a number of documents that I now wish to put to Mr Folbigg and rather than do it in the order in which they were found, I am going to do it in chronological order of the documents.

15

Q. Firstly, would you have a look at these four blue health record documents, one for each child? (Shown.) Are they the baby health centre records for each of your four children?

A. They are.

20

CROWN PROSECUTOR: Might those be marked for identification?

HIS HONOUR: They are marked 6 for identification.

25

MFI #6 HEALTH RECORDS FOR FOLBIGG CHILDREN

CROWN PROSECUTOR: Q. Would you have a look, please, at this diary, 1989 diary? (Shown.) Do you recognise that?

A. Yes, I do.

30

Q. And do you recognise the handwriting in that diary?

A. Yes, I do. It's--

Q. Whose writing is it?

35

A. Kathy's writing.

Q. Was that a diary in which she wrote up a feeding and sleeping schedule for Caleb?

A. Yes, it is.

40

Q. Do you know why she wrote that up?

A. She was keeping track of his feeding and sleeping progress; how he was going.

45

Q. And it goes from the day of his birth to the day of his death, from 1 February to 20 February 1989?

A. Yes, it does.

50

CROWN PROSECUTOR: I tender that, your Honour. I can explain the relevance to my friend, if he wishes.

Your Honour, I understand that my friend wants to have an opportunity to look at some other pages of that diary and tells me that he hasn't had that opportunity.

55

HIS HONOUR: You are only asking for it to be marked.

ZAHRA: We were only served with one page, your Honour.

HIS HONOUR: It is described as the 1989 diary, isn't it?

CROWN PROSECUTOR: Yes, your Honour.

5

HIS HONOUR: That is marked 7 for identification.

MFI #7 1989 DIARY

10 CROWN PROSECUTOR: Q. Would you have a look at this 1990 diary? (Shown.) Do you recognise that diary?

A. I do.

Q. Whose diary was it?

15 A. It was my diary, one that I kept in my briefcase originally, and, as was the 1989 diary, was my diary, and Kathy has obviously taken it and used it for herself.

Q. Now, I direct your attention to 3 June?

20 A. Yes.

Q. In that diary, being 3 June 1990. Do you recognise the writing on that page?

25 A. I do. It's Kathy's writing.

Q. And that was the day that your son, Patrick, was born?

A. It was.

30 CROWN PROSECUTOR: I tender that diary, your Honour.

ZAHRA: We have previously been served with copies of that. I have no objection.

35 CROWN PROSECUTOR: I have copies of the entry for 3 June.

HIS HONOUR: Is it just the entry for 3 June?

40 CROWN PROSECUTOR: No, I am tendering the whole diary, your Honour, but drawing attention to the entry for 3 June.

HIS HONOUR: Well, the 1990 diary is exhibit G.

45 EXHIBIT #G 1990 DIARY TENDERED, ADMITTED WITHOUT OBJECTION

HIS HONOUR: It is noted that the jury is being handed copies of the page entry for 3 June.

50 CROWN PROSECUTOR: I have a working copy for your Honour.

HIS HONOUR: They can be handed to the jury now, thank you.

55 Mr Zahra, it will be necessary for you to hand back that 1989 diary now so that it can be marked, otherwise it will get lost.

(Copies of exhibit G distributed to the jury.)

5 HIS HONOUR: Mr Crown, there was a note attached to the diary. That is yours, I think?

CROWN PROSECUTOR: It is.

HIS HONOUR: You can have that back.

10 Yes, Mr Crown?

CROWN PROSECUTOR: Q. Would you have a look at this document, please? Do you recognise that?

15 A. I do.

Q. What do you recognise it as?

A. It's a page from a calendar with Kathy's handwriting on it.

20 Q. Is it a page from the 1993 calendar?

A. It's August 1993.

Q. And do you recognise the handwriting on it?

25 A. It's Kathy's writing.

Q. And did you find that in June of 2001?

A. I did.

Q. Where did you find it?

30 A. We had a - an old bread tin that had been painted that we kept all of our important documents in, birth certificates for the kids, doctors' receipts and bills, and stuff like that, so I found it in there.

35 Q. And was there an entry there on 30 August 1993 that you noticed when you found it?

40 A. It was folded when I found it and I opened it to see what it was. I was looking for a particular piece of paper at the time. I came across this and recognised the month. I knew obviously - went to the day of 30 August and saw that Kathy had written something in that day.

Q. That being, of course, the day that Sarah died?

45 A. That was the day that Sarah had died.

Q. And as a result of what you read for that entry, did you give it to the police?

A. I took it to the police.

50 CROWN PROSECUTOR: I tender it.

ZAHRA: No objection, your Honour.

55 CROWN PROSECUTOR: Does your Honour have any objection to me perhaps reading out the entry to the jury, and then perhaps if the jury could quickly see it?

HIS HONOUR: The page from the August 1993 calendar is

exhibit H.

EXHIBIT #H PAGE FROM THE AUGUST 1993 CALENDAR TENDERED,
ADMITTED WITHOUT OBJECTION

5

CROWN PROSECUTOR: The relevant entry is on 30 August 1993
and it reads:

"Sarah left us, lam."

10

Perhaps the jury might see that.

JURY SHOWN EXHIBIT H

15

HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Q. Mr Folbigg, earlier today you
identified MFI 5, which was Kathleen's diary for 1996?

20

A. Yes.

Q. I forgot to ask you whether you recognised the
handwriting in it?

A. Oh, right.

25

Q. Whose handwriting is it?

A. It's Kathy's handwriting.

30

Q. Yes, thank you. I now show you another diary. This
is the 1997 to 1998 diary. When I say "diary", it is
really a notebook with diarised entries. (Shown.) Have
you seen that diary before?

A. I recall the diary and Kathy writing in the diary at
times.

35

Q. Do you recognise the handwriting in it?

A. Yes, it's Kathy's handwriting.

40

CROWN PROSECUTOR: Your Honour, I tender that diary. The
previous one, MFI 5, I will have photocopies made of and
distribute that tomorrow. This one I tender, but we have
got photocopies made, which I will also give out tomorrow.

45

That will mean that over the course of days or weeks the
jury will have an opportunity to read both entire diaries
at their leisure.

50

I will also tender the extracts that we particularly rely
upon, and we will also have copies of that for the jury
tomorrow.

HIS HONOUR: Yes, thank you, Mr Crown.

The 1997/1998 notebook is exhibit J.

55

EXHIBIT #J 1997/1998 NOTEBOOK TENDERED, ADMITTED WITHOUT
OBJECTION

HIS HONOUR: The exhibits will be sent in to you in the

jury room from time to time throughout the trial, ladies
and gentlemen. We are not going to save them all up until
the end and then shower you with them, so you will have a
good opportunity as you go along to be looking at the
documents, as well as listening to the evidence.

CROWN PROSECUTOR: Q. Mr Folbigg, during the course of
your evidence, you referred to the fact that on the day
before Laura died, some friends of yours and Kathy's came
over and the kids were playing in the pool and you took a
video?

A. Yes, I did.

Q. Would you have a look at this video? (Shown.) Is
that the original video that you took?

A. No, this isn't the original.

Q. Is it a copy?

A. It seems to be a copy, yes.

CROWN PROSECUTOR: I tender that, your Honour.

HIS HONOUR: The video entitled "Footage of Laura Folbigg
on 28/2/99" is exhibit K.

EXHIBIT #K VIDEO ENTITLED "FOOTAGE OF LAURA FOLBIGG ON
28/2/99" TENDERED, ADMITTED WITHOUT OBJECTION

CROWN PROSECUTOR: If I could indicate that Laura is the
young girl with the reddy or orangey float on, that's
orangy on her front.

Might that be played, your Honour?

ZAHRA: Can I indicate in the meantime, so far as MFI 7
is concerned, that we have no objection to its tender.

HIS HONOUR: Thank you, Mr Zahra.

Then the 1989 diary, formerly marked 7 for identification,
is exhibit L.

EXHIBIT #L 1989 DIARY, FORMERLY MFI 7, TENDERED, ADMITTED
WITHOUT OBJECTION

VIDEO (EXHIBIT K) SHOWN

CROWN PROSECUTOR: Your Honour, I now retender MFI 7,
which is the 1989 diary, and I have copies of the entry
for 19 February. There is another working copy for your
Honour.

Your Honour, I don't know if it is appropriate, but
subject to my learned friend's attitude, I could state
what the Crown says is the significance of the entry.

ZAHRA: I think it is a matter for address, your Honour,
because there are certain things that I would want to say

about it also in the context of the whole of the diary.

CROWN PROSECUTOR: I accept that.

5 HIS HONOUR: All right, we will go no further on that.

CROWN PROSECUTOR: Q. Mr Folbigg, you gave evidence
that when you came back to your home after you'd been to
the hospital when Laura died there were two things that
10 you noticed: one was the location of the audio monitor
and the other thing that you referred to was some little
shoes?

A. Yes.

15 Q. Could you tell us about those little shoes?

A. Laura had been given at Christmas a pair of Teletubby
sandals. She adored the Teletubbies and the sandals were
virtually inseparable from her feet. They were the
sandals that she had on that day, and the thing that
20 struck me about the sandals was Kathy had said--

Q. Just pause there. What I want you to tell me is what
you saw when you entered the house; that's all. I don't
want you to tell me what your opinion is; just what you
25 saw?

A. I saw the sandals on the Futon.

Q. In which room was the Futon?

30 A. It was in the lounge room.

Q. Would you have a look at these two photographs which
are numbered in order "22" and "19"? (Shown.)?

A. They're Laura's Teletubby sandals.

35 Q. And are those the shoes and the location of the
shoes, as you saw them, when you came home from the
hospital?

A. Yes, yes, that is.

40 Q. And, if I might approach, your Honour--

HIS HONOUR: You too, if you wish, Mr Zahra.

CROWN PROSECUTOR: Q. --the first photograph that is
45 numbered 22 shows a close-up view of the shoes?

A. Yes.

Q. The second photograph shows that Futon in the lounge
room?

50 A. Yes.

Q. Can you indicate whereabouts, just by pointing,
whereabouts the shoes were when you saw them?

55 A. They were here (witness indicated).

Q. So, you're indicating just to the right of the
photograph?

A. Where the picture ends.

Q. If I put an arrow in here, a red arrow, does that show the direction where the shoes were?

A. Yes.

Q. And that was in your family room?

A. Well, the lounge/family, yep.

Q. Where was Laura's bedroom compared to that room?

A. Up the hall.

CROWN PROSECUTOR: I tender those two photographs.

ZAHRA: Yes, I've no objection.

HIS HONOUR: The photographs with captions numbered respectively "19" and "22" are exhibit M.

EXHIBIT #M PHOTOGRAPHS WITH CAPTIONS NUMBERED RESPECTIVELY "19" AND "22" TENDERED, ADMITTED WITHOUT OBJECTION

CROWN PROSECUTOR: If the jury might see them, your Honour?

HIS HONOUR: Yes, they can be shown to the jury.

(Exhibit M shown to the jury.)

CROWN PROSECUTOR: Q. Mr Folbigg, did you have any conversation with Kathy on that day about those shoes?

A. No.

Q. On any other day did you have a conversation with her about where you'd seen the shoes?

A. No.

Q. Did she, at any stage, tell you at what stage she'd taken Laura's shoes off?

A. At the hospital.

Q. What did she tell you?

A. She told me that - when I'd asked her what had happened, she told me that she drove home, and when she drove home Laura was asleep in the car, and that she got Laura out and carried her up the hallway to her bedroom and took her shoes off on the way up the hall, and put Laura to bed.

Q. Might I approach again?

HIS HONOUR: Yes, Mr Crown, you may. You too, Mr Zahra.

CROWN PROSECUTOR: Q. Would you have a look at this plan (shown)? Is that a plan that you've drawn of your home at Millard Close, Singleton?

A. Yes.

Q. And you've marked where the front door was?

A. Front and back door, yes.

Q. And where Laura's room was?

A. Laura's room was.

Q. And the hallway is the hallway outside Laura's room?

A. Yes.

Q. Would you mark with this red pen where the Futon was, where you saw the shoes?

A. (Witness complied).

Q. Perhaps if you'd write "Futon"?

A. (Witness complied.)

Q. If Kathy drove home, would she normally come in the front door or the back door, or could it be either?

A. It could have been either.

Q. And you've marked on the plan where Laura's bed was?

A. Yes.

Q. Could you mark with a line where the door into the lounge room was?

A. Right

Q. So you've already marked that in black before?

A. Yes.

Q. Perhaps you could write "door" next to it?

A. (Witness complied.)

Q. Thank you.

CROWN PROSECUTOR: I tender that, your Honour.

ZAHRA: Yes, I've no objection, your Honour.

HIS HONOUR: The marked sketch is exhibit N.

EXHIBIT #N MARKED SKETCH TENDERED, ADMITTED WITHOUT OBJECTION

HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Might the jury see that, your Honour?

HIS HONOUR: Yes.

(Exhibit N shown to the jury.)

CROWN PROSECUTOR: Q. Mr Folbigg, would you have a look at this document (shown)? Do you recognise that document?

A. I do.

Q. Did you find that document?

A. I did.

Q. Where did you find it?

A. At home.

Q. Did you find it in September 2001?

5 A. Yes, I did.

Q. It purports to have been written on 23 July 1999?

A. It does.

10 Q. Do you recognise the writing?

A. Yes, it's Kathy's.

Q. And do you know the circumstances in which it was written?

15 A. It - we were advised to get legal advice when the police made it obvious that they were investigating Kathy as part of the children's deaths and we met with a solicitor and that - the solicitor asked Kathy to write an account of the day that Laura had died whilst it was still
20 fresh in her mind.

CROWN PROSECUTOR: Your Honour, I tender the document. I understand, from conversations with my learned friend, that there is no privilege issue that arises.

25

ZAHRA: There is no objection, your Honour.

CROWN PROSECUTOR: Your Honour, we will have photocopies of that made tomorrow.

30

HIS HONOUR: The accused's handwritten statement dated 1 March 1999 will be exhibit O.

35 EXHIBIT #0 ACCUSED'S HANDWRITTEN STATEMENT DATED 01/03/99 TENDERED, ADMITTED WITHOUT OBJECTION

CROWN PROSECUTOR: Q. Mr Folbigg, you gave some evidence today about Sarah's snoring?

40 A. Yes.

Q. Did she continue to snore all her life?

A. Yes.

45 Q. Was she a child who snored some of the time, all of the time, or what?

A. Most of the time.

50 Q. And were there some times when you were in the room with her, like you were in bed and she was in bed, and you couldn't hear her at all because she wasn't snoring at all?

A. Yeah, at the odd times, yes.

55 Q. Apart from when Kathy got up for the kids, was she the kind of person who would sometimes get up to go to the toilet?

A. Yes, yes, she did, through the night.

Q. Was that apart from when she got up from the kids?
A. I'm not aware.

5 Q. Sorry?
A. I - I really don't know.

Q. Did Kathy ever go and see a clairvoyant, to your knowledge?
10 A. Not to my knowledge, no.

Q. Did she ever tell you--?
A. Oh, sorry, no. Yes, once.

15 Q. Did she ever tell you that she'd been to see a clairvoyant?
A. Yes, sorry, I do recall that.

Q. And did she tell you about the session with the clairvoyant?
20 A. Yes, she told me bits and pieces of it I recall.

Q. Did you ever tell Kathy about whether or not you had a belief in life after death?
25 A. Oh, I - yeah, I told Kathy stuff like that all the time.

Q. All the time?
A. All the time.

30 Q. Did you have a belief in life after death?
A. I did.

Q. Did you have a belief that your children had had a spiritual existence before their birth?
35 A. I did.

Q. Did you convey that to Kathy?
A. I did.

40 Q. And, finally, did any of your children show any signs of failure to thrive physically?
A. No, not one of them, no. They were all--

45 Q. Did any of them have recurrent infections requiring hospitalisation?
A. Not to my knowledge.

50 CROWN PROSECUTOR: Your Honour, that completes the evidence-in-chief of Mr Folbigg.

HIS HONOUR: Mr Zahra, it is a quarter to four. Do you want to start this afternoon?

55 ZAHRA: Yes, if that's possible.

HIS HONOUR: Yes, very well.

<CROSS-EXAMINATION

ZAHRA: Q. Mr Folbigg, can I take you to the day that Caleb died, 19 February. It was a Sunday?

5 A. Caleb died?

Q. Caleb, yes?

10 A. Early hours of the morning, the 20th. You - oh, the 19th was the day before, yes.

Q. And you had been with Caleb all day?

A. All day.

Q. You had gone, in fact, to see your brother?

15 A. My brother and his family.

Q. Yes. You spent the day with them?

A. Yes.

20 Q. And you were close by Caleb for most of the day?

A. There would have been times I would have been outside with Johnno or looking around his barbecue area or such, but most of the day I was around Kathy and the baby, yes.

25 Q. You were asked by the Crown how Caleb appeared that day and you said that he was fine?

A. Yes.

Q. Is that your memory?

30 A. Yes.

Q. You were asked was he well and you said, "Yeah, he was well"; is that right?

A. Yes.

35 Q. Was there any sign of anything untoward or unusual at all and you said, "No, he got tired by the end of the day but I guess most babies would have"?

A. Yes, I said that.

40 Q. And you arrived home about 8pm?

A. I said that.

Q. And Caleb was asleep at the time, as you told the Court?

45 A. Yes.

Q. And you've reached these conclusions, that he was fine and well, because obviously you were with the child that day?

50 A. Because of - well, yes.

Q. And you weren't concerned at all on that day about his feeding problems?

55 A. No, not after what the doctor had told us.

Q. What doctor are you talking about?

A. The doctor Kathy had taken the baby to on the Friday.

Q. That was the Friday before the Sunday?

A. The 17th, yes.

5 Q. And had you, over that weekend, had any concerns about feeding?

A. None at all.

10 Q. Prior to that Friday, had you concerns about the child's feeding?

A. It seemed troublesome, so, yes, I did.

Q. But nothing on the day. You had no concerns on the day?

15 A. After what the doctor told us, it pretty much put our minds at ease and wasn't a problem anymore.

Q. So, you don't recall on that day whether you were concerned in any way about Caleb?

20 A. About Caleb?

Q. Yes.

A. No, I don't.

25 Q. And you say that quite assertively; you had no concerns at all?

A. To the best of my memory.

30 Q. Yes, well, a moment ago you were really quite certain. Well, what is it?

A. I'm certain that I wasn't worried.

Q. Did you go to see Dr Springthorpe?

35 A. Not me personally, no.

Q. You've never been to see Dr Springthorpe?

A. Not with that baby, no.

Q. Did you go to see Dr Springthorpe after Caleb died?

40 A. To the best of my knowledge, no.

Q. Do you recall telling Dr Springthorpe after Caleb died that you were anxious about Caleb's feeding difficulties?

45 A. I recall asking Kathy, when she told me she was going to the doctor's on the 17th, to please bring it up with the doctor because it was worrying me. I don't recall ever meeting Dr Springthorpe.

50 Q. Did you tell Dr Springthorpe on the night that Caleb died that you had wanted to take him into bed with you because of the feeding problems and the stridor?

A. I don't recall.

55 Q. Just have a look at this document. (Shown.) Have a look at the first paragraph.

A. (Witness complied). Yes.

Q. Does that help your memory?

A. I saw a lot of people after this baby died.

5 Q. You see, you did go and see Dr Springthorpe?

A. According to this.

10 Q. And you did, in fact, tell him that you were concerned and anxious about his feeding problems?

A. Apparently.

15 Q. Yes, so you see, so much so that you told Dr Springthorpe, didn't you, that you were concerned on this night so much so that you wanted to bring Caleb in bed with you?

A. That may well be according to this letter that that's what I said to this man. It would never have happened anyway.

20 Q. Well, you understand what I have asked you?

A. No, not really.

25 Q. Well, do you have any recollection now, after reading the letter?

A. Of meeting Dr Springthorpe?

Q. Yes.

A. No.

30 Q. You see, you see the date of that letter?

A. The 21st of March 1998.

Q. Can you see it?

A. 1989 sorry.

35 Q. You can see the first paragraph?

A. I can see that, yes.

Q. And you can see Dr Springthorpe says--

40 CROWN PROSECUTOR: I object. My friend knows it is not admissible.

HIS HONOUR: Yes, Mr Zahra.

45 ZAHRA: We anticipate Dr Springthorpe will be called.

Q. Do you have any memory of telling Dr Springthorpe that you were concerned so much about Caleb that you wanted to take him into your bed that night?

50 A. I don't remember telling Dr Springthorpe that. I don't remember even meeting Dr Springthorpe, but I do remember telling Kathy that and that's all that I can remember.

55 Q. Do you say that it's not possible that you saw Dr Springthorpe or are you saying that you saw a lot of people and you may have seen him?

A. I may have seen him. I don't recall I seen him. I

saw a lot of people after that baby died.

5 Q. The statement that Caleb was not well that day so much so that you wanted to take him into your bed, you would dismiss today out of hand?

10 CROWN PROSECUTOR: I object. He has already answered it, I think, three times, your Honour. He says he doesn't remember saying that; he doesn't even remember seeing Dr Springthorpe. He has said it many, many times now.

HIS HONOUR: There comes a limit, Mr Zahra.

15 ZAHRA: Your Honour, I am asking him whether he is changing his position; that is the question I am now asking him.

20 Q. Are you changing your position at all after seeing that letter?

A. No.

Q. Do you recall telling your wife?

25 A. I told Kathy a number of times over that little fellow's life that that noise he made when he fed worried me?

A. I used to sneak that baby into bed with us and she would get him and put him into bed.

30 Q. And that was because of concerns about his--

A. No, it was because I wanted to have him with me.

Q. Might that be returned, your Honour?

(The document was returned to Mr Zahra.)

35 ZAHRA: Your Honour, is that a convenient time? There is a housekeeping matter your Honour needs to attend to.

40 HIS HONOUR: Yes, very well.

Ladies and gentlemen, there is another matter counsel want me to attend to this afternoon in your absence, so we will end today there and we will resume the evidence at 10 o'clock on Monday.

45 I shall remind you, yet again, of what I told you before. Over the weekend you may very well be spoken to by people you don't ordinarily come across during the week and the subject of this trial may very well arise. Please take to heart everything that I have told you about that.

50 I wish you a very pleasant long weekend and I look forward to seeing you all at 10 o'clock on Monday. Good afternoon.

55

IN THE ABSENCE OF THE JURY

HIS HONOUR: Yes, Mr Zahra?

5 ZAHRA: Your Honour, just on the question of bail, your
Honour will recall that a question was posed when this was
considered on the first day about the arrangements for the
weekend. I understand that Mrs Folbigg will be remaining
10 at the same residence and, no doubt, your Honour's bail
ruling would suggest that there is in fact a restriction
on her moving from the premises.

Your Honour, it is proposed that over the weekend that
15 she, in fact, at least get out of the house, but she would
be going with the officers from the Salvation Army so she,
in fact, is asking that some approval be given for that,
in other words, that the bail conditions could be varied
so she could in fact go with the Salvation Army officers
20 outside of the house so long as she remains in their
presence.

The other issue is that your Honour will recall that there
is a condition that she report each day to my instructing
25 solicitor and to come with him to the Court. We are
seeking a slight variation of that condition to include
her counsel, not specifically my instructing solicitor,
because from time to time there may be things that he
would need to do in relation to this case. So if your
Honour would vary that condition that she would come to
30 court, either with counsel or with an officer from the
Salvation Army. I have spoken with my friend and he has
no difficulties with those conditions.

35 CROWN PROSECUTOR: Yes, that's correct.

HIS HONOUR: And the officers of the Salvation Army are
prepared to cooperate in this respect?

40 ZAHRA: Yes, they have been doing so.

HIS HONOUR: I have said this many times; they are very
valuable people.

45 ZAHRA: Yes, they have been extremely valuable. So, as I
understand, the condition is in relation to the arrival
and departure, so could your Honour vary that to allow for
the arrival and departure either with counsel or with the
Salvation Army.

50 CROWN PROSECUTOR: Your Honour, we have no objection to
that. Major Harmer has said that Kathleen Folbigg will be
using public transport to go to and from her home where
she is living and the Court. I don't think she needs--

55 HIS HONOUR: Excuse me a moment. I am being very rude to
Mr Folbigg.

I do apologise for leaving you there, Mr Folbigg. You may step down. I just want to say something to you before you leave the Court.

5 It is important that from now until you come back at 10 o'clock on Monday you don't discuss your evidence with anybody. You understand that?

10 WITNESS: I do.

HIS HONOUR: Please leave the Court. Certainly step down, but leave the Court, if you wish to.

15 CROWN PROSECUTOR: Might I, through your Honour, also explain, because he is under cross-examination, we are not permitted to speak to him at all.

HIS HONOUR: I meant to anybody.

20 WITNESS: Yes.

<WITNESS STOOD DOWN

25 HIS HONOUR: Did you want to say anything else about the conditions of bail?

CROWN PROSECUTOR: Yes.

30 I just confirm that we have no objection to those two variations. But also this: That Major Harmer has said that Mrs Folbigg wishes to travel to the Court and from the Court by public transport, not in the presence of anybody else, and we understood that that was permissible under her present bail conditions. To go to the
35 solicitor's office and from the solicitor's office by public transport would be permissible, without being in anybody's presence, so long as it is to go directly home or directly to the solicitor's office or to court.

40 HIS HONOUR: That is permitted under the conditions as they now exist.

45 I will vary the condition of bail which deals with the applicant's coming to court each sitting day to read as follows:

50 That she leave 206 Forest Road, Arncliffe, on each morning on which the Court sits and proceeds directly to her solicitor's office or her barrister's chambers, and thereafter travels directly to court in the presence of her solicitor or barrister, and that she arrives no later than 9.30am.

55 On any day when the Court is not sitting, the accused may leave her place of residence, provided she is and remains in the company of an officer of the Salvation Army.

I think that is all I need to say, isn't it?

5 CROWN PROSECUTOR: Your Honour, I had understood that what the defence is seeking is that she be permitted to come to court on a sitting day in the company of a Salvation Army officer and to leave also in the company of a Salvation Army officer, so that her legal representatives might be relieved of their obligation.

10 HIS HONOUR: Alternatively to the conditions already made, the accused may travel directly from her home to the Court and from the Court to her home, provided she is always in the company of an officer of the Salvation Army.

15 CROWN PROSECUTOR: Your Honour, just for abundant caution, just to confirm - I think Major Harmer is still a bit concerned about it - just would your Honour confirm that it would be in accordance with the bail conditions if Mrs Folbigg were to go from the home to her solicitor's office by public transport not in the company of anybody, and from the solicitor's office to the home also on public transport not in the company of anyone?

25 HIS HONOUR: Yes, that can be added.

CROWN PROSECUTOR: Thank you.

HIS HONOUR: We will adjourn then until 10 o'clock.

30 ADJOURNED PART-HEARD TO MONDAY 7 APRIL 2003

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

FOURTH DAY: MONDAY 7 APRIL 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE PRESENCE OF THE JURY

<CRAIG GIBSON FOLBIGG(10.09AM)

20 HIS HONOUR: I thank the juror who has written me a note
about personal circumstances and enquiring whether it
would be possible for the Court not to sit on Friday 9
May. I will discuss the matter with counsel and speak to
you again about it later in the day.

25 MFI #8 JURY NOTE

HIS HONOUR: Mr Folbigg, you are still bound by the
promise you took to tell the truth.

30 <CROSS-EXAMINATION CONTINUED

ZAHRA: Might I mark for identification a document that
was shown to the witness on Friday?

35 MFI #9 DOCUMENT SHOWN TO WITNESS ON FRIDAY 4 APRIL 2003.

ZAHRA: Q. Mr Folbigg, you told the Court last week that
when you found the diaries you became sufficiently
concerned to go to see Detective Ryan?

40 A. That's correct.

Q. You were concerned about the entries in the diary?

A. Those that I read, yes.

45 Q. And you thought it necessary that you go to the police
to give them information about the background to the
deaths of the children?

A. I can't actually answer that with a yes or a no. I
need to explain that to you.

50 Q. Is it the case that you had gone there with an
intention to give them as much information as possible in
conjunction with what you had read in the diary?

55 A. I felt it important, having read what I had read, to
explain to the police my concerns from what I had read and
they asked me aspects of my life with Kathy and the
children's life with Kathy.

Q. That was a detailed process?

A. It was fairly lengthy.

5 Q. It was clear that you had been asked about quite some detail about your own life and your life with your wife before and after the children were born?

A. Yes, that was clear to me at the time.

10 Q. Detail about your own family, the background of your own family?

A. Yes.

Q. And the circumstances of your meeting your wife?

A. That's correct.

15 Q. And the type of relationship that you had with her?

A. Correct.

20 Q. In particular, the type of relationship that she had with the children?

A. Yes, that was part of it.

Q. Those questions were dealt with with quite an amount of precision by the police?

25 A. No, I don't think I would have put the word precision to that.

Q. They asked you much about the detail of the relationship of your wife with the children?

30 A. I think it was more that I told them, more so than they asked.

Q. But you intended to give them as much detail as possible?

35 A. I tried the best I could.

Q. Similarly, with conversations that you had with your wife about decisions about having the children, again, you tried to relate those conversations as best as you recall to the police?

40 A. After I had read those diary entries, certain things about my life in some ways made sense to me then and I expressed all that to the police.

45 Q. And you were fairly keen to give them the detail about the types of conversations that you had with your wife when decisions were made about whether to have more children or not?

A. I wouldn't put the word "keen" to it, I'm sorry.

50 Q. I am sorry--

A. I wouldn't put the word "keen" to it. I would have thought that I was apprehensive at the time that I made those statements. I was - I felt that I needed other people to know what my life was like.

55 Q. Your state of mind was to be as helpful to the police as possible?

A. Yes.

Q. In trying to recall everything that you could about, firstly, the relationship between the children and your wife?

5 A. Yes.

Q. And the conversations that you had with her, particularly in relation to the decisions to have more children?

10 A. Yes.

Q. You considered it to be your obligation and duty to make the statement to the police?

15 A. Not necessarily make a statement to the police, but it was my obligation and duty to my children, yes.

Q. In fact, you say that in your statement, that you say that it is your obligation and duty to your children that this diary be inspected by Detective Ryan and the Coroner?

20 A. Yes.

Q. So, do we understand, therefore, that your state of mind when you made this statement was no doubt to assist the police in their inquiries?

25 A. Yes.

Q. Even if that meant that you had to say things about your wife which were quite personal?

30 A. Yes.

Q. And things about your wife that related to obviously her interrelationship with the children?

35 A. I also expressed things that were of a personal nature to myself.

Q. Now, the statement, as I asked you a moment ago, also refers in quite some detail to your background and your own family?

40 A. It does.

Q. It talks about you being one of a number of children who in fact essentially lived in the Newcastle area?

45 A. I have seven brothers and sisters. I am one of eight children.

Q. Quite an extended family in the Newcastle area?

A. I have 22 nephews and nieces as well.

50 Q. In fact, you have quite a good relationship particularly with your older brother, John, and your sister, Carol?

A. I have a very good relationship with all my family.

55 Q. Was it the case that after you met your wife and were married to her, that essentially your life gravitated around this extended family?

A. Yes, it did.

Q. In other words, during your marriage - and this was before Caleb was born - essentially your life was your work, your wife and your extended family?

A. Yes.

5

Q. There wasn't any socialising essentially outside that to any degree?

A. I had some friends, but those - socialising with those people fairly ceased after I met Kathy.

10

Q. In a sense, your life gravitated towards your own family?

A. Yes, correct.

15

Q. Your wife became quite a part of that?

A. She was welcome by everybody.

Q. In a sense, there was nothing really outside your extended family so far as going to clubs or socialising is concerned?

20

A. Over a period of time that became the case, but at the start of the relationship we still socialised outside of the family.

25

Q. You met her socialising?

A. Correct.

Q. At a club; is that right?

A. Correct.

30

Q. You went out with her in that sort of setting at the start?

A. Yes.

35

Q. But isn't it the case that after a period of time, after you started living together, in a sense, that sort of life was, in fact, not pursued. You, in a sense, gravitated towards your extended family?

A. What length of time are you talking?

40

Q. Wasn't that the case?

A. It wasn't immediate, no.

Q. Well, before Caleb was born that was the case?

45

A. No, no. It was well after Caleb died that we really hunkered down friendless and family only.

Q. When do you say that going to clubs together before Caleb was born had stopped?

50

A. Obviously when Kathy was well pregnant with Caleb, nightclubbing stopped. Socialising out in clubs stopped.

Q. That was together; you and your wife?

A. Yes.

55

Q. It is then that you essentially mixed within your own family?

A. Essentially.

- Q. In the prenatal care your wife went regularly to see doctors?
A. No, no - well, not with Caleb, no.
- 5
- Q. She went to - any prenatal care?
A. Doctors?
- Q. Yes.
A. Yes, she went to doctors.
- 10
- Q. That is what I am putting to you. She went to see doctors obviously during the course of her pregnancy?
A. She did.
- 15
- Q. She was happy to be pregnant?
A. Yes, she was.
- Q. She was, in fact, ecstatic that you were going to have a child?
A. She was.
- 20
- Q. In that regard she didn't mind at all gravitating towards the family life with your family in those times immediately prior to the birth of Caleb?
A. There were only a few members of the family who we gravitated towards, but she didn't seem to mind that.
- 25
- Q. In fact, you say in your statement, describing this time, that life was good, we were married and we had heaps of fun?
A. We did.
- 30
- Q. In 1988 Kathy fell pregnant. Everything seemed fine and we were happily anticipating the birth?
A. We were.
- 35
- Q. In the times leading up to the birth, she was in fact happily anticipating the birth of the child?
A. Do you want a day-to-day account of that or do you just want a general description?
- 40
- Q. Generally that's the case, isn't it?
A. Generally she was happy.
- 45
- Q. Are you saying that she wasn't happy prior to the birth of Caleb at times?
A. There were times she wasn't.
- 50
- Q. In what circumstances?
A. Hmm. She couldn't get out of bed so we had to buy a new bed. She did what I had seen every other mother I ever knew do, which was whinge about her belly.
- 55
- Q. Nothing out of the ordinary, was there?
A. Nothing horrendous, no.
- Q. The sorts of problems that a mother has in the period

of time up until the time of birth?

A. Pretty much seemed standard to me.

5 Q. You see, there was nothing about her attitude at this time that you, at any time in any of your statements, have suggested that there was anything untoward or anything about her attitude that concerned you?

A. That's right.

10 Q. You have made many, many statements, haven't you, since this time when you first went to the police?

A. I have made a few.

15 Q. It is true that in none of those statements do you ever say any word at all about any attitude, problem or difficulty in the time, firstly, before the child was born?

A. This boy?

20 Q. Yes.

A. None of those statements at all.

25 Q. When the baby was born, again nothing in any of those statements to suggest that there was any hint or anything about your wife at that time that gave you any concern at all?

A. Not in the statements, no.

30 Q. Some years have passed since the time you made your first statement in May 1999?

A. Yes.

35 Q. You have continued to make statements even in recent times?

A. In regards to other situations, yes.

Q. As recently as December?

A. Yes.

40 Q. Just before Christmas?

A. Just before Christmas.

Q. About three months ago?

A. Yes.

45 Q. In none of those statements, none of those statements, did you make any reference at all to any concern about anything that your wife had done before Caleb's birth or in fact during the time that Caleb was alive?

50 A. Not in the statements, no.

Q. Are you suggesting that there is in fact something now that you want to say about that?

A. Am I allowed to say anything--

55

Q. Let me put it to you this way.

A. --if it's not in my statement?

Q. Let me put it to you this way. You have had some years since 1999 to think of all the circumstances that gave you any concern whatsoever about your wife's treatment of the children. Yes or no?

5 A. Yes.

Q. And you knew that this was, in fact, an important part of the police investigation?

10 A. Yes.

Q. So, correct me if I am wrong, that would have been apparent to you even from the time you went to make your first statement?

15 A. Correct.

Q. That the police wanted to know about the relationship with Caleb?

20 A. The police didn't really ask me a lot about the relationship with Caleb.

Q. Are you suggesting that since then that was ruled off and that there was never any consideration by you that the police might want to know about how she handled Caleb?

25 A. I don't purport to know the law and even when I was being questioned by the police did I not purport to know the law and I didn't know what things were just my opinions and what things weren't just my opinions, and so there was - there were some things that I didn't say because I was stuck in the brain waves of it just being my
30 opinion.

Q. It is very convenient to put things in that way as if you are the victim?

35 A. I am not saying I am the victim and I have never suggested I am the victim.

OBJECTION TO STATEMENT. QUESTION WITHDRAWN.

Q. You are saying that it is not your fault?

40 A. No, I'm not saying that. What I'm saying is I don't know what's my opinion and what's acceptable by law, so there were opinions of mine or views or things I had seen that I had formed opinions on that I didn't tell anybody, because I don't know the value of them or the worth of
45 them in this situation.

Q. Are you suggesting now that there are things that you want to say about the way she treated Caleb that were of concern to you?

50 A. It wasn't so much necessarily how she treated Caleb.

Q. What was it?

55 A. It might have been her disposition at being a mother. It might have been what I viewed as - okay, it sort of kind of boils down like this: When Kathy was pregnant with the boy, she was special and everybody looked on her as special because she was having this baby. When the baby was born he became special and Kathy wasn't special

any more. It is something that I saw back then. It is something I carried in my heart. I don't know what to do with it, I didn't know where to take it. I just lived with it. Then more things go on in life that make Kathy special and then things happen that keep her being special. Whether it is engineered by her or it is just the nature of it happening, along its course. That is what I'm trying to explain to you.

5
10 Q. What are you suggesting by that? What are you suggesting, that that was apparent by her demeanour at that time?

A. After Caleb was born.

15 Q. Yes.

A. Everybody was ripping around and yahooing that I had a son; Craig had a son. It put the spout on it. All that sort of stuff. Where was Kathy in all that?

20 Q. What are you suggesting, that that affected the relationship with Caleb?

A. I don't know. That's the thing. I don't know. All I know is that 19 days after this little fellow was born he was dead.

25

Q. Are you suggesting, from what you can infer now, that maybe she didn't think she was special?

A. Having lived with Kathy for the years that I did, having lived through the things that I lived, I'm not saying that I was perfect in all that as well, but having lived, I've learned that Kathy has a pattern and the pattern started back then.

30

Q. What was it that you saw about the way she was, anything about her demeanour, that concerned you?

35

A. She was grumpy and testy, grumpy, and tired all the time.

Q. Out of the ordinary for what you saw with other members of your family, other mothers having children?

40

A. I never got to spend any time around my sisters after they had children other than just quick visits to see the babies.

Q. Nothing that you can compare to see whether it was out of the ordinary then?

45

A. No.

Q. So, you don't know whether it was out of the ordinary?

50

A. It was out of the ordinary for Kathy.

Q. Let me read this to you. Do you remember making a statement last December, 11 December?

55

A. Yes.

Q. Is it the case that you went to make a statement to the police particularly about Caleb, well, where you addressed Caleb?

A. I recall being asked whether Kathy showed signs of depression at that time.

5 Q. And you were relating to the police your observations about everything you could remember about Kathy and her relationship with the child?

A. And I related to the police that I didn't believe that she showed depression. Not in a clinical sense, no.

10 Q. Let me read parts of this. Again, this was with the mind that you had to provide the police with as much as you could remember as to whether there was anything unusual about your wife's behaviour at this time? Was that understood by you at the time?

15 A. Yes, it was.

Q. And this was December last year, that you were called upon to make a statement about everything that you could remember about her demeanour when Caleb was alive?

20 A. Uh-huh.

Q. Yes or no?

A. Yes.

25 Q. In paragraph 4 you say this:

30 "On 1 February 1989 my estranged wife, Kathleen Folbigg, gave birth to our first child, Caleb Gibson, at the Western Suburbs Hospital Newcastle. Prior to the birth, Kathy and I were happy setting up the bedroom before the birth. We had fun getting together the things we needed when our child was born."

35 Do you recall that?

A. I do.

Q. That's right?

A. Yes.

40

Q. Kathy didn't appear depressed or otherwise concerned about the impending birth. Again that's right?

A. That's right.

45

Q. Again, from what you were saying earlier on today, everything appeared to be normal and she was happy?

A. Yes.

50

Q. Then you were present at the birth. You remember that the labour went for about 11 hours; is that right?

A. Yes, it did.

55

Q. "Immediately after birth I recall that Kathy was exhausted but happy"?

A. Yes.

Q. Again, that's the truth?

A. Yes.

Q. "Kathy seemed happy to nurse and feed Caleb"?
A. Yes.

5 Q. "On one occasion Kathy attempted to breastfeed Caleb, but Kathy and Caleb seemed to be distressed by the attempt and Kathy didn't breastfeed him after that"?
A. That's correct.

10 Q. You see, it was the case that your wife did attempt to breastfeed the child, wasn't it?
A. Yes, she did.

15 Q. And there were problems about the child feeding at that time; that's what you have already referred to?
A. There wasn't a problem about the child feeding on her breast, no. She had a problem with the child feeding on her breast.

20 Q. Were you present when the problem so occurred?
A. I was, yes.

25 Q. You recall there were problems with the child taking the nipple at that time?
A. There wasn't a problem with the child taking the nipple. There was a problem with Kathy having the child on her nipple.

30 Q. The child also seemed distressed at that time?
A. I pretty much figure his mother's distress rubbed off on him.

35 Q. This is all what you infer?
A. Once again, as I said before, this is my opinion.

40 Q. You go on: "Kathy stayed in hospital for about two days and I would visit with them after I finished work." Is that right?
A. Yes.

45 Q. "I was of the opinion that Kathy appeared happy and comfortable with being a new mother"?
A. Yes.

50 Q. Again, that's the case, isn't it?
A. Yes.

55 Q. "Kathy was keen to get out of the hospital and go home"?
A. Yes.

Q. "We arrived home and settled into our new situation of having a child"?
A. Yes.

Q. "From then on I noticed that Kathy was tired and grumpy from lack of sleep, however she outwardly appeared calm and comfortable with her new situation"?

A. As she does now, yes.

5 Q. Mr Folbigg, it is a matter for answering the questions, not making commentary. Do you understand that, Mr Folbigg?

A. I do.

10 Q. So you will be asked questions and give answers. The question of your opinion is to be left out. Do you understand?

A. I do.

15 Q. "However, she appeared calm and comfortable with her new situation"?

A. Yes.

20 Q. "And apart from the grumpiness I mentioned, I did not notice a major change in Kathy's moods or general character occur after Caleb's birth"; yes or no?

A. That's what I wrote or told them, yes.

Q. It's the truth, isn't it, Mr Folbigg?

A. Yes.

25 Q. Why have you taken a bit of time to think about that?

A. So that I was comfortable with my answer.

Q. Were you attempting to tell the truth in this statement?

30 A. I did the best I could.

Q. Mr Folbigg, were you intending to tell the truth when you made this statement?

35 A. Yes, I was.

Q. Why did that take you time to answer?

OBJECTION.

40 CROWN PROSECUTOR: Might the record show it took about one second?

45 ZAHRA: Might the record also show that it was not a spontaneous answer?

CROWN PROSECUTOR: If one second is not spontaneous--

50 HIS HONOUR: I do not think the question was fair. Ask another one, please.

ZAHRA: Yes.

55 Q. You did not notice a major change in Kathy's moods or general character after Caleb's birth. That's what you have in the statement. Is that the truth?

A. Yes.

Q. You go on: "It didn't appear to me that Kathy was

having any serious problems coping with motherhood"?

A. It didn't appear to me, no, but a lot of things didn't appear to me either.

5 Q. Mr Folbigg, this statement is quite plain: "It didn't appear to me that Kathy was having any serious problems coping with motherhood"; is that the truth?

A. At the time it didn't appear to me, no.

10 Q. Mr Folbigg, you made this statement on 11 December. We could probably count the weeks since then.

OBJECTION. QUESTION WITHDRAWN.

15 CROWN PROSECUTOR: What is in the statement is, "It did not appear to me", ie, at the time.

ZAHRA: I accept that. The question was going to be directed further than that.

20 Q. You made this statement. We could probably count the weeks, a matter of weeks really. December, about three months. At that point in time you say: "It didn't appear to me that Kathy was having any serious problems coping with motherhood"; is that right? Is that right?

25 A. Are you referring to December or the time when the boy was born?

30 Q. I was about to come to that. Obviously what you are now saying is that what you are saying there is you are referring to your state of mind then, not now?

35 HIS HONOUR: Just a moment, please. Mr Folbigg is being asked what he said last December about his state of mind when?

ZAHRA: That is what I am asking.

40 HIS HONOUR: You do not know?

ZAHRA: If this sentence, as my friend was about to object, is equivocal then I am about to ask him what he was intending to convey at that time.

45 CROWN PROSECUTOR: I object. I do not think it is equivocal at all. I think its meaning is quite clear.

50 HIS HONOUR: Yes. So it seems to me. The part of the statement which you have extracted and presented to Mr Folbigg in a question is this: "It didn't appear to me that Kathy was having any serious problems coping with motherhood". Now, we know from questions and answers that the statement from which that is extracted was made last December.

55 ZAHRA: Yes.

HIS HONOUR: Plainly the words are not intended to

describe Mr Folbigg's state of mind last December.

5 ZAHRA: That is, in fact, what I wanted to clear up. I agree with your Honour that is the literal reading. I wanted to clear that up before I asked my next question.

HIS HONOUR: Let us clear it up.

10 ZAHRA: That is what I was intending to do.

15 Q. Mr Folbigg, by that phrase, "It didn't appear to me Kathy was having any serious problems coping with motherhood", when you made this statement on 11 December 2002, were you suggesting there that you were referring to your state of mind at the time that Caleb was alive, not your state of mind on 11 December?

A. That's correct.

20 Q. Wasn't it the case that when you made this statement on 11 December, however, that you had been asked to recall as much as you can about her demeanour at the time?

A. I was asked questions that had me answer how I felt in 1989, not last year.

25 Q. Let us understand this: You were making a statement in December last year; is that right?

A. Correct.

30 Q. And you were asked whatever you could remember about Kathy's demeanour towards Caleb when Caleb was alive?

A. Correct.

35 Q. Are you saying that at that time you only wanted to tell them what your thoughts were when Caleb was alive and not tell them anything else?

40 A. I think it goes to how you actually remember things, and when he asked me that question, I remembered 1989, and, as I said, there were parts of Kathy as a mum from when that little fellow was born to when he died that I kept to myself. And so last year, when he asked me what was she like in 1989, I only told him the things that I remembered that I didn't think - or that I thought he wanted to know, not the things I thought I felt I knew.

45 Q. But wasn't that the purpose of your going to see the police in December 2000, to give them as much information as possible?

50 A. But they don't and you people don't ask questions that allow you to gob on and wax on.

Q. You didn't think it necessary to say to the police "hang on a moment, since then I've thought more about it and this is what I want to tell you"?

55 A. No, I didn't think to say that.

Q. You didn't think to say that when they were asking you questions about what your memory was about how she treated Caleb?

A. No, I didn't think to say that.

Q. You see, you have had some years to reflect on this?

A. I have carried stuff inside me for years.

5

Q. From what you are saying here today there are other things you want to talk about Kathy's relationship with Caleb that do not appear in this statement of 11 December 2002?

10

A. Well, I just said all that and the other stuff that aren't in any statement are about other aspects of life, not necessarily that little fellow's life.

15

Q. So, earlier today is the first time that you have ever said anything about these additional concerns?

A. To people such as yourself and law officers, yes.

20

Q. And you didn't think it was important in December 2002 to tell the police "hang on a moment, I've got a lot more I want to say"?

A. Well, there's some stuff that you just don't know whether you can say or not and I've already told you that.

25

Q. See, you are just trying to take this opportunity to try and slur your wife further about her relationship with Caleb, when, before today, you have never ever suggested in any--

30

OBJECTION. DOUBLE QUESTION.

HIS HONOUR: Do not go any further. Please start again.

ZAHRA: Yes.

35

Q. You are just intending to slur your wife further about her relationship with Caleb?

OBJECTION. NOT CLEAR AS TO MEANING OF WORD "SLUR".

40

ZAHRA: I will make it clear.

Q. You are just trying to put a different colour on the relationship today, aren't you, Mr Folbigg?

45

A. It's funny you should say the word "colour" because part of the reason that I want to be here, and this is a very hard thing to be doing--

50

Q. Can you answer the question?

A. I'll get to it.

55

Q. Can you answer the question?

A. Part of the reason I wanted to be here is to put colour into an otherwise black or white affair.

55

HIS HONOUR: Mr Folbigg, I want to give you some directions about how you are to answer questions. Two things: First, sometimes you are beginning the answer to the question before the question has ended. I would be

grateful if you would not do that. Secondly, just answer the question itself. Don't volunteer information which is not asked of you. If you do not go far enough counsel will be sure to ask you about it.

5

ZAHRA: Q. Mr Folbigg, you have decided to say a little bit more for the first time today because my questions to you this morning have made it clear that you've not said anything in the past that was bad about the relationship?

10 A. Sorry, was that a question? I thought it was a statement. I'm sorry. No.

Q. You see, it was becoming fairly clear to you, by my cross-examination and taking you through the detail of the statements, that you had not said anything bad about your wife and her relationship with Caleb, wasn't it?

15

A. That is correct.

Q. You have decided to add a little bit of mystery to this by saying: Well, now I can see that there were certain things about her not feeling special; to add a little bit of mystery, Mr Folbigg, that's what you are doing, isn't it?

20

A. No.

25

Q. See, because, quite clearly, up until this morning, taking you through the detail of the statements, there is nothing, nothing that you have ever said before that her relationship was other than quite normal?

30

A. According to the statements.

Q. During the course of Caleb's life, you were going to work?

35

A. Yes, I was.

Q. And you were coming home each evening?

A. Yes.

Q. About what time?

40

A. On average I would say it was 6 to 6.30pm.

Q. Was the child awake when you got home?

A. There were times he was; sometimes he wasn't.

45

Q. Did it appear to you that your wife was being quite diligent in her care for Caleb?

A. Yes, it did.

Q. The child appeared to be well looked after?

50

A. He was thriving.

Q. The child appeared to be well clothed and kept clean?

A. Always tidy.

55

Q. That included bed clothes. Everything about the child was kept clean and well cared for?

A. Yes.

Q. She seemed to fuss over Caleb in that regard?
A. She seemed diligent with it.

5 Q. Well, she fussed over him, didn't she?
A. It depends on the words, doesn't it?

HIS HONOUR: Q. What was the answer?
A. It depends on the word.

10 CROWN PROSECUTOR: It is hard to hear Mr Folbigg. I wonder if he might sit closer to the microphone.

HIS HONOUR: Sometimes he drops his words.

15 CROWN PROSECUTOR: It is more when he sits back.

ZAHRA: Q. (Shown 1989 diary). Have you seen that diary before?
A. I have.

20 Q. Have you read it word for word?
A. No. Would you like me to?

25 Q. No, no. I was asking you the question. Have you?
A. No.

Q. Have you looked through each page?
A. I think I've flicked through it in the past.

30 Q. Can I just take you to the diary entries for the 19 days of Caleb's life?
A. Yep.

35 Q. Let me just put some general observations to you and ask you whether you agree or not. The jury has this as an exhibit.

CROWN PROSECUTOR: They only have one page.

40 ZAHRA: The jury will have access to this.

Q. In the days that Caleb was alive your wife essentially made entries almost on the half hour about the child?
A. Almost.

45 Q. She noted everything, at times whether he had done a number two, absolutely everything; would you agree with that, Mr Folbigg?
A. Yes.

50 Q. Have you ever seen anything like that before, any other person that you know filling out a diary about every half hour what the child was doing?
A. Yeah, I have seen other people do it.

55 Q. But your wife appeared to be watching that child intently; yes or no?
A. Pretty much about every time any other mum would have

looked at her kid.

5 Q. Again, it is not a matter for you to issue a commentary. It was a question that I was asking you about your wife's care of this child. Do you understand what I'm asking you?

A. Yes.

10 Q. Isn't it apparent from that that your wife attended to every one of the needs of the child?

A. It is apparent.

15 Q. In fact, she made entries?

A. Yes, she did.

Q. You don't call that fussed over the child?

A. Do you want my opinion?

20 Q. Do you understand the question?

A. I don't call that being fussed over?

Q. Yes. You call that average, do you?

A. I call it probably a new mum's way of coping.

25 Q. Yes, a new mum being excited about the birth of the child?

A. Or a new mum keeping track of how he's going and when he's awake and when she's awake.

30 Q. So, you say there is nothing significant about that diary to suggest that your wife was properly caring for the child?

A. I don't understand the question.

35 Q. Are you suggesting that you don't read anything into that diary about your wife's attitude towards the child and her diligence at being a mother?

A. No.

40 Q. Sorry?

A. No.

Q. You don't read anything into that?

A. No.

45

HIS HONOUR: The question was are you suggesting that and the answer was no.

ZAHRA: Q. You are suggesting it means nothing?

50 A. It is just a mum writing stuff down about her baby.

ZAHRA: Might that exhibit quickly pass through the jury? Might the jury just see that in the context of the evidence the witness has just given?

55

HIS HONOUR: Yes.

CROWN PROSECUTOR: There are 19 pages of it. If each

juror looks at all 19 pages - it might be easier if we uplift it and have the whole thing photocopied.

5 HIS HONOUR: I thought we were just working on one page.

CROWN PROSECUTOR: The significance in the Crown case is the last page. The whole thing has been tendered; my friend is asking questions about the whole 19 days.

10 HIS HONOUR: I understand the problem. It would be better I think if the diary were to be copied and copies made available to each juror.

15 ZAHRA: I ask that that be done as quickly as possible.

CROWN PROSECUTOR: We will do it straightaway.

HIS HONOUR: The original should be retrieved.

20 ZAHRA: Might the exhibits be returned to the witness?

HIS HONOUR: Yes.

25 ZAHRA: Q. Can you just flick through the pages after - firstly, just go to the time when Caleb had died, that day?

A. (Witness complied).

30 Q. Now, can you see there that from that point on the pages are still ruled up as they have been in the times prior to that point. In other words, the pages are ruled up to account for every half hour in the future, for some pages?

A. That's correct.

35 Q. Also, if you flick through the pages following, you can see, in fact, that she had made notations for the attendance at various doctors that she was required to see, immunisations?

40 A. How far in? There is only one doctor mentioned in that part.

Q. Yes. Can you see that there are references to doctors? The jury will be able to see this.

45 A. Yes.

Q. Can you see there are references into the future about seeing doctors; do you agree with that?

A. Yes, on the 22nd.

50 Q. Also in the diary there is a notation in the future about the anniversary of each week of the child's life?

A. There's a thing about the dog being one year old. Four weeks, one month at the start of March.

55 Q. You couldn't resist that, could you, about the dog?

A. Well, I loved that dog.

Q. Okay. Can you see what I am putting to you? She does note well into the future about the anniversary of the weeks and the months old?

A. Yes.

5

Q. Your wife was extremely happy to have that child?

A. Do you think - sorry.

10 HIS HONOUR: Would you ask the question again? Nobody understands it.

ZAHRA: Q. You see your wife was happy to be a mother?

A. Yes.

15 Q. She embraced it?

A. Yes.

ZAHRA: Might the exhibit be returned?

20 HIS HONOUR: Yes.

WITNESS: When would you say - sorry.

25 ZAHRA: Q. It was your wife who was the primary care giver of the child?

A. Correct.

Q. She had fed the child?

A. She did.

30

Q. She was the one who, in fact, had woken up during the night?

A. Every time.

35 Q. You stayed asleep?

A. Correct.

Q. You stayed asleep because you didn't think that it was your role to wake up, look after the child?

40 A. I stayed asleep because when I go to sleep I pretty much don't see anything until the next morning.

Q. You would disagree with that proposition?

45 A. I would disagree with what you are saying that I didn't take any care with this child.

Q. I am not suggesting that. What I am putting to you is that at night you were of the view that it was your wife's function to wake up; that you should remain asleep because you were the provider?

50

A. My wife was well aware that I was willing to get up and look after this little fellow if she needed me to or wanted me to and my wife never attempted to wake me and ask me to. So when I went to bed I didn't really see much until the next morning.

55

Q. Did you understand my question? I was asking you about your attitude to waking up; that, in fact, it was

your attitude that you were the provider and it wasn't your job?

OBJECTION.

5

HIS HONOUR: You have an answer to the question clearly enough. Ask another.

10

ZAHRA: Q. In your statement of 19 May, paragraph 62, you were saying this in relation to Laura:

15

"As far as the day-to-day care of Laura is concerned, I must admit that I didn't do as much as I should have. I was working full-time and Kathy was home with the baby. I felt that I was performing my duties as provider and, therefore, I couldn't be expected to do more at home. I now realise this was wrong and Kathy was doing everything at home."

20

Do you recall saying that in your statement?

A. (Witness nodded.)

25

Q. That was your attitude at the time that Laura was born; that you were the provider?

30

A. Kathy and I made a deal; she wanted to be a mum; she wanted to leave her job, so we made a deal. I put 150 per cent into what I could do in my life to provide for her and this baby, and me to provide a tidy life and she would put 150 per cent into her life as a mother. I did help out at home, but not very much.

35

Q. Particularly so far as waking up at night is concerned; that wasn't your job?

40

A. Laura's corometrics monitor woke me up at night when the alarm sounded. I would get up. Kathy would tell me just to go back to bed; she would take care of it. So eventually I didn't get up anyway because I was just being told to go back to bed.

45

Q. It was the case with all of the children, wasn't it, that you didn't believe that it was expected of you to wake up because you were the provider?

A. It wasn't so much that I didn't believe because I was the provider I didn't have to do stuff like that. I had partly a belief that way, but the other part was when I go to bed and go to sleep I pretty much don't see much until the next day.

50

Q. Caleb appeared to be a happy baby?

A. It's hard to say. I mean he was only a little fellow, a little tiny thing. They don't smile. They just look at you with big eyes and cry.

55

Q. He was a good baby?

A. He was a pretty good baby.

Q. He was not irritable?

A. If he was hungry, had a wet bum; that would be about it.

5 Q. Nothing out of the ordinary; he was a good baby?
A. For a 19-day old.

Q. He slept well?
A. He did actually.

10 Q. See, wasn't he a very quiet baby?
A. He was a quiet baby.

Q. Well, he was a very quiet baby, wasn't he?
15 A. And we need the word "very" for what?

Q. You have some hesitation in using the word "very", do you?
A. Well, he was a very quiet baby, yeah.

20 Q. Why have you had such trouble--

HIS HONOUR: Is that the question?

25 ZAHRA: No. Would your Honour excuse me a moment?

HIS HONOUR: Yes.

30 WITNESS: Your Honour, sorry to bother you, would I be able to have a copy of this statement of 19 May 1999?

HIS HONOUR: Not for the moment. But if it appears necessary for you to have it, it will be provided.

35 ZAHRA: Can I read part of your own statement, paragraph 9, at page 4?

HIS HONOUR: Which paragraph?

40 ZAHRA: I notice there are a couple of paragraph 9s. This is the paragraph 9 that commences at page 3 and the top of page 4. I think that is what threw me before. Does your Honour have that?

45 HIS HONOUR: Yes.

ZAHRA: Q. Starting from up towards the top of the page:

50 "This room was joined to our bedroom. Caleb slept in the bassinet on each occasion. There was a cot in the room, but he never slept in that. He was a very quiet baby and to my knowledge he slept fairly well."

55 Do you recall saying that?

A. I do.

Q. They are your words not mine, "very quiet baby"?
A. Good.

Q. You had a lot of trouble with that this morning because you just don't want to disagree with anything I put to you; is that the case?

5 A. Sorry, that isn't the case. I want to do the best I can for you.

Q. You had a lot of trouble a moment ago with the word "very".

10

OBJECTION. COMMENT. QUESTION WITHDRAWN.

Q. So far as the difficulty with feeding of Caleb, you were concerned about the problems with the feeding?

15

A. It wasn't so much problems with feeding. The little fellow fed really well. It is just that while he was feeding he would break off from the bottle, take in big gulps of breath and he made this funny little noise.

20

Q. You were concerned about that?

A. Yes.

Q. There was a specialist paediatrician who saw Caleb at the hospital, Dr Springthorpe?

25

A. I don't recall that, but - I'm sorry.

Q. You recall your wife going to see Dr Springthorpe about the circumstances of the child breathing?

A. Yeah, I recall that.

30

Q. She also was concerned about the circumstances of breathing?

A. Yes.

35

Q. Concerned to want to go to see a specialist?

A. No, not that concerned. She was going to him anyway. That was a normal baby doctor thing, that.

40

Q. She went to see a specialist about this during the life of Caleb?

A. She brought those issues up with the doctor on a normal baby doctor visit.

45

Q. But she went to see the specialist about this?

OBJECTION.

CROWN PROSECUTOR: This is the third time now he has been asked.

50

HIS HONOUR: Please do not be argumentative.

ZAHRA: Yes.

55

Q. You understand she did go to see Dr Springthorpe?

A. Yes.

Q. Did she discuss going there with you?

A. I recall she asked me if I would go, but I couldn't get time off work so she went on her own.

5 Q. Mr Folbigg, I read a portion of your statement of 11 December 2002 a while ago. Let me just make sure I have put to you the whole of the sentence about breastfeeding. You have this:

10 "On one occasion Kathy attempted to breastfeed Caleb but Kathy and Caleb seemed to be distressed by the attempt and Kathy didn't breastfeed him after that."

15 That is a sentence that I may have already read to you. Do you see that you say "Kathy also became distressed about breastfeeding"?

20 A. When Caleb was born, Kathy was distressed about breastfeeding. The nurses went through all - what the value to the child was. Kathy had said to me "I don't want to do that", and I said "Well, you've got to give it a go." She had a go at it and the kid never got on there.

25 Q. However, as late as December last year, you were recalling that Kathy was distressed. That was the word you used?

A. That's correct.

30 Q. Can I just take you to the night that Caleb had died? That night, otherwise, was quite a normal night?

A. Yes, it was.

35 Q. Again, in your statements, you make no mention of anything about her demeanour that suggested anything was wrong?

A. That's correct.

40 Q. As you sit there today, there is nothing that you could recall about her on this night, that you can attribute to something, that she was having trouble with Caleb?

A. No.

45 Q. Or so far as her mood is concerned?

A. No.

Q. There's nothing that you can recall out of the ordinary?

A. No. She pretty much seemed normal.

50 Q. You gave evidence that on that night you kissed the child good night?

A. Yes.

55 Q. You made no mention in evidence that your wife kissed the child. Did she kiss the child?

A. I don't recall.

Q. See, can I just read from paragraph 10 of your

statement, page 5?

HIS HONOUR: Which statement is this?

5 ZAHRA: The first statement of 19 March.

Q. See, can I read this to you: "I kissed Caleb on the forehead, as did Kathy, and we went to bed." That's in your statement?

10 A. Is that 19 May 1999?

Q. Yes?

A. Is that the statement I told the lies in?

15 Q. You lied in that statement, did you?

A. In the 19 May 1999. I thought we had already dealt with this before this started.

Q. You lied, did you, that she kissed Caleb?

20 A. The statement of 19 May 1999 also pertains to 23 May 1999, which is when I went back and changed the statement that I made on 19 May 1999.

25 HIS HONOUR: Please do not argue with Mr Zahra. Please just answer his questions.

ZAHRA: Q. See, this statement was made on 19 May and signed on 23 May?

30 A. Correct.

Q. Now, in that, in paragraph 10, towards the start of making the statement, you have "I kissed Caleb on the forehead, as did Kathy, and we went to bed." Now, that's a lie, is it?

35 A. Well, as I said, I don't recall whether Kathy kissed the boy good night, because Kathy would have took the boy in and put him into bed. When I went in, I kissed him good night.

40 Q. You were fairly specific in the statement. "I kissed Caleb good night on the forehead, as did Kathy"?

A. This is the statement I wanted a copy of.

45 Q. Because you don't know when you were telling lies and when you weren't?

A. I do, but you people won't let me say when I was telling lies or when I wasn't.

50 Q. Were you telling lies about your wife kissing Caleb?

A. Yes.

Q. Why?

A. Because she asked me to.

55 Q. When did you tell the lie?

A. On 23 May.

Q. So, you went back and added that?

A. We went back - the police officer and I, at my request, dialled back through the police computer, and we changed certain aspects of what I told him on 19 May.

5 Q. You are lying about that, aren't you?

A. No.

Q. How can we tell the difference?

10 A. Because I swore on that Bible (witness indicated), here, to tell the truth.

Q. Can I just read parts of this statement to you? Do you recall, at the front of the statement, you say:

15 "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
20 tendered in evidence I shall be liable for prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true."

25 HIS HONOUR: I would be surprised if any witness could answer that question "yes" or "no". Are you going to continue to ask questions about this statement without putting it into the witness' hands?

30 ZAHRA: Might the witness have a copy of this statement?

HIS HONOUR: Yes.

35 CROWN PROSECUTOR: We will find an unmarked one.

(The witness was handed a copy of his statement of 19 May 1999.)

40 ZAHRA: Q. Do you recognise that statement?

A. Yes. I have one in the bottom of my budgie cage.

Q. I am sorry?

A. Yes. I have one of these in the bottom of my budgie's cage.

45

Q. Can I take you to paragraph 1?

A. Paragraph 1?

Q. Yes. Is that the paragraph I just read to you?

50

A. It is, yes.

Q. You see, you indicate there that it accurately sets out the evidence that you would be prepared to give in court as a witness?

55

A. Well, I didn't indicate that. It's on the machine when they typed it all up.

Q. Did you read it when you signed it?

A. You don't see it until at the end of it all.

Q. Did you read it when you signed it?

5 A. No. I didn't actually read that part. I didn't want to read any of this statement.

Q. You didn't read that part?

A. I didn't read any of that statement when I signed it.

10 Q. What you are saying is that you didn't mind lying in these circumstances?

A. I minded it, but there wasn't really much I could do about it.

15 Q. You couldn't do much about it because you would have us believe that you were in love with your wife and you were blind. Is that what you are going to say?

A. Are you doubting that I was in love with her.

20 Q. No. I'm asking you the question. Is that what you are going to say?

A. I was in love with her.

25 Q. That's what you are going to say, isn't it, as to why you lied?

A. Well, yes, I guess I am.

Q. You guess you are?

30 A. I know I am.

Q. So, it is not you; it is some other part of you that wanted to lie.

QUESTION WITHDRAWN

35 A. No, I'll answer that.

HIS HONOUR: No, you will not.

40 ZAHRA: Q. You see, you're lying because of revenge, aren't you, about your wife?

A. In this (witness indicated his statement of 19 May 1999)?

45 Q. Well, that's what you are doing here today, isn't it?

A. No. No. Here today I'm telling the truth. When I changed that, it wasn't for revenge; it was for concern.

50 Q. See, you now, conveniently, say that you were blinded by love, but you are motivated by the wish to get back at your wife, aren't you?

A. What have I got to get back at her for?

55 Q. You see, that was the motivation for you to go to the police, wasn't it? Revenge, because your wife had left you?

A. No. I was devastated my wife had left me. I had no thoughts of revenge against her whatsoever.

Q. You weren't motivated at any time to get back at your wife at that time?

A. No.

5

Q. Never?

A. Never.

Q. When I put that to you, you are quite abhorrent about that. You are quite upset when I put that to you; that that's the motive?

10

A. I take offence at it.

Q. Do you recall there were some listening devices in your home, placed there by police?

15

CROWN PROSECUTOR: The way the question is asked almost assumes that he was aware at the time that there were listening devices there.

20

ZAHRA: Q. Have you since become aware that various conversations of yours were captured by listening devices?

A. I have been made aware that there were conversations of mine heard on the devices, yes.

25

Q. Have you read transcripts of those?

A. Never.

Q. Have you listened to tapes?

30

A. I had one played to me but I really couldn't figure it out, like to listen to.

Q. Can I just read part of a transcript of one of the listening devices known as B9?

35

CROWN PROSECUTOR: It is a transcript that we have not got. My friend has made his own transcript available to me.

40

HIS HONOUR: Are you ready to proceed now, Mr Zahra?

ZAHRA: This might be a convenient time. I will provide my friend with a copy.

45

JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Mr Folbigg, there is nothing special about
your evidence - I say this to every witness who is being
cross-examined when we have an adjournment - as I said to
you last Friday night - I will not continue to repeat it -
if we have an adjournment during your cross-examination,
while you are being cross-examined you must not talk to
10 anybody about your evidence. I mean anybody at all.

You may step down now.

15 WITNESS: Can I just leave this here (witness indicated
his statement of 19 May 1999)?

HIS HONOUR: Yes. Leave the statement.

SHORT ADJOURNMENT

RESUMPTION

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Your Honour, we have photocopies now
of the 1989 diary. My solicitor has photocopied the whole
of the month of February.

10 HIS HONOUR: That is exhibit L.

EXHIBIT #L SUPPLEMENTED BY THE ADDITION OF WHOLE OF DIARY
ENTRIES RELATING TO CALEB TENDERED, ADMITTED WITHOUT
OBJECTION

CROWN PROSECUTOR: I have a copy for each juror and a
working copy for your Honour.

20 HIS HONOUR: I think, Mr Zahra, you would like the jurors
to see these documents.

ZAHRA: Yes, your Honour.

25 HIS HONOUR: May they be handed to the jury, please?

(Copies distributed to the jury.)

30 ZAHRA: Your Honour, I am happy for the jury to see that
at lunchtime, if that is suitable.

HIS HONOUR: Very well. You will be able to take those
documents with you to the jury room, ladies and gentlemen.

35 Yes, Mr Zahra.

ZAHRA: Thank you, your Honour.

40 Q. Mr Folbigg, I was just about to read to you part of a
listening device of a recording of conversation between
yourself and your wife, of 23 July 1999, and I will read a
passage to you. This is you speaking:

45 "I said, 'I went there because I was so full of
hate and spite and anxiety and grief and anguish
over the fact that not only lost my daughter,
I'd lost my wife. You know, I'd lost the two
most precious things to me - not possessions,
50 but people who ... a person who I had built my
whole existence on.

I'm sorry to say that, that's the truth. I
couldn't see that I would function with anybody
else. I didn't want to meet someone and ... for
55 them. I stood in a church in front of a man of
God and swore my whole life to you until I die
because I loved you and I've never ... it
waivered, yeah, it's changed, you know, and -

but it's never failed, never disappeared.

5 I wanted to stay with you because we've both
been through the same things. We'd both shared
these losses, so therefore we should share life
with these losses",

and there's "No, not the case" and then following:

10 "I wanted to stay with you because years and
years ago when I met you, I never wanted to not
be with you. It didn't appear to me ... I
15 didn't know how to voice that in what I felt was
a romantic way that would sway you or anything
like that. I was so frustrated, I was hurting,
so I thought, fine, I'll fucking fix this."

Mr Folbigg, do you recall saying those things?

20 A. No, I don't recall.

Q. Can I just continue on:

25 "I'll fuck your life, you fucked mine, I'll fuck
yours. I'll go and tell some fucking horrible
things about you that the police think you did
it anyway and I couldn't do it. Went there to
do it, started to do it, couldn't do it, cause
all that, but when I told ... that that was the
30 case, I mean, he said, well, you know, I think
...."

Do you recall saying that?

A. I don't recall actually saying those things, no.

35 Q. You see, was that your state of mind at the time that
you went to the police?

A. No, it wasn't.

40 Q. You see, you say there:

"I'll fuck your life, you fucked mine, I'll fuck
yours. I'll go and tell some fucking horrible
things about you that the police think you did
it anyway and I couldn't do it."

45 A. Is this a conversation I had with Kathy?

Q. Yes.

50 A. I was of a - it became a nature of mine to tell Kathy
things she needed to hear.

Q. You see, you say there that you went to the police
and started to do that; that was your intention?

55 A. I went to the police to tell them about life, about -
with Kathy and the babies and stuff, yes.

Q. You see, Mr Folbigg, you are prepared to say
anything, if it suits your objective?

CROWN PROSECUTOR: I object, your Honour. I object to the word "so", thereby implying that there is some connection--

5

HIS HONOUR: Yes, the question doesn't follow from the answer.

ZAHRA: I withdraw that.

10

Q. Mr Folbigg, you are prepared to say whatever you believe is going to suit your objective, even if it means lying?

15

A. Is that my objective of having peace and harmony at home, or my objective - what?

Q. You see, I am putting to you that that's what you were doing then; that to suit your objective you were prepared to lie to the police?

20

CROWN PROSECUTOR: I object, your Honour. It is not clear - I withdraw the objection. The very end of the sentence made it clear what he is suggesting.

25

WITNESS: A. It was - yeah, sorry, could you repeat the question?

ZAHRA: It might be read.

30

Q.
"Q. You see, I am putting to you that that's what you were doing then; that to suit your objective you were prepared to lie to the police?"

35

A. That's not correct.

Q. And that you are a person who would lie to suit your objective?

40

A. To suit my objective in my life with Kathy, to Kathy, yes.

Q. See, there's another excerpt from the listening device. It is on tape B13 of 26 July 1999. You say:

45

"I just don't want to hear you mention it again. It's bad enough he's going after one of us, I'm not having him going after you."

Sorry, that is a statement of your wife. Then you say:

50

"Well, I don't want him going after you for something you didn't do. That you and I know. I knew you didn't do it like you know I didn't do it. But get this sick pack of pricks that, you know, maybe what we're doing now is what he wants us to do, sit there and have factional fights instead of joint, cohesive support."

55

5 I really wanted to pose all that to you to show
you're not a wicked person either, but I can be
a wicked person, I can be the deviate person,
how I sell motor cars. I use whatever I can to
my advantage to sell a motor car, whether it's
my children's lives or my children's deaths.

10 When Laura was alive, I used the fact that she
was alive and part of my life as an advantage to
sell a motor car."

Do you recall saying that?

A. No, I don't.

15 Q. Do you have anything to say about that?

A. In what way, sorry?

Q. Well, do you have any comment to make about that?

20 A. Well, we all draw on life experiences to do the
things we do with our lives.

Q. This is out of your mouth. This is you expressing--

25 CROWN PROSECUTOR: I object.

ZAHRA: Q. Do you have any comment to make about what
you say there?

30 A. I don't recall saying it. But I do know that in life
we will draw from our life experiences to do what we do
with our lives.

Q. Can I just take you back to the night of Caleb's
death? When you observed Caleb, he was still wrapped in a
bunny rug?

35 A. When he was dead?

Q. Yes, when you first saw him?

40 A. Well, I didn't know he was dead when I first saw him,
but he was in a bunny rug, yes.

Q. He was in a bunny rug. You say that your wife - she
was just standing there screaming and screaming, "My baby.
Something is wrong with my baby", and she was holding her
forehead?

45 A. That's correct, yes.

Q. And she was very upset?

A. Yes, she was.

50 Q. And later that she was devastated?

A. She was.

Q. And she was, at that time, as devastated as you were?

55 A. She appeared to be.

Q. You said, in evidence, that after the death, so far
as your wife's concerned, that she pretty much got on with
life?

A. Yes.

Q. Did she cry when she grieved about Caleb?
A. Just after he died, yes.

5

Q. How long for?

A. Pretty much up until the funeral, maybe a couple of days after that, from--

10

Q. So, a matter of days?

A. About a week or so.

Q. I'll just read this. Have you still got your statement in front of you?

15

A. I do.

Q. Can you go to paragraph 14, page 6? You see the first sentence there:

20

"Over the following weeks, Kathy and I cried a lot over the loss of our baby."

Was that the truth or was that a lie?

25

A. No, it would have been a couple of weeks.

Q. You see, a moment ago you wanted to limit it in terms of days?

A. Or not a couple of weeks; in terms of days as well.

30

Q. You see, you're again trying to colour the evidence to place the accused in the worst possible light, to limit her grief to some days, when in your statement you say, "Over the following weeks Kathy and I cried a lot over the loss of our baby"; you see there is quite a difference, isn't there, Mr Folbigg?

35

A. From a week to weeks?

Q. Yes.

40

A. Yes, there is.

Q. And you're trying to limit it purposely, to place your wife in the worst possible light?

A. One week, two weeks, it doesn't seem long enough, does it?

45

Q. You see, what I am putting to you is that you're now changing what you said before; you are bringing it down from weeks to a week. What do you say about that?

A. Sorry.

50

Q. You said, in evidence, that you fell to pieces and she didn't seem to fall to pieces?

A. I found--

55

Q. Do you recall saying that?

A. I do recall that.

Q. You see, isn't it the case that you were expecting

your wife to have the same reaction as you; falling to pieces?

5 A. I wouldn't have suspected that she would have had the same reaction as me. She probably had her own reactions.

Q. She was quite a private person about her emotions?

A. She never let anything out, no.

10 Q. So that the difference between you falling to pieces and her not falling to pieces is understandable in the light of the difference in the personality between you and her?

A. Yeah, I guess so.

15 Q. And there was then a conversation about having another child; do you recall giving that evidence?

A. Yes.

20 Q. Have you got your statement in front of you at paragraph 15, page 7? You see it reads this:

25 "After this Kathy and I started to talk about having another baby because we felt that we needed this to help get over Caleb's death."

Can you see that?

A. I can.

30 Q. Now, you see, aren't you there saying that, at the time there was a discussion about a child, there was, in fact, still residual grief about the death of Caleb?

A. We both wanted to be parents, yes.

35 Q. And the grief that you both felt over Caleb was evident at that time?

A. I can't begin to speak for her on that point, from memory.

40 Q. Well, you did in your statement?

A. We both wanted to have another baby, yes.

Q. Yes, "Because we felt that we needed this to help get over Caleb's death". That's the way you expressed it then?

45 A. Yep.

Q. Is that the truth?

A. Yes.

50 Q. And, some time after, your wife was pregnant with your second child, Patrick--

A. Eventually.

55 Q. And, even before that, there were renovations to your house so that you could, in fact, have the second child?

A. We did renovations to the house based on the information that the SIDS people had told us at the time.

Q. And your wife had quite an input in that also?
A. She helped paint.

5 Q. In other words, discussions about what should be done
as a result of what the SIDS people had told you?
A. Pretty much so.

10 Q. So, it was a joint effort, after the information you
got from SIDS, to try and design the house or to make sure
that the child would be safe?
A. Yes.

15 Q. And your wife was quite happy at that time?
A. She appeared to be.

Q. And she was looking forward to the arrival of the new
baby?
A. She never actually told me whether she was or not.

20 Q. See, can you go to paragraph 20? See the first
sentence there? "Kathy and I were happy again", not
"appeared to be happy", "...and I were happy again and
looking forward to the imminent arrival of our new baby".
25 You had no restriction on description there, as you have
today; would you agree with that?
A. Apparently.

30 Q. You see, you want to qualify observations at every
opportunity, don't you, Mr Folbigg?
A. Sorry?

35 Q. Well, I'll put it this way: You see, now, when you
refer to her demeanour, you say "appeared to be"?
A. Yep.

40 Q. But you didn't use those words when you made the
statement that you made, what appears to be a very clear
statement, "Kathy and I were happy again and looking
forward to the imminent arrival of our new baby"?
A. I didn't write or type this.

45 Q. So, is that wrong, or is it a lie?
A. Well, I'm not saying it's wrong or a lie. All I'm
saying is when this was typed or written, I was just
talking. What words were used were probably close to the
mark of the words I was using when I was talking.

50 Q. Probably close to the mark?
A. And, more than likely, were.

Q. So, are you going to retract from that today?
A. No.

55 Q. Well, why did you qualify the second part of that
sentence a moment ago: Well, she never told me that she
was looking forward to the child's arrival, but you
clearly say there that--

A. Life was just what it appeared. Kathy never told you

much at all.

5 Q. But you had no trouble describing her demeanour at that time as "looking forward to the imminent arrival of our new baby"?

A. That's how it appeared.

10 Q. You didn't say "That's how it appeared". You say that as a clear statement, don't you?

A. I say that here, yes.

15 Q. As a clear statement?

A. Yes.

15 Q. And, again, she went to see Dr Marley, your family doctor?

A. Yes.

20 Q. And she appeared to be excited about the birth of the child?

A. She appeared to be.

25 Q. You said, in evidence, that after Caleb's death your wife, after a few months, went to nightclubs with friends?

A. After Caleb died, Kathy got her job back at an Indian restaurant she worked at in Newcastle, and on Friday and Saturday nights sometimes she would go to nightclubs with people that she worked with.

30 Q. When you say "sometimes", it was infrequently?

A. Yes.

35 Q. In fact, on no more than two or three occasions?

A. I can't recall exactly the number.

Q. But it's of that order, isn't it, Mr Folbigg?

A. It may be some more than that; it may not be. I can't recall.

40 Q. You see, you were trying to create an impression the other day that, in a sense, soon after Caleb's death, your wife was going out very regularly?

A. I beg your pardon? Sorry, is--

45 Q. You weren't trying to create an impression the other day, when you said those things about your wife going to nightclubs, that she was going there frequently or regularly?

50 A. Once again, I'm sorry, I don't understand the question.

Q. When you gave this evidence about your wife going to nightclubs, you didn't talk about how frequently it was; would you agree with that?

55 A. Oh, I don't recall.

Q. And you did that purposely because all you wanted to do was create an impression that your wife was going out

almost every night?

A. I don't think that's what I created.

5 Q. But you didn't say that it was maybe more or less than two or three occasions?

A. The other day?

Q. Yes.

10 A. No, I didn't say that.

Q. The decision for her to go back to the restaurant was based, wasn't it, the first thing, on financial reasons?

A. No.

15 Q. Was it based on the fact that she was staying at home and not doing anything, reflecting on the death of Caleb, and it was thought that it was important for her to get out of the house?

A. No.

20 Q. You're saying that that isn't the case?

A. That's correct.

25 Q. Was it ever the case that she had to go out to work because of financial reasons?

A. No. Only when we bought the house at Millard Close.

Q. Do you know when that was?

30 A. When we bought the house at Millard Close?

Q. Yes.

A. We purchased it in October and - we laid a deposit down in October 1995 and we took possession of the house in January 1996.

35 Q. Do you know where she was working at that time?

A. Retravision.

40 Q. You see, can you go to paragraph 38?

A. Yes.

Q. You see it says there,

45 "When Sarah, the third child, was about two and a half months old, Kathy went back to work at BabyCo on Saturdays and Sundays. We had to do this for financial reasons."

50 Then you go on, "I looked after Sarah on these days."

A. I can see that.

Q. You see, it was the case, wasn't it--

A. No.

55 Q. --that when your wife went back to work, amongst other reasons, from time to time, it was because of financial reasons?

A. That's what I've said there, but that wasn't the

case.

Q. So, you lied there?

5 A. That was another one of the lies that day, yes.

Q. Did you lie when you made it, or did you go back and correct it?

A. I added that in on the 23rd.

10 Q. Now, when Patrick was born, again, your wife was euphoric?

A. When Patrick was born.

Q. When Patrick was born, yes?

15 A. Please explain "euphoric".

Q. Was she overcome with happiness?

A. No.

20 Q. Well, can you go to paragraph 20? Can you read the last sentence? Read it out loudly?

A. "Patrick appeared to be healthy and Kathy and I were overcome with happiness".

25 Q. Well, you're saying today that she wasn't?

A. I'm saying she wasn't euphoric.

Q. Well, remember when you asked what "euphoric" meant and you said "overcome with happiness", I used the words "overcome with happiness" and you said "No"?

30 A. I don't think "overcome with happiness" means "euphoric".

Q. Putting that to one side for a moment, remember I asked you the question based on those words, "Overcome with happiness" and you said, "No"?

35 A. Well, I wouldn't say she was overcome with happiness.

Q. Well, let's read the question and answer. The question was:

40 "Q. Now, when Patrick was born again, your wife was euphoric?"

45 and your answer "When Patrick was born?"

"Q. When Patrick was born, yes?"

A. Please explain euphoric."

50 And "Q. Was she overcome with happiness?" And you said, "No". Do you understand that was the sequence, putting to one side what you now believe is the meaning of the word "euphoric"? I put to you, using those words, "Was she overcome with happiness?" And you said "No"; do you agree with that? That's what I've just read?

55 A. Yes, I agree with that.

Q. Well, in your statement you say she was?

- A. Okay, so she was.
- Q. Well, what is the case?
- A. She was overcome with happiness.
- 5 Q. Why did you say "No" a moment ago?
- A. I misunderstood where you were going with it all, or what you meant.
- 10 Q. You weren't lying?
- A. No.
- Q. So, were you lying when you said those words in the statement, "Kathy and I were overcome with happiness"?
- 15 A. I think I was.
- Q. You, in fact stayed at home for the early part of Patrick's life?
- A. I did.
- 20 Q. Was your wife still, however, the primary caregiver; she was the one who would feed the child?
- A. We, through that period of time, we both took care of the boy.
- 25 Q. And what about at night?
- A. I'd say through the early hours of the morning of a night it would have been Kathy.
- 30 Q. She would have been the person who woke up for the night feeds?
- A. That's correct.
- Q. And was she happy being a mum?
- 35 A. She appeared to be.
- Q. And did she appear to be enjoying it?
- A. Most of the time she did.
- 40 Q. Can I just go back a moment? Remember the interchange a moment ago about "euphoric" and you said "What does euphoric mean"?
- A. Yes.
- 45 Q. At page 107 of the transcript of this trial, line 34 - sorry, Mr Folbigg, it is the evidence, not the statement - this is what you said last week in answer to the Crown's questions:
- 50 "Q. What was your attitude and Kathy's attitude to the birth of Patrick?"
- And you say,
- 55 "Oh, that day--
- Q. Well, in the very initial stages"

and you said, "Oh, euphoric".

Q. You were both euphoric?

A. Yeah."

5

Now, this was a transcript of last week's evidence?

A. Mmm-hmm.

Q. And it was you who used the word "euphoric" there?

10 A. Mmm-hmm.

Q. But you didn't know what it meant today?

15 A. It's not that I didn't know. I wanted to hear what your interpretation of it was. I know what euphoric is to me. And you've told me what you think euphoric is.

Q. But, anyway, when you gave this evidence last week, you didn't put any qualification on that?

20 A. No, because I used "euphoric" in terms of what I understood and what I meant by euphoric was.

Q. Again, so far as your wife was concerned, you didn't qualify that in any way? You didn't put any--

25 A. Nobody asked me to.

Q. You see, one of the statements you made in December last year, again only three months ago - you say this - this is at paragraph 7, page 2, of 11 December:

30 "Again, Kathy seemed happy about the birth and interacted with Patrick well. After they arrived home from the hospital I didn't notice Kathy having any serious problems coping with motherhood. At that time I quit my job to spend
35 more time with Patrick and, therefore, money was tight. Again, I don't recall Kathy's behaviour diverging to any extent. She was proud to show him off to other people and generally happy. She was grumpy like before from the lack of
40 sleep, but that's about it. I couldn't see that she was stressed out about being a mum."

Now, you said that, again, not in 1999 or not in the context of your being blind to the love; this was a
45 statement made on 11 December last year, three months or so ago - four months ago. No - was that the truth?

A. Yes.

Q. And after about three months you went back to work?

50 A. I did.

Q. There were no problems about your going back to work?

A. How do you mean?

55 Q. Well, there were no problems between your wife's interaction with the child or ability to care for the child that gave you any reservations about going back to work?

A. None at all.

Q. Everything was normal?

A. Seemed fine.

5

Q. She was happy to be a mother?

A. Seemed so.

10 Q. She appeared to be enjoying it?

A. Seemed to be.

15 Q. Despite your making many, many statements, there is nothing in any of these statements that you've suggested any incident, anything that would suggest that she was not coping with the child?

A. That's correct.

Q. And you've had years to think about this?

A. Sorry--

20

Q. You've had some years obviously to think about this?

A. About this what?

25 Q. About, obviously, recalling everything you can about her relationship with the children?

A. I wouldn't say I've had - it's been years since this boy was around.

30 Q. Well, let me put it this way: You remember earlier on today I was telling you about going to the police on 11 December. Again, remember I took you through parts of that in relation to Caleb, where you were asked to recall everything you could about your wife's relationship with the child?

35

A. Yes.

Q. Well, the part that I've just read is part of the same statement, and you were asked to recall everything about the child Patrick?

40

A. Yes.

Q. And there is nothing there that suggests you had any concerns or misgivings?

45

A. No.

Q. Or could relate any incident?

A. No.

50 Q. Now, on the night of the ambulance taking the child Patrick to hospital; do you recall that, that night? That was 17 October 1990?

A. I recall 17 October 1990.

55 Q. Now, again, in your statements, you mention nothing about that night being anything but normal?

A. Correct.

Q. And that's your recollection here today?

- A. That seemed like a normal night.
- Q. There were no stresses?
- 5 A. I certainly didn't see any.
- Q. No arguments?
- A. Not that I recall.
- Q. Well, when you say you didn't see any, you were in
10 the house?
- A. As I said, Kathy didn't really show much, or say much.
- Q. There's nothing that you saw about her, anything
15 about her demeanour, that gave--
- A. Not that I recall.
- Q. --gave you concern? And when Patrick was put to bed,
20 everything was normal?
- A. Seemed so.
- Q. You awoke that night at about 3.30 and your wife was
screaming?
- 25 A. I was woken by the scream.
- Q. And you went into Patrick's room?
- A. I rushed into Patrick's room.
- Q. And you saw your wife in front of the cot?
- 30 A. I saw Kathy sort of kind of at the end of the cot.
- Q. Not in front of the cot?
- A. About there (witness indicated).
- 35 Q. Well, can I take you to paragraph 24 of your
statement, of 19 May, your first statement? It is on page
9. You see the second sentence, "I rushed into Patrick's
room and I saw Kathy standing in front of the cot". Why
the qualification here today? What is the significance--
- 40 A. I need to show you. Cot's in the corner, corner,
wall. She's there - that's the front of the cot at the
end. She couldn't be behind because there was a wall
there (witness indicated).
- 45 Q. You say in your statement that Patrick was lying on
his back and the covers were not on him?
- A. No, they weren't.
- Q. However, you say in your statement that they were
50 crushed up near his feet and he looked as though he had
kicked them off?
- A. That's what it appeared.
- Q. And you said that in your statement in May?
- 55 A. Yes.
- Q. That wasn't a lie?
- A. No.

Q. You've described, in evidence, the sequence at the hospital and the history that Patrick had of seizures; do you recall giving evidence about that?

5 A. He developed those?

Q. Yes.

A. And - yes.

10 Q. And those seizures were quite stressful?

A. For me?

Q. For your wife?

A. Well, yes.

15

Q. Your wife attended to Patrick's needs after the time at the hospital, after this day when the first seizure took place at the hospital?

A. At the hospital?

20

Q. Well, in the times after that?

A. It appeared to me that that was the case.

Q. It was a very difficult time?

25

A. Yes, it was.

Q. And you said in evidence - this is at page 112 from line 4 - you say this:

30

"She had this little fellow that she had to work out his - do his medication. On top of all the normal mum stuff; feeding him, bathing him, teaching him things. Then she also had the Royal Blind Society was involved as well so she could - they could try to keep him on track for his age development. So she had a huge amount of stuff to do."

35

That is what you said in evidence last week?

40

A. Mmm-hmm.

Q. And you were then asked:

45

"Q. Are you able to tell us how she coped with all of that?

A. Not very well.

50

Q. What was it that you saw or observed or she said that led you to think that? What sorts of things happened to show that she wasn't coping very well?

A. She sort of would lose her temper a bit.

55

Q. With whom?

A. With me and Pat. Get frustrated."

Do you recall giving that evidence?

A. I do.

Q. Were those reactions, as you'd observed, understandable in light of the burden that was placed upon her?

5 A. I guess so.

Q. You say that she did the normal things about bathing and feeding, but she - using your own words - was teaching him things?

10 A. Yes.

Q. In other words, interacting with him on a day-by-day basis, ensuring his development by teaching him?

15 A. Yes.

Q. And, similarly, with the Royal Blind Society, that she interacted with them, sought their advice and acted upon their advice?

20 A. She didn't seek their advice. They gave it, offered it, and she didn't interact with those people. She missed appointments and didn't respond to telegrams that they sent.

Q. Was she the person who, in fact, was diligent so far as the medications were concerned?

25 A. She was the person who gave the boy his medication.

Q. And, so far as his blindness was concerned, she was, in fact, attempting to teach him, regardless, obviously, of that disability?

30 A. She wasn't the only one who was.

Q. But, putting the question of whether she followed the Blind Society or not, she was attending to those particular needs of the child?

35 A. Yes.

Q. And she was diligently attending to those particular needs?

40 A. She was doing the best she could.

Q. Well, she was doing the best that could be done?

A. I suppose.

45 Q. Well, was she? She was doing the best that could be done?

A. She didn't keep appointments.

Q. Well, I am asking you about her day-to-day care of that child?

50 A. Appeared to be.

Q. Let me finish the question. And the particular needs so far as the difficulty of the blindness was concerned, she day-to-day attended to that disability?

55 A. (Witness nodded).

Q. Well, you nodded yes?

A. Yes.

Q. And it was quite a stressful situation for both you and she?

5 A. Yes, it was.

Q. Quite distressing at times?

A. Very distressing at times.

10 Q. She expressed feelings of inadequacy about her care from time to time about the child?

A. Not to me.

15 Q. She expressed to you that she felt inadequate that she wasn't doing the right thing at times?

A. Not to me.

Q. I put it to you that she expressed questions of whether she was doing things right with Patrick?

20 A. I don't recall.

Q. Well, are you excluding it out of hand?

A. No.

25 Q. So, she could have said those things, that she was concerned and that she was maybe was not just doing it right so far as his particular needs were concerned?

A. No, because she - she never usually said things like that.

30

Q. Well, you dismiss that out of hand?

A. Well, yes, I guess I do.

35 Q. I see. I put it to you at times she needed reassurance from you that, no, she was doing a good job?

A. She didn't seek any reassurance from me at all.

Q. Your sister, Carol, was involved at this time?

40 A. We had - or I had - cause to ask for Carol's assistance.

Q. Now, Carol was called in, you say, after you read the diary?

45 A. I found a diary of Kathy's on her bedside table and read an entry.

Q. The diary was in plain view?

A. It was sitting on her bedside table?

50 Q. In plain view?

A. Yes.

Q. And you read that; you read the diary?

55 A. No, I read it - I read an entry.

Q. Yes. And you concluded that she appeared to be going through a lot of emotional turmoil?

A. Yes.

Q. And, in those circumstances, you called upon your sister, Carol?

5 A. I asked Carol to come over and sit with Kathy and I and have a talk about things, because Kathy had handwritten in her diary that entry that I had read, that she wasn't coping, and she was going to leave me and Patrick, and I had all my family and Patrick, and I would be better off without her.

10

Q. You said "wasn't coping". They are the words you just used. "Wasn't coping"?

A. That's what she had written in her diary.

15

Q. You see, your wife had a good relationship with Carol?

A. Yes.

20

Q. And Carol spent quite a lot of time with her?

A. Carol tried to be there for her as far as I'm aware.

Q. And in those times that she was offering your wife quite some reassurance, she was good at what she was doing?

25

A. I don't know what she offered my sister.

Q. I'm asking you about your sister reassuring her?

A. I don't know what my sister offered her.

30

Q. Was there any discussion at that time about the need for you to share the workload of Patrick's care?

35

A. I did share the workload of Patrick's care when I was home from work, so there wouldn't have been any further discussion of me taking on any further workload because, when I was home, I hooked in and gave a hand.

Q. At this point in time, are you saying that there was no discussion, there was no discussion about her feeling inadequate, and that you needed to help more?

40

A. I don't really recall.

Q. Well, doing your best, doing your best, do you recall discussions at this time, when Carol was offering assistance, to the effect that there was a need for you to do more and that the load, because of Patrick's particular disabilities, was a very difficult burden, one that you needed to share more in?

45

A. I don't recall that discussion.

50

Q. Are you dismissing it out of hand?

A. No.

OBJECTION TO QUESTION. OBJECTION WITHDRAWN.

55

Q. From that time onwards, Carol was around your house quite a bit?

A. Well, we mostly went over to Carol's place, from memory.

- Q. But there was quite a bit of sharing of the workload of Patrick's needs from time to time with Carol?
- 5 A. As far as I'm aware, yes.
- Q. There was quite some need for physiotherapy?
- A. I don't recall.
- 10 Q. You see, there was need for physiotherapy, wasn't there, that your wife and Carol had carried out?
- A. Physiotherapy?
- Q. Physiotherapy, sorry?
- 15 A. On his body?
- Q. Yes.
- A. Well, I don't recall.
- 20 Q. You don't recall there being any physiotherapy?
- A. Is that where you get someone on the ground and bend them around; twist them and stuff?
- Q. Well, let me put it this way? Did your sister, Carol, involve herself in the day-to-day care of Patrick from time to time; in other words, assist her with the care of the child, Patrick?
- 25 A. Yes.
- Q. And that appeared to have some positive effect on your wife?
- 30 A. Yep.
- Q. She had someone to share the workload?
- 35 A. She had someone to help her.
- Q. Yes. Particularly the workload, so far as attending to Patrick's particular needs because of his disabilities?
- A. That's what it appeared, yep.
- 40 Q. And that had quite some effect on your wife's emotional well-being?
- A. She seemed to settle down a bit.
- 45 Q. And, again, despite these particular disabilities, as I have taken you through your statements, again, there was nothing that you can recall that suggested that she was in any way abusive of Patrick?
- A. Not that I recall.
- 50 Q. There was no incident at all. Remember I asked you those questions a moment ago, taking you to the statements? There is nothing that you can relate to this Court, any incident or any other matter, that relates negatively to her motherhood?
- 55 A. As in was she physically violent?
- Q. Well, remember a moment ago I took you through your statement?

A. Yep.

5 Q. And asked you whether there was any incident,
anything that you could recall, that impacted negatively
on her treatment of Patrick?

A. No.

10 Q. There was nothing, was there?

A. No.

ZAHRA: Is that a convenient time, your Honour? I am
about to go on to another topic.

15 HIS HONOUR: Yes. We will take the luncheon adjournment,
ladies and gentlemen.

IN THE ABSENCE OF THE JURY

HIS HONOUR: You may step down, Mr Folbigg.

5 <WITNESS STOOD DOWN

10 HIS HONOUR: I forgot to mention to counsel before this jury note. One of the jurors is due to graduate from one of the Sydney Universities on 9 May and would like to be able to be there in person. I think that is a reasonable request.

CROWN PROSECUTOR: Yes, your Honour.

15 HIS HONOUR: The juror doesn't say what time the graduation is, but asks for the day off. I think it is reasonable to grant it.

20 CROWN PROSECUTOR: Yes, we would agree with that, your Honour.

25 Your Honour, just one point, if I might raise it. One of the medical officers who saw Caleb during the time that he was alive is Dr Springthorpe. Your Honour has heard mention of him. He, as I understand it, is elderly, and has recently had a heart attack, and has agreed to come down to Sydney this afternoon, to make himself available to give evidence, and we would like to intervene him. I understand that my friend has kindly agreed to that.

30 ZAHRA: Can I indicate, to accommodate that, Mr Cook will be cross-examining Dr Springthorpe? We have no problem with that.

35 CROWN PROSECUTOR: Would it be suitable to do that at 2 o'clock?

ZAHRA: Yes, that is fine.

40 HIS HONOUR: Whenever it is convenient for counsel, that can be done.

LUNCHEON ADJOURNMENT

45

RESUMPTION

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: There is one thing I have forgotten, yet again, to mention. About the note that came from one of your number, we shall not sit on Friday, 9 May, so that your graduand can graduate.

10 CROWN PROSECUTOR: Dr Springthorpe, a consultant paediatrician, is here from Newcastle. He is only available this afternoon. I understand my friend has no objection to me intervening Dr Springthorpe now, so I wish to call him out of order. He is in relation to Caleb.

15 ZAHRA: Can I indicate, to accommodate that, Mr Cook will be cross-examining Dr Springthorpe.

20 <BARRY JOHN SPRINGTHORPE(2.13PM)
INTERPOSED, SWORN AND EXAMINED

CROWN PROSECUTOR: Q. Would you please tell the Court your full name and your place of work?

25 A. Yes. May I get my notes out as well?

Q. Yes, please?

A. My name is Barry John Springthorpe. I'm a consultant paediatrician in private practice in Newcastle.

30 Q. Do you tell the Court that you got your medical degrees at Sydney University in 1960?

A. Yes.

35 Q. You worked for many years in general practice in Yorkshire, in the United Kingdom; and various places in Canada; Newcastle, and in Taree?

A. That's true.

40 Q. Did you then become a paediatrician?

A. Yes.

Q. As part of your activities in Newcastle, did you establish the Child Development Unit in 1976?

45 A. That's true.

Q. Did that unit have an emphasis on the development problems of children, SIDS and child abuse?

A. That's true.

50 Q. As part of your role in that group, did you establish a group known as SCAN, suspected child abuse and neglect group?

A. Yes.

55 Q. Were you the consultant paediatrician at the Royal Newcastle Hospital for some years?

A. Yes, that's right. I should perhaps explain there that the paediatric centre in Newcastle shifted over the

years from Royal Newcastle to the Mater to the John Hunter.

5 Q. Do you currently have hospital appointments at John Hunter, a private hospital, and are you the honorary associate physician at the Children's Hospital at Westmead, the honorary associate in paediatrics at the Sydney Children's Hospital in Randwick, and a fellow in paediatrics at the Medical School of Newcastle University?
10 A. Yes. I was the fellow in paediatrics. I don't hold that post now.

15 Q. Do you have a number of publications, including in the area of child abuse and non-accidental childhood injuries?
A. Yes.

20 Q. Have you presented papers at various medical conferences, including conferences on child neglect and abuse, and SIDS?
A. Yes, that's true.

25 Q. On 2 February 1989, did you examine a young baby, Caleb Folbigg, at the Western Suburbs Hospital in Newcastle?
A. Yes, I did.

Q. Was Caleb then about 14 hours old?
A. That's true.

30 Q. Did he require oxygen through the night, which is quite a common thing in newborn children?
A. That's true.

35 Q. Over the next few days did his condition improve?
A. Yes.

40 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.

45 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.

50 Q. Did Caleb's father at some stage express concern to you about Caleb's noisy breathing during feeding?
A. Yes, he did.

55 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.

5

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

A. Yes, I did.

10

Q. Was that in your rooms?

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

Q. You took a photograph of mother and child?

A. That's right.

15

Q. At that stage, did you examine Caleb?

A. Yes, I did.

20

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, 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.

25

Q. Can you spell that?

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

30

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

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

Q. What is a floppy larynx?

35

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

40

Q. Was Caleb premature?

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

45

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, it wasn't apparent at rest. I specifically asked the parents if it interfered with feeding or with sleeping and was reassured that it had not.

50

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

55

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.

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

A. That's right.

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

A. That's right.

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

A. Yes.

15

Q. Having been put down at around 1am?

A. Yes.

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

A. Yes.

25 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. 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.

30

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

A. Yes, I did, Dr Roy Cummings.

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

A. He certainly did.

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

45 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.

50 Q. So, in your opinion, did the stridor have anything to do with his death?

A. In my opinion, it had nothing to do with his death.

55 Q. Is this the case: The cause of death in your mind still remains a mystery?

A. That's true.

Q. In the course of your activities as a paediatrician and all of those things that I mentioned in your qualifications, are you able to tell the Court whether it

is possible to smother a young baby and to leave no external signs at all?

5 A. Yes, it most certainly is. A pillow over the face could certainly cause this child's death and not leave any marks whatsoever.

Q. What about a hand?

10 A. Well, because of the baby's age, there wouldn't be very much pressure involved. It's possible, but certainly a pillow over the face would not leave any marks at all.

15 Could I add here that over the years people have looked for absolute signs of babies dying from SIDS as a cause and, although there have been various theories floated over the years, none of these have stood up to examination of the petechiae in various parts of the brain, and so on.

20 Q. So, SIDS is, as yet, at this stage, a cause of death from unknown origins?

25 A. Yes. Sudden death can occur at any age. This is children who die unexpectedly in childhood. We look for a possible cause and, if we are unable to establish that cause, then it is put in the broad category of sudden infant death. It should really be called sudden unexpected death in infancy, or sudden unexplained death in infancy.

<CROSS-EXAMINATION

30 COOK: Q. Just a few matters. Firstly, you first met Mrs Folbigg at the hospital, is that right?

A. That's true.

35 Q. That was in your capacity as a paediatrician?

A. That's right. I saw a number of babies in the maternity hospital, and Caleb was one.

40 Q. You then became Caleb's paediatrician for a period after that?

45 A. Yes. If babies have perfectly uneventful times, then it is not always necessary to have a follow-up visit, but where there has been some concern, and things not running smoothly, then I make it my practice to see them for follow-up.

50 Q. Was it because this baby did have some complications to his health that you arranged for a follow-up visit? Is that right?

A. Yes.

55 Q. Just going back a little to when you first saw Mrs Folbigg and the baby at the hospital, did you have some discussion with her, or were you led to believe, that she had some particular intention in relation to breastfeeding initially?

A. Yes, I have made a note at the time.

Q. What was her initial intention, so far as you were

aware?

A. That she intended to breastfeed if she could, and that there was a big family on her husband's side, and she herself was adopted. She was the third of two siblings.

5

Q. But you learned that later she didn't continue with the breastfeeding, is that right?

A. That's true. I have a note on the third of the second, so the next day, she had decided to abandon breastfeeding.

10

Q. In your experience as a paediatrician of longstanding, it is very much a matter of personal preference among women, isn't it; breastfeeding as opposed to bottle feeding?

15

A. Certainly.

Q. In relation to the floppy larynx, that was a matter of concern to you, is that right?

20

A. Not of particular concern because, as I have said before, it didn't interfere with feeding and it didn't interfere with the baby's sleep. If it had, then we would have contemplated doing further investigations.

25

Q. But it was of sufficient concern for you to arrange for Mrs Folbigg and the baby to attend on you in your rooms on 17 February, is that right?

A. Yes.

30

Q. You observed then that it wasn't a particularly serious problem, is that right?

A. That's true. Very mild, in fact.

35

Q. But it was exacerbated or worsened if the child lay on his back, is that right?

A. Yes, which is so of all such children.

Q. That is so of all upper airways obstruction children?

40

A. Children with floppy larynx. As it sags back. Obviously, if they are lying quietly, it is not very prominent. As soon as the effort increases, it becomes more exaggerated.

45

Q. Is this right: The most vulnerable position a child like Caleb could be, regarding upper airways obstruction, is to be lying on his back and becoming distressed, is that right?

A. That's oversimplifying the matter, because, as you are probably aware, the current recommendation, or recommendation as far as SIDS children are concerned, for some time has been to lie them on their back. Experience teaches that there are some children who are not happy lying on their back and will roll on their side or, in fact, like to sleep face down, and provided the mattress is firm and other factors are taken into account, then it's not a problem.

55

Q. Sure, but this child, you noted, had his problem

worsened when he was lying supine, is that right?

A. That's right.

Q. And, also, when he was upset?

5 A. That's right.

Q. Now, when you saw the parents for a consultation after Caleb's death, you got some information from Craig Folbigg, the husband, about particular concerns that he had had, is that right?

10 A. Yes. I have a note made at the time that the family were counselled, but that Craig, the father, noted as "F" for father, "was very bitter but coping" and I have noted "See comments regarding his mother dying when he was 15 and the brother's child dying".

Q. Did Craig Folbigg tell you at this follow-up consultation that he had wanted to take the child, Caleb, into bed with him on the night that Caleb died?

20 A. Yes, he did.

Q. Did Craig Folbigg tell you that that was because of particular concerns he had had on that night about Caleb?

25 A. Yes. I have a note there that Craig was concerned that the stridor might interfere with Caleb's feeding and he wanted to pick him up and take him to bed with him that night at around the 1 o'clock mark.

Q. Did he tell you that he had noticed some particular difficulty with the child at about the 1 o'clock mark that led him to want the child in bed with him?

30 A. I don't have a specific account of that, but my assumption, and recollection at the time, was that the baby was just unsettled, and that was the reason he wanted to take him in.

Q. Of course, is this fair to say: If the child were unsettled, assuming that's another way of saying mildly distressed or distressed, then that is something which would exacerbate the condition?

40 A. Yes, certainly.

Q. Now, in some cases, a floppy larynx can cause a complete airways obstruction, can't it, in a child?

45 A. If it's sufficient to cause obstruction, then we investigate the problem further with sleep studies, and perhaps direct visual impairment. If that's the case, one of the concerns is that there is a web or a cyst down there, or a blood vessel formation, that is actually adding to the obstruction. As I say, this was ruled out in his case.

Q. But, in particular cases of this condition, it can lead to a blockage of the upper airways, is that right?

55

OBJECTION. HYPOTHETICAL.

CROWN PROSECUTOR: He said he ruled it out in this case.

What possible relevance can other cases have?

HIS HONOUR: The question may be answered.

5 COOK: Q. In some cases - and I understand you would say in worse cases than this - in some cases it can cause a blockage of the upper airways in an infant child, is that right?

10 A. Given that this was a newborn infant and if there was obstruction to that degree we would certainly have taken other steps. It was not of that degree.

15 Q. Do I understand what you are saying to be that at particular degrees, and worse than this on what you say, it can cause that obstruction to breathing, is that right?

A. It can cause that obstruction, but if this was the case we wouldn't have discharged this child from hospital.

20 Q. You are talking about this child?

A. Yes, this particular child. You have to take it on a case-by-case basis, obviously.

25 Q. Is this a condition which can get better or get worse within a matter of days in a young child; a young baby?

30 A. No. The natural history of this is that it gradually improves as the child gets older and the airways get bigger and the cartilage gets stronger. In the vast majority of children, it ceases to be a problem by the time they are six to nine months of age; certainly by the time they are 12 months of age.

35 Q. Is this fair to say: The younger the baby is, the more vulnerable it is to having an upper airways obstruction caused by a floppy larynx?

A. Certainly.

40 Q. Could you explain the mechanism by which the floppy larynx can lead to an airways obstruction?

45 A. Well, the noisy breathing is a function of air passing through a narrow passage and, as I say, if there are cysts or webs or other mechanical obstructions that can cause this, then, in the case of the floppy larynx, it is just because the cartilage of the larynx is so soft, and the same problem can occur further down in the trachea, that when the child makes the effort of breathing and the bigger the breath, and the harder the breath, the worse it is, then that airway collapses because it hasn't got the strength to stay open.

50 Q. The airway can collapse in the absence of cysts or webs, can't it?

A. Yes, certainly.

55 <RE-EXAMINATION

CROWN PROSECUTOR: Q. You told my learned friend, Mr Cook, that in this particular case you were able to rule out complete airways obstruction in Caleb?

A. From a mechanical cause, yes.

Q. How were you able to do that?

5 A. The post-mortem examination did not reveal any of these other problems that I mentioned. The stridor is a functional thing. As I say, when children are breathing quietly, as in his case, the airway is perfectly adequate and doesn't collapse in, and doesn't cause any noise, nor any symptoms.

10

Q. What about during his life when you examined him? Were you able to rule it out on those occasions?

A. The cysts and so on, do you mean?

15

Q. Yes.

A. No. You can't visualise them from above. You have to use special instrumentation or, in this case, post-mortem.

20 Q. So, your conclusions are based upon the post-mortem examination?

A. No. My hypothesis with the child was that it was simply a floppy larynx, but the exclusion of those cysts or webs was made at post-mortem, so we were quite sure that they did not occur.

25

Q. Now, you were asked questions about what you were told by the parents and, in particular, by Craig. Did you send a letter on 21 March 1989 to a GP in Newcastle?

A. Yes, I did.

30

Q. If I could direct your attention to the third paragraph, the second sentence?

A. Yes.

35

Q. Did you say this: "Both the parents in retrospect were sure that the stridor did not distress Caleb unduly during sleep."

A. Yes, I did.

40

Q. Was that based upon what you were told by either or both parents?

A. Yes.

45

Q. Are you able to say either or both?

A. No, I haven't noted - actually, I specifically said "both the parents in retrospect", so I obviously asked them both.

50

<WITNESS RETIRED AND EXCUSED

<CRAIG GIBSON FOLBIGG(2.41PM)

HIS HONOUR: Do you want Mr Folbigg to have his statement again, Mr Zahra?

55

ZAHRA: Yes, it might be of assistance.

HIS HONOUR: Would you mind giving it to Mr Folbigg?

(The witness was handed a copy of his statement.)

5 Just leave it face down, thank you, Mr Folbigg. You will be asked to look at it in due course.

<CROSS-EXAMINATION CONTINUED

10 ZAHRA: Q. Just before lunch I was asking you some questions about the circumstances in which your sister Carol was called in to assist your wife. Do you recall me asking you about that?

15 A. I do.

Q. Did you ever express concern to your wife in a sense that your relationship was under pressure because of the attention that was needed totally to the child, Patrick?

20 A. Not that I recall.

Q. Do you recall ever making a statement to your wife that, in a sense, with the way things were going the attention to you by her was given a fairly low priority?

25 A. Not that I recall.

Q. Could you have said that?

A. I wouldn't rule it out of hand.

30 Q. Can I take you back to the morning of Patrick's death? You have given evidence last week about how things appeared when you left for work that day, do you recall that?

A. I recall I did, yes.

35 Q. You were asked this, page 114, line 50:

"Q. When you left that morning how did Kathy appear?

40 A. I say the same as usual, but I really don't know whether I could say whether I really took a huge amount of notice.

Q. Certainly there was nothing unusual that you noticed?

45 A. No."

Do you recall those questions and answers from last week?

A. I do.

50 Q. Is it to be understood from your answer that you can't assist one way or the other as to whether your wife appeared to be quite normal at that time?

A. I don't understand the question, I'm sorry.

55 Q. Is it to be understood from that answer that you can't recall whether she was normal or not, or are you concluding there that she was normal?

A. I'm - I don't believe I'm trying to conclude anything.

I'm trying to say.

5 Q. What do you mean by the answer, "I say the same as usual, but I really don't know whether I could say whether I really took a huge amount of notice"?

A. Well, I don't recall whether I took a huge amount of notice.

10 Q. What is your memory today?

A. I remember that morning when I left for work I was sitting in a chair and Patrick was on the table and he was eating a piece of toast and I remember kissing him and saying, "Who loves you bubby?", and I left for work, carried him to the door, gave him to his mother - I assume that's what I did - and then went to work.

15 Q. He appeared to be quite okay?

A. He seemed fine.

20 Q. He seemed content and happy?

A. He did.

25 Q. What about your wife? What do you recall about her?

A. I don't recall very much about her that day.

ZAHRA: Might he have a look at his statement?

HIS HONOUR: Yes, please look at your statement.

30 ZAHRA: Q. Might I take you to paragraph 28? Can you see the last sentence there: "I kissed him goodbye and left for work about 7.30am. When I left, Kathy appeared her normal self and nothing out of the ordinary had occurred this morning or the previous days."

35 A. Yes, I can see that.

40 Q. Well, were you lying then or were you telling the truth?

A. No, that's the truth.

45 Q. You had quite a memory of this in May 1999 sufficiently to make a positive note in this statement to that effect?

A. That I didn't take any notice?

50 Q. Well, it doesn't say that, does it, that you didn't take any notice?

A. Well, when someone appears to be their normal self, it's because you have not really taken all that much notice.

55 Q. Well, you say "appeared her normal self and nothing out of the ordinary had occurred this morning or the previous days"?

A. Correct.

Q. Are you saying also that, so far as "nothing out of the ordinary occurred this morning" is concerned, that is

something you positively recollect, or are you assuming?

A. No, I'm sorry, I'm confused.

5 Q. Do you have a memory of the fact that nothing out of the ordinary had occurred this morning, or are you assuming that?

A. I have a memory that nothing out of the ordinary had occurred that day.

10 Q. That included your wife, Kathy?

A. I have a memory that nothing out of the ordinary had occurred that day.

15 Q. And also that nothing had occurred this morning or the previous days?

A. That's how I remember it.

Q. That's your memory here today?

20 A. That's how I remember it.

Q. Are you seeking to qualify that answer in some way; that there might have been something?

25 A. As I said, my whole life really was how it appeared, and it appeared that day that nothing out of the ordinary was there.

30 Q. You see, you have said nothing since this day of making this statement that might suggest that there was anything that you recall about your wife's demeanour on that day being negative?

A. Not that I recall.

35 Q. Well, you would agree that you have said nothing since this day about - anything about - your wife that concerned you on this morning?

A. I don't recall if I have said anything since then.

40 Q. I put it to you that you haven't made a statement qualifying this part of your original statement in any way since then?

A. And?

45 Q. All right. Do you accept that?

A. If that's what you are saying to me?

Q. I am putting that to you. You can reject it, if you wish?

A. I don't recall.

50 Q. See, before lunch I took you to the statement of 11 December. Do you recall me doing that?

A. I do.

55 Q. Do you remember me taking you to the passages in relation to Patrick?

A. I do.

Q. Again, you would agree that there is nothing there

that you mentioned about your wife, Kathy, in any negative way?

A. Fair enough.

5 Q. That was only December; four months ago?

A. Four months ago.

Q. You would agree with that?

A. Okay.

10

Q. You left for work about 7.30?

A. Yes. I used to ride a push-bike to work, so it would have been about 7.30, so I could have got there on time.

15 Q. At 10am your wife telephoned you at work and she was screaming at that time?

A. She screamed, yes.

20 Q. It was about 10 o'clock, so some two and a half hours after you left this house, where everything appeared to be okay?

A. That's so.

Q. Your wife had not been under any stress at that time?

25 A. It didn't appear to me that she was.

Q. Or having any difficulties with the child on that morning, or the days previous, as you said in your statement?

30 A. Fair enough.

Q. Now, you were asked questions about both yours and your wife's reaction to the death of Patrick. You said this at page 117, line 15: "That it devastated me and devastated Kath."

35

A. Yes.

Q. That's your recollection here today?

A. Yes.

40

Q. You were overcome with grief?

A. I was.

Q. Was your wife also overcome with grief?

45

A. It appeared to be the case.

Q. What do you mean "appeared to be the case"?

A. Kathy pretty much just got back on with things, so it appeared from time to time that she was hurting about the fact that Patrick had died.

50

Q. When you were told about the death of Patrick by the ambulance officers, you were overcome with grief?

A. The ambulance officers didn't tell us about Patrick.

55

Q. Sorry. You went to the hospital, I'm sorry. At the Mater Hospital?

A. Yes.

Q. When you were told that, you were overcome with grief?
A. I remember being distraught.

5 Q. What about Kathy? Did she appear to be overcome with grief at that time?

A. We were in a little room and her Mum was in there with us. I remember her mother put her arms around her, tried to put her arms around me, and I pushed her away, and,
10 yes, Kathy did look very upset.

Q. Did she appear to be overcome with grief?

A. Yes.

15 Q. Subsequent to that, you continued to suffer quite some grief?

A. I did.

20 Q. You, in fact, indicated in evidence that you had lost your job?

A. Yes.

25 Q. You say that you went into yourself, or "I went into myself". That's the expression you used. What do you mean by that?

A. Pretty much just kept to myself. Spent a lot of time down in my garage. Eventually I got another job. But I pretty much just kept to myself.

30 Q. Was it the case that at this stage there was very little communication between you and your wife?

A. That is the case.

35 Q. Would you attribute that to that aspect of your personality? That you just went into yourself. You wanted to be on your own?

A. No.

40 Q. You said this, when you gave evidence - page 117, line 21:

45 "The world pretty much stopped for me. I lost my job, didn't really sort of see any sunshine in any situation or anything like that, and sort of went into myself. Spent a lot of time in my garage. Pretty much kept away from a lot of people, and that's how I am."

50 That's the way you described it the other day. That part of you?

A. Yeah.

Q. That's the way you are?

55 A. Yep.

Q. So, you were there the other day, correct me if I am wrong, saying that your reaction was the way you were. You went into yourself. You kept away from a lot of

people "and that's how I am"?

A. That's what I said the other day.

5 Q. In a sense, you were remarking on your personality.
That's the way you are. That's the way you reacted?

A. Yes.

10 Q. You then say that your wife "gets on with things" in
that same sentence?

A. Uh-huh.

Q. You would agree that that's the way you have expressed
it?

15 A. Yes.

Q. So, is it to be understood from what you are saying
there that what you are remarking about here is the
difference in personalities. You react in one way,
because that's how you are; and then she reacts
20 differently. She gets on with things?

A. What I would like you to understand is I like to talk
about things and I like to talk about Pat and Caleb and
how they were as bobbies and how much fun they were and
how loving they were and how much fun it was being their
25 Dad. I tried to many, many times to coax Kathy into
conversations like that, and she would not talk about
those babies. So, what you do to defend yourself from the
inevitable of the fact that this girl wouldn't talk about
the life that you had had, you just go into yourself.

30 Q. Can you attribute it, therefore, to the difference in
the personalities, the difference between you and she, so
far as expressing grief is concerned?

35 A. Well, that is the difference, expressing grief.

Q. It is a difference in personality. It is the way
different people react to grief in different ways?

A. Obviously.

40 Q. In fact, you go on to say, in that same passage, in
that same answer: "I wouldn't say that she just forgot
the little fellow." Do you recall saying that?

A. I do.

45 Q. So, is it to be understood that what you are saying is
that she reacted this way, but it doesn't necessarily mean
that she forgot about the little fellow, as you say?

A. That's correct, but she didn't want to talk about him,
or about his death.

50 Q. You say, in a sense, that because of this difference,
this was a source of argument?

A. It was a source of tension in the relationship.

55 Q. I think you used this expression "She would rip into
me because all I wanted to do was dig a big black hole"?

A. Yes.

Q. That was a source of tension?

A. Yes, it was.

5 Q. You spoke of some social events after the death of Patrick, where you went with her?

A. Uh-huh.

10 Q. You mentioned nothing about any social event that she went to on her own after the death of Patrick and before Sarah was born?

A. That's correct.

15 Q. I put it to you, apart from going to a staff Christmas party, she didn't go anywhere on her own, socialised on her own, between the time of Patrick's death and Sarah's birth?

A. Fair enough.

20 Q. There wasn't any gym or any dancing at that time?

A. There wasn't any gym, no.

Q. Or dancing?

A. Not that I can recall.

25 HIS HONOUR: We will take just a very short adjournment, ladies and gentlemen.

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Folbigg, you may step down and leave the Court, if you wish.

5

(The witness left the courtroom.)

There is a gentleman seated in the public gallery, just inside the door on his right and my left of the door, right next to the door. Sir, would you mind standing?

10

(The person complied.)

It may be that I am wholly mistaken but I have the impression, and so do others, that you are staring at the Crown Prosecutor. Do you have any particular interest in the Crown Prosecutor in this case, sir?

15

PERSON: Nothing in particular, no.

20

HIS HONOUR: So, we would be mistaken, would we, in thinking that you were staring at him deliberately?

25

PERSON: Yes.

HIS HONOUR: You understand that if you were to do so, it might possibly be construed as interfering with the business of the Court. Do you understand that?

30

PERSON: I do.

HIS HONOUR: I express no opinion about that, of course, but if it came to the point, and I did think that you were trying to interfere with the business of the Court, I might have to consider what I should do about it. Anyway I do not want you to respond to that.

35

PERSON: I'm more than willing to leave the Court.

40

HIS HONOUR: I am not requiring you to leave the Court.

PERSON: I think, your Honour, if the prosecutor feels in any way harassed or intimidated - I think he's acting in the course of justice. It means nothing to me.

45

HIS HONOUR: I am not requiring you to attend or not to attend. I am just asking you not to stare at the Crown Prosecutor. As you say, our impression that you have is mistaken.

50

PERSON: If I am, it is unintentional.

SHORT ADJOURNMENT

RESUMPTION

HIS HONOUR: Officer, I would like the jury brought back
and Mr Folbigg brought in.

5

(The witness entered the courtroom.)

IN THE PRESENCE OF THE JURY

10 ZAHRA: Q. Mr Folbigg, some mention has already been
made about the making of this statement on 19 May and your
coming back at a later stage to continue with that
statement?

15 A. That's correct.

Q. Eventually signing the statement on 23 May?

A. Correct.

20 Q. About four days later. Do you know how much of the
statement you completed in that first portion?

A. No, I don't.

Q. Were there two occasions or were there more than two
that you were with the police to complete this statement?

25 A. There were two occasions.

Q. Do you know how much of the statement you completed
on the first occasion?

30 A. No, I don't.

Q. Was the process, however, on the second occasion to
go back on what you already prepared, or was it just
recommenced and continued on from that point?

35 A. At the start of when I first went back, I told
Detective Bernie Ryan that he should rewind right back to
the start, and I would go through and change some things.

Q. Is that what happened?

40 A. That's what happened.

Q. Do you know what portions you did change?

A. Given an opportunity to read it, paragraph for
paragraph, I could tell you.

45 Q. You don't have a copy of that statement otherwise
than the one that's before you?

A. I have a copy in my possession that I've highlighted
the changes I made.

50 Q. That's the one in the budgie cage, is it?

A. That's correct.

Q. But you changed them because you had lied previously;
is that the case, or were you changing it to lie?

55 A. I changed it to soften the blow of what I'd said the
first time.

Q. And when you did that, you were lying?

A. When I changed it, I lied.

5 Q. Can I just clear up one matter from earlier on. You may recall that, in relation to Patrick, you indicated that there were some appointments that were missed with the Blind Society?

10 A. In cleaning up and going through information that I had at my home, I found information from the Royal Blind Society in the form of telegrams where they were expressing to Kathy that she hadn't responded to them or - yeah, that she hadn't responded to them.

15 Q. Do you recall before lunch I had asked you about whether you recall there being, with your sister, some need for physiotherapy? Do you recall me asking you those questions?

A. I do.

20 Q. Do you recall - I may have misled you - whether there was an occupational therapist, not a physiotherapist. An occupational therapist?

A. No, I don't recall.

25 Q. You don't recall anything about an occupational therapist?

A. No, either.

30 Q. I put it to you that, attending to the disability of blindness, there were two, essentially, organisations, the Blind Society and the occupational therapist, that required - I withdraw that. That there were these two organisations as quite separate: the Blind Society and the occupational therapist?

35 A. Okay.

Q. Could those letters have been from an occupational therapist?

40 A. I distinctly recall having read them and I distinctly recall that - the top of the telegrams were from - that said they were from the Royal Blind Society.

Q. Do you recall there being any discussion from the Blind Society referring Patrick to an occupational therapist?

45 A. I don't recall.

Q. Did you give those letters to the police?

A. I did, eventually.

50 Q. But you don't recall anything about an occupational therapist?

A. No, I don't.

55 Q. You don't recall your sister Carol being involved with any occupational therapist?

A. I can remember Carol and Kathy teaching Patrick to sit up, trying to teach Patrick to concentrate on noises, so that he could reach for things. I can remember that.

Q. Did you have any input in that part of Patrick's care?

A. I did when I was at home.

5

Q. You gave evidence about conversations you had with your wife about having another child after Patrick's death?

A. Yes.

10

Q. And you have referred to that as being an ultimatum?

A. Yes.

Q. There was quite some discussion at that time?

15

A. There was discussion.

Q. And, essentially, what you were telling your wife was that you didn't want to see or hear certain things again, as a father?

20

A. I told Kathy that I didn't ever want to experience that sort of pain again, the pain of having lost the baby. I never wanted to hear her scream, and/or see a dead baby again. I recall that.

25

Q. Scream in the sense of screaming at the time of the death of the children?

A. At finding the dead children.

Q. Was that the extent of the concerns that you expressed to her?

30

A. That I expressed to her, yes.

Q. You never made any suggestions to her that she was not a good mother?

35

A. I'm not sure at what juncture and what conversation about which one of these bobbies I ever expressed to her the fact that I didn't enjoy or want to see her pregnant again.

40

Q. But you say nothing in your statement to the effect that you had any conversation with her ever expressing the concern that she wasn't a good mother?

A. That's correct.

45

Q. You never said to her that you just can't handle it, "We shouldn't have another child"?

A. It wasn't exactly the type of thing you could say to Kathy.

50

Q. You never raised anything with her in these conversations regarding having another child?

A. I'm sorry, Mr Zahra, but I would never have been game to.

55

Q. Can you answer the question? You never did, did you?

A. No.

Q. You never did because there was nothing of any

concern that you had about her parenting?

A. That's not correct.

5 Q. When your wife was pregnant with your child, Sarah, again, you were happy at that time?

A. I'd made the decision after some days of thought, that it was going to be fun to be a dad again, yeah, so I was happy.

10 Q. And your wife was happy?

A. She appeared to be.

15 Q. Well, can you have a look at paragraph 35 of your statement? See:

20 "About February 1992, Kathy became pregnant with our daughter Sarah. Once again, we were happy and it seemed that our lives had now a direction. I thought everything was fine between Kathy and I."

A. Correct.

25 Q. Is that the truth?

A. That's the truth.

30 Q. Is that something that you adjusted in your statement at any time?

A. I didn't change that, no.

35 Q. Well, you don't use the word "appeared to be" there. You quite straight out say, "Once again, we were happy and it seemed that our lives had now a direction"?

A. I can't remember word for word what I told the police that day. What more do you want me to say?

40 Q. Well, is that wrong then? Is it wrong? "Once again, we were happy and it seemed that our lives had now a direction"?

A. And it seemed that our lives had a direction and I thought everything was fine between Kathy and I.

45 Q. Well, is that right or wrong?

A. That's right.

50 Q. This wasn't a part of the passage that you wanted to be re-edited or changed?

A. No.

55 Q. Was that said at the first time?

A. That was said at the first time.

Q. So you recall going back over that in this editing process on the second occasion?

A. Yes.

Q. You left that as it was?

A. Left it as it was.

Q. Your wife was happy at the birth of Sarah?

A. She was.

5 Q. And you had the assistance of the apnoea blanket with Sarah?

A. Yes, we did.

10 Q. You indicated that it caused quite some problems, however?

A. It was stressful.

Q. Now, an alarm would go off quite frequently?

15 A. Yes, with high frequency, yep.

Q. And that alarm would wake Sarah?

A. It appeared when we got to Sarah at the times when the alarm went off, that it had stirred her, yes.

20 Q. Was it the case from what you'd been told by the SIDS organisation that this type of blanket was, in fact, designed to cause the baby to--

A. To rouse the baby, yes.

25 Q. And that's the reason the alarm was either in the bassinet or in the bed?

A. It was always very close to the baby.

30 Q. So it wasn't the case that the blanket, or the corometrics monitor for that same reason, that the speaker was kept remotely in your bedroom; it had to be in with the baby?

A. I don't understand what you mean.

35 Q. Sorry, it was a clumsy question. I apologise. The apnoea blanket and the corometrics monitor both had an alarm?

A. Correct.

40 Q. And the alarm was quite a loud alarm?

A. Very loud.

Q. And the alarms were designed to be kept near the baby?

45 A. Well, they were on cables that couldn't go all that very much far away.

Q. You're indicating with your hands about a metre?

50 A. About that far.

Q. Maybe a bit more. But about that?

A. They were on cables.

55 Q. You understood, from what you answered a moment ago, that that was purposely designed so the alarm would go off and stir the baby?

A. With the mat that the SIDS people had given us, oh, I remember being told that that was what that machine was

all about.

Q. And similarly with the corometrics monitor?

5 A. Well, the corometrics monitor was quietly - the alarms were quieter, more a beeping effect. And I don't think that the corometrics monitor was meant to rouse the baby, hence why we were taught to go in and check the baby the way we were.

10 Q. There was no provision for there to be a remote monitor, even with the corometrics monitor, that the monitor was there about a metre away from the child?

A. Neither machine had a remote monitor.

15 Q. That's what I'm putting to you; that in a sense the only alarm was an alarm that--

A. Came from the machine.

Q. --came from the machine and only about a metre away?

20 A. Correct.

Q. You couldn't take it into another room. You couldn't take the alarm itself. The--

25 A. No.

Q. Now, so far as the apnoea blanket was concerned, you have a positive recollection of your being told that, in fact, it was designed to stir, the alarm was designed to stir, the child?

30 A. Yep.

Q. And that's what it would do to the child, Sarah? It would wake her up when it would go off?

35 A. It would rouse her, yes.

Q. Sarah didn't have a regular sleep routine as the other children did?

A. Yes, she did.

40 Q. Was it the case that she was easily stirred?

A. No.

Q. Was it the case that she would tend to catnap rather than have lengthy sleeps?

45 A. Not that I'm aware.

Q. You say that that's not the case?

A. Not that I'm aware.

50 Q. Would there be difficulty when the apnoea blanket alarm would go off to put Sarah back to sleep?

A. Most times she was rousing, but still asleep, so there may have been times when it was difficult. Depends on how incessant the alarm was. But most times she was
55 still asleep.

Q. When the apnoea blanket alarm would go off, it was your wife by and large who attended to the child?

A. If I was asleep.

Q. Which was most of the time, wasn't it?

5 A. Well, the baby was asleep when I was awake, up watching TV and such.

Q. Well, you've indicated that you were a very heavy sleeper?

10 A. Yes, when I was asleep, yes, it would have been Kathy who got up.

Q. So, in those circumstances, you don't know the frequency with which the alarm was going off during the night?

15 A. No.

Q. And, similarly, when you were at work, you wouldn't know how frequently it was going off when you were away from home, obviously?

20 A. No.

Q. And, that being the case, that you don't know the frequency with which it went off at those times and the times that it woke Sarah; you wouldn't know?

25 A. Not totally, no.

Q. You wouldn't know how difficult it would have been, otherwise, to put her back to sleep?

30 A. Not while I was asleep, no.

Q. The alarm, however, was quite harrowing when it would go off?

35 A. It - it wasn't a very nice sound. "Harrowing" probably came from your own emotions of the alarm going off.

Q. Yes, that was quite clear, wasn't it; that it was harrowing for you when the alarm would go off?

40 A. Yes.

Q. No doubt in the context of what had gone on before with your previous two children?

A. That's correct.

45 Q. And, similarly, it affected your wife Kathy in the same way?

A. It appeared to.

Q. It appeared to be harrowing for her?

50 A. It appeared to be.

Q. Well, have you got your statement again in front of you?

55 A. Mmm-hmm.

Q. Paragraph 37. Can you see, about a little more than halfway through the paragraph, the sentence:

"This was quite harrowing for both of us, but I insisted that it be continued as I wanted to do everything possible to keep Sarah alive."

5 Can you see that?

A. Paragraph 37?

Q. Yes.

A. Yep.

10

Q. You see, you didn't say "it appeared to be" there. You made quite a simple statement, "This was quite harrowing for both of us"; you agree with that?

A. Yep.

15

Q. You didn't qualify it then?

A. No, I'm sorry about that.

20

Q. Well, what I am putting to you is that the whole nature of your evidence is, wherever possible, you are seeking to minimise her emotional reaction and up play your emotional reactions compared to hers?

A. Fair enough.

25

Q. The blanket was causing her quite an amount of distress, wasn't it?

A. It was.

30

Q. You see, if one got the impression from your evidence the other day when she was saying "Get rid of the bloody thing", that she just didn't care for it, that would be a wrong impression?

A. No.

35

Q. It would be a wrong impression or a right impression?

A. She didn't very much care for the mattress, the monitored machine thing.

40

Q. It wasn't the case that the alarm going off was causing her that degree of stress that it was becoming unbearable?

A. More than likely.

45

Q. You see, you say that, don't you, in paragraph 37? Can you read the last sentence:

50

"I can understand why she was stressed, because of the important job to raise a child, and, considering our past, there were even more pressures on her."

Now, again, is that something you made in your statement in the first sitting or the second?

A. That's something that I left be.

55

Q. And that was made in the first sitting, was it?

A. Yes, it was.

Q. And this was at a time, obviously, when you wanted to go there and tell them about the diaries and wanted to tell them everything about what your wife was doing with the children?

5 A. Yes.

Q. And, at that point of time, that you expressed that, in the context of her being stressed by the blanket at it being activated, you expressed this:

10

"I can understand why she was stressed, because it was an important job to raise a child, and, considering our past, there were even more pressures on her."

15

A. Yes.

Q. So, isn't it the case that her reaction to the apnoea blanket could be understood in those terms that you observed?

20

CROWN PROSECUTOR: I object.

HIS HONOUR: You needn't answer the question, Mr Folbigg.

25

Yes, Mr Zahra.

CROWN PROSECUTOR: Your Honour, I object to the question.

30

HIS HONOUR: Yes, I have rejected it.

ZAHRA: Q. The blanket was still used for quite some many months despite it going off?

35

A. It was used up until just short of Sarah's death.

Q. About nine months?

A. Just about.

40

Q. Yes. And during that time that she expressed concern that it was needlessly going off--

A. Sorry, beg your pardon?

Q. During that nine months she continued to express a concern that the alarm was continuing to go off?

45

A. Yes, she did.

Q. And you understood that that was causing her stress?

A. Yes.

50

Q. And stress because of it adding extra pressures on her?

A. Yes.

55

Q. You found it, however, comfortable?

A. That machine used to put a beep out, and then it would alarm, and I found the lights comforting.

Q. But at the same time it was not you who was obviously

getting up?

A. Not while I was asleep, no.

Q. Or having to meet this during the day?

5 A. Not while I was at work, no.

Q. Or attend to the child if it stirred during the day. It was not a matter for you?

10 A. No.

Q. You can understand how it would be easy for you to be comforted, but for her to be stressed, being in a situation as she was?

15 A. But, Mr Zahra, she was never left to her own devices. She always knew, and had told me not to bother, that I was there. All she had to do was wake me up.

Q. But you understood--

20 A. To give me an opportunity--

Q. But you understood, at the same time, before she took that role, that it was causing her stress?

A. Yes.

25 Q. You indicated after Sarah was born that your wife returned to work at BabyCo?

A. She did.

30 Q. The reason you cited on the last occasion when you gave evidence, in answer to the Crown's questions - and this is at page 122, line 15 - was that she was sick of being broke and sick of being stuck at home?

A. That's what I said.

35 Q. You recall, before lunch, I took you to paragraph 38 about this very question?

A. Yes.

40 Q. And you recall that I referred you to that sentence, "We had to do this for financial reasons"?

A. Yes.

45 Q. You see, you make no mention there that your wife was sick of being stuck at home?

A. That was one of the paragraphs that I changed.

Q. Are you saying that you originally had that phrase there?

50 A. Originally I had that phrase there, and I asked the police officer to change it to this phrase.

Q. Well, you would agree that ultimately the statement doesn't contain anything like that, does it, about being sick of being stuck at home?

55 A. No, it doesn't.

Q. You see, that's a lie, isn't it; that the reason that she returned to work was because of financial reasons?

A. That's a lie. Well, we weren't in financial dire straits. She may have felt she wanted to go back for financial reasons.

5 Q. That's not the way it appears in your statement but, is it, Mr Folbigg?

A. No.

Q. You say "We had to"?

10 A. That's correct.

Q. But that's a lie?

A. Yep.

15 Q. It's not the case, is it, that you now want to add that because it fits neatly into this picture that you want to paint of your wife?

A. No.

20 Q. As a mother?

A. When Kathy was pregnant with Sarah, we had purchased the house at Thornton, Kathy had purchased the new car, she wanted to feel that she was achieving something for her efforts at work.

25 When Sarah's birth became imminent, my boss paid the loan on the car out, so that Kathy could quit work, and after a period of time we then borrowed equity from our house to pay my boss back for the car. It was the only way we
30 could get our debt level down so that she could finish work, so that I didn't have this big car payment and this big house payment. So we were not that bad financially after that man helped me do that.

35 Q. But, ultimately, you say you were lying when you put it the way that it appears in the statement?

A. Yes.

40 Q. So far as Sarah was concerned, I have asked you questions about whether she was a poor sleeper or whether she was easily able to be aroused and you say "no"?

A. To the best of my recollection, she slept fairly well.

45 Q. Was it the case that there were arguments between you about the need for the child to be kept to a routine of sleeping?

50 A. Kathy was very rigorous in her setting of regimented action, and I worked long hours in Singleton, had a fair amount of time to drive home, and I would get home and play with Sarah and rev her up. I didn't feel that 8.30 was a necessary time for this child to go to sleep if she didn't want to go to sleep, if she was playing or
55 whatever, and Kathy used to go off her guts over it, because Kathy wanted this baby to sleep at these times.

Q. Your wife was concerned that your daughter have a regular sleeping pattern or routine?

A. Correct.

Q. And you disagreed with that?

5 A. In so much as if the baby wasn't tired, why make her go to sleep.

Q. It was a source of argument, wasn't it, that when she was attempting to put the child to sleep, you had wound, or would wind, her up?

10 A. Oh, I wouldn't wind her up while Kathy was trying to put her to sleep. I had wound her up by coming home from work and playing with her and being excited to be with her.

15 Q. That had a tendency, didn't it, to rev her up? That was a continual source of argument?

A. That happened a lot.

20 Q. Did she indicate to you that, obviously being with the child all day, it was important for the child to have a regular sleep pattern?

A. Not that I recall.

25 Q. Did you understand that it was important that after 8.30 she may be tired at that point?

A. She could have gone to bed at any time, and she always knew that.

30 Q. That this may have been a concern of hers to have the child with a regular sleeping pattern so she herself could properly attend to the child?

35 A. But I was home and it was one thing that was always a contentious issue with us. I was home. I was quite happy to take on that responsibility, bathing her, giving her her dinner, playing with her, putting her to sleep. It was never an issue to me. And that's why we constantly argued over this 8.30 affair. But Kathy could have gone on her merry way and done whatever she wanted to, because I had Sarah.

40 Q. This was, in fact, the nature of the argument that you had after the day out with Sarah?

A. The night before she died?

45 Q. Yes. And the child had been out with you all day?

A. Yes.

50 Q. And there was a concern that she may be wound up because of being out all that day and it might have been important that she get some rest?

A. She was tired.

55 Q. But there was, in fact, an argument about her being wound up?

A. Not that I recall.

Q. But Sarah was wound up from being out that day?

A. Sarah was overtired from being out that day.

Q. Overtired, in the sense that she was irritable; is that what you're saying?

5 A. She was irritable; didn't want to go to bed.

Q. When you were talking about this the other day, in answer to the Crown's questions - and this is at page 126 - describing this incident, you say:

10 "Sarah loved her bath, so I recall running her a bath and having a bath and getting her in her PJs. We had dinner and then Kathy took - Sarah was all wound up from the day, I suppose, and I had a tendency to wind her up, and Kathy took
15 her to put her to sleep, to bed, and that's when it all went pretty ordinary after that."

A. Yep.

20 Q. Well, you, in fact, offered that particular phrase "and I had a tendency to wind her up" in the context of the sequence on this particular night?

A. No, in the context of life, not that night.

25 Q. Why did you offer it in that context: "I had a tendency to wind her up"?

A. Well, Sarah was wound up, and "I had a tendency to wind her up" was just the comment. I remember that night. I remember videoing her crawling down the hallway towards
30 the camera. I remember videoing her standing at the lounge, playing on her little organ. She had a little organ she used to play on.

Q. You say that, in fact, from then on, you could hear that your wife Kathy was with your daughter and that you could hear, I think you say, Sarah crying and grumbling?

35 A. Yes.

Q. Then you say you could hear Kathy patting Sarah to try to comfort her?

40 A. Yes, to quieten her.

Q. Then you heard her growl?

45 A. I heard Kathy's growl.

Q. And then you went into the bedroom?

A. Yep.

Q. And you say that you saw that your wife had Sarah pinned to her - in what you describe as a one-arm bear hug?

50 A. Yep.

Q. That's a lie, isn't it?

55 A. No.

Q. You then say that you saw her patting Sarah on the bum?

A. Yes.

Q. And you described that when you gave evidence?

A. I did.

5

Q. You see, you didn't make any mention of that in your statement, did you?

A. What chapter are you up to now?

10

Q. Well, can I just, firstly, take you to the statement that you made on 19 May. Have you got paragraph 41?

A. Yes.

15

Q. You say:

"As Kathy took Sarah into the room, I heard Sarah start to cry and carry on because she didn't want to go to bed. This made Kathy angry, which was evident to me by Kathy making an angry, growling noise. I heard this from where I was sitting and I had heard it many times before with Sarah and Patrick. I went up to the room and said, 'What's the problem?' Kathy said, 'Nothing. Get out.' I said, 'How about mellowing out? She's only a bloody baby. If she doesn't want to go to sleep, just leave her be.' She said, 'Just go away. She will go to sleep if I say.'"

20

25

30

Paragraph 42:

"I went back and sat on the lounge in the lounge room and listened intently to what was happening in the bedroom. I heard a noise that sounded like Kathy stomping down the hall and she came into the lounge room."

35

Are you following my reading of those passages?

A. I have.

40

Q. Have I left anything out--

A. No.

45

Q. There is nothing in that about this part of the incident?

A. About her smacking her on the bum?

Q. Yes?

50

A. No, there is nothing about her smacking her on the bum there.

Q. I apprehend that you are going to say that you lied?

A. No, this is true.

55

Q. Well, let's get this straight. Is this one of the passages that you made before you decided to lie or was this after?

A. This is the truth.

Q. Was this made in the first sitting?

A. I assume it was made in the first sitting.

5 Q. Did you ever say anything at this first sitting about the slapping on the bum?

A. Obviously not.

10 Q. Mr Folbigg, the way you described it--

A. Some things come back to your memory, some things, down the track. You remember things more clearly when you're given more time and less stressful situations to remember them. So, I'm sorry I didn't say it that day, but that was a horrible thing and day, and over the period of time since then I remembered that being the case.

15 Q. Well, Mr Folbigg, you described this in a very dramatic way the other day?

A. Yes, I did.

20

Q. In fact, you became emotional and described the slapping noise with your hand?

A. On my leg, yep.

25

Q. And you became emotional, recalling this--

A. Yep.

30 Q. --the other day?

A. Yep, I did.

35

Q. But for some reason you had forgotten about that when you made this statement?

A. In 1999?

40

Q. Yes.

A. I can't explain it any better than I already have.

45 Q. Can you think about it for a moment? Am I wrong in suggesting that you performed a very dramatic--

50

A. No, I have already answered that.

55 Q. Well, you agree it was a very dramatic part of the proceedings, wasn't it?

60

A. Because it was very upsetting, and it is very emotional.

65 Q. And it was very upsetting to you in the witness box; you were upset at the time?

70

A. Yep.

75 Q. And it was upsetting, I presume, from what you're saying, when it happened?

A. Yep.

80

85 Q. And it slipped your mind when you were telling the police that?

A. It didn't slip my mind.

Q. Well, it is not there?

A. And you have a problem with that?

5 Q. Well, you understand it is for me to ask the questions, not for me to express an opinion. I can't express an opinion to you?

A. Sorry.

10 Q. My job is to ask you the questions, not to express an opinion; do you understand that?

A. I do.

15 Q. What I am asking you is, from what I understand from your answers, that you are saying that a moment ago, that some things you forget and some things you don't, and then some things you have a bit of a think about and remember. You were giving that answer in the context of my taking you through these passages, looking for the part about patting on the bum, and that is what you offered a moment ago, that some things you forget. Well, is that why it doesn't appear there? You forgot?

20 A. The day the police were asking me the questions?

25 Q. Yes.

A. Yep.

Q. That incident you dramatically and graphically described, with its emotional impact on you, you forgot it?

30 A. I had a lot of things in my life that had emotional impact on me.

35 Q. Well, let's look at the detail, however, from what I have just read to you; 41, 42. Do you agree that you were talking about: "I went back, sat on the lounge, in the lounge room, listened intently, I heard a noise that sounded like Kathy stomping down the hall". It wasn't just general statements being made at that time, was it, Mr Folbigg?

40 A. No.

Q. You were talking about detail, weren't you?

A. I was.

45 Q. And yet no detail about this very dramatic incident?

A. I softened the blow throughout this. I've already explained that to you.

50 Q. A moment ago you said that this was quite right; that this wasn't something you had edited later on?

A. As far as I can remember. Yet in 42 there is something I'd edited.

55 Q. But nothing in 41 you edited?

A. Not that I remember.

Q. Well, you see, in 41 you were still talking in terms of:

5 "I said, 'How about mellowing out? She's only a bloody baby. If she doesn't want to go to sleep, just leave her be.' She said, 'Just go away. She'll go to sleep if I say'."

A. Yep.

10 Q. That's hardly softening, is it?

A. This is 41?

Q. Yes, can you see where I've just read from?

A. Yes.

15 Q. It's hardly softening, is it?

A. That's not very soft.

20 Q. You see, you are offering as an explanation, maybe at 41, when you were explaining the sequence, that you left it out because you had a mind to make it soft on her?

OBJECTION. NOT WHAT HE SAID. QUESTION WITHDRAWN.

25 Q. A moment ago you said that there were times during this where you purposely intended to be soft on her?

A. Yes.

Q. From reading 41, can you confirm that mindset at that time?

30 A. No.

Q. You're saying that in 41 there were times when you decided to go hard and sometimes go soft?

35 A. You have to take it in the context of the day and when I was rolling this police officer through all this sort of stuff he was berating me. It was a very hard day.

Q. Suffice it to say, when you came back the second time, you didn't add to it at that time?

40 A. Not 41, no.

Q. Do you recall ever making a further statement about that part of the incident about hitting her on the backside?

45 A. No, I don't recall.

Q. It wasn't the case, was it, that you added that the other day for dramatic effect?

50 A. That is what happened that night.

ZAHRA: Your Honour, I am about to go on to another topic.

55 HIS HONOUR: All right. We will end the day's proceedings there, ladies and gentlemen. Will you please go with the Sheriff's officer?

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Folbigg, you may step down.

5 <WITNESS STOOD DOWN

ADJOURNED PART-HEARD TO TUESDAY 8 APRIL 2003

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

FIFTH DAY: TUESDAY 8 APRIL 2003

10 70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

15 IN THE ABSENCE OF THE JURY

ZAHRA: Your Honour, there was one matter. It is a matter I have just alerted my friend to.

20 Your Honour may recall there was cross-examination yesterday in relation to certain listening devices. Your Honour, they were tapes that were given to us by the Crown. They were transcribed by a person who was then a clerk at the Legal Aid Commission. Before embarking on the cross-examination yesterday, my instructing solicitor
25 contacted her to check the accuracy of the portions that were to be cross-examined on. She, in fact, no longer works at the Legal Aid Commission. She, in fact, was admitted as a solicitor last Friday.

30 She, in fact, unbeknownst to my instructing solicitor, decided to turn up here yesterday afternoon to sit in the back of the Court to watch the case. She then recognised one of the jurors as, in fact, being the boyfriend of a girlfriend of hers.

35 Regrettably, she then phoned the girlfriend to make sure that that was him. She had a conversation with the girlfriend to the effect that: Did you know that that was the case I was working on? The girlfriend, I understand,
40 said, "No" and from what I understand the conversation was essentially limited to that.

45 I have asked her to be available this morning for my friends to speak with, in order to ascertain the extent of that particular conversation, but I have alerted my friend to that. I have asked that she be available and to speak with my friend at morning tea time.

50 HIS HONOUR: Thank you, Mr Zahra. It is very proper that you should have done that.

CROWN PROSECUTOR: Yes, I thank my friend.

55 HIS HONOUR: Either of you may raise the matter again if it seems appropriate.

<CRAIG GIBSON FOLBIGG(10.05AM)
ON FORMER OATH

.08/04/03

299

IN THE PRESENCE OF THE JURY

5 ZAHRA: Q. Mr Folbigg, can I just take you back to raise one issue with you in relation to Patrick's death. I think you indicated in evidence that you had an impression that your wife was restricting your sister Carol from seeing Patrick; is that your recollection?
A. No. I don't think I expressed that at all.

10 Q. Can I take you to the night that Sarah died, the evening before? You have already given evidence about the argument between yourself and your wife the evening before when you had returned from this day out. Now, was it the case that your wife was attempting to put the child to bed
15 at about 8.30?
A. That's the case.

20 Q. And I think you used the expression that the child appeared to be overtired?
A. I did.

25 Q. Do I understand by that expression you mean that, in a sense, she was quite excited and difficult to get to sleep?
A. Yeah, I guess that's what I meant.

30 Q. I put it to you that, when your wife had attempted to put the child to sleep, each time she was concerned that you were distracting the child in her attempts to put the child to sleep?
A. That's not correct.

35 Q. I put it to you that she tried to, firstly, about three times, calm the child down by feeding her and cuddling her on the lounge; that she would doze off and then wake up wanting to play more?
A. That's not correct.

40 Q. And it was in this circumstance that you continued to suggest to your wife that she should be let go until she dropped asleep on the floor?
A. That's not correct.

45 Q. And I put it to you that she was saying to you that the child needs to go to bed to sleep and that she, being your wife, was tired too?
A. Not that I recall.

50 Q. I put it to you that, after she said those things, she again attempted to put the child to sleep for a fourth time and that you said, argumentatively, words to the effect, "You're always having a battle of wills with her. Let her be. Leave her with me and I'll sit till she drops off"?
55 A. I don't recall.

Q. I put it to you--

A. Sounds like--

Q. I'm sorry, did you--

5 A. Sounds like something I would have said, but I don't recall saying it.

Q. I put it to you that you, in fact, were raising that matter again to stir the child from dozing off?

10 A. I don't recall.

Q. I put it to you that the child then went to you again to play?

A. And?

15 Q. I put it to you that, after that, she then took the child into your bedroom and sat on the bed and tried again to put the child to sleep?

A. Oh, I recall she took Sarah to the bedroom to put her to sleep.

20

Q. I put it to you that you then went into the bedroom while she was attempting to put the child to sleep and said, "She doesn't want to go to sleep. Leave her alone"?

25 A. I remember going up to the bedroom after I heard Kathy's frustrations at Sarah's mood and I remember telling Kathy what I told her, but I don't recall going in there any more than that one time.

30 Q. I put it to you that she then said, "Go away. She'll go to sleep if you stop interfering"?

A. Would have been more like, "Piss off. She'll go to sleep if I tell her she will".

35 Q. You see, Mr Folbigg, you're trying to add another dimension to this--

A. No, Mr Zahra, I am trying to tell the people how things were in that house.

40 Q. You are trying to add another dimension to suggest that she was, in fact, losing control?

A. I'm telling the truth.

45 Q. I put it to you that you left the bedroom and after a while she then came out of the bedroom to where you were and then she had the child and approximately when she was about one foot away that she abruptly handed the child to you?

A. Threw her.

50 Q. I put it to you that she did not throw the child?

A. So you're not softening the words. You're not--

Q. I put it to you that she did not throw that child?

55 A. Well, I'm saying she did.

Q. After that, she then went to bed?

A. She did.

Q. I put it to you that she did not swear, as you said that she did, to the effect that "You fucking deal with this" or words to that effect; she didn't say those words?
A. She did.

5

Q. In describing this in your statement of 19 May, did you say that your wife "moved her arms forward and let go of Sarah, causing Sarah to fall into my lap and I had to catch her"? Paragraph 42?

10

A. That's what I've said there.

Q. You don't use the word "threw"?

A. That was one of the things I changed.

15

CROWN PROSECUTOR: Well, I think, in fairness to Mr Folbigg, the previous sentence should be read with it.

ZAHRA: I am happy to do that, your Honour. I will read this from the start.

20

"I went back and sat on the lounge in the lounge room and I listened intently to what was happening in the bedroom. I heard a noise that sounded like Kathy stomping down the hall. She came into the lounge room and she was carrying Sarah in her arms and Sarah was crying. Kathy stood about three paces in front of where I was sitting on the lounge."

25

30 Can you see?

A. I can see that.

Q. And you then described that she moved her arms forward and let go of Sarah?

35

A. That's what I described there.

Q. You say that this is one--

A. That is one of the things I changed.

40

Q. That is one of the things you later edited?

A. I softened it.

Q. You say originally--

45

A. Originally told the detective at the time--

HIS HONOUR: Mr Folbigg, you must wait for the question otherwise the question and answer won't make sense. Please ask the question again, Mr Zahra.

50

ZAHRA: Q. Are you saying that you told the police or used the words that she threw the child originally?

A. Originally.

55

Q. And are you saying that, in fact, when you changed this, this was a lie?

A. Yes.

Q. And you're saying that this was softening?

A. Yes.

Q. You didn't retract what you said?

A. It was still important. It just lessened the blow.

Q. So, you say that you lied when you edited it?

A. Yes.

Q. You see, you didn't soften the next part, did you:

"I had never seen Kathy do this before and it alarmed me. She was definitely angry and irrational."

Q. Only you didn't soften that part?

A. No, I didn't.

Q. You see, it doesn't make sense, does it, Mr Folbigg, that you were editing this to soften the blow?

A. I guess it doesn't make sense to you because you weren't in my situation.

Q. You would agree that the way it reads is hardly softening the blow?

A. I would agree that I tried to soften the blow, yet still impart the importance of what had happened.

I had already made all these statements, or this statement, to the police and it was apparent to me at the time that they would still investigate and carry on investigating Laura and subsequently the other children's deaths. So I merely tried to soften the blow.

Q. You recall a statement prepared by your wife for the solicitors Turnbull Hill was tendered in your evidence?

A. Yes.

Q. You also went to see the solicitor at times that your wife went?

A. I did.

Q. Did you tell your solicitor that, so far as throwing the child, you overexaggerated that she threw the baby at you, and that it was not true?

A. I recall the conversations I had with that man.

Q. Well, you told him, didn't you--

A. I did.

Q. --that you overexaggerated and you said to the solicitor that you told police that she threw the baby at you, and that was not true?

A. I was sitting next to Kathy at the time I recall.

Q. Well, can you answer the question? That's what you said?

A. Yes, I recall saying that to that solicitor.

Q. I gather you will say that this was blinded by your love; that's why you said those things?

A. I don't understand why you make light of that.

5 Q. I am putting that to you. Is that the explanation?

A. By that time I wasn't blinded by love anymore. I was trapped.

10 Q. Well, you see, you also blamed your predicament at that point in time on the detective in charge, Bernie Ryan?

A. In what way?

15 Q. Well, can I take you to some listening devices about what you told others about why you said things to the police? I will take you to those now. I am about to refer you to the transcript of a listening device between yourself and a person, Tanya, on 26 July 1999, at about page 7 of the transcript. You said this to her:

20

"You know, he, he come, he come and planted some bullshit in my head when I was at me lowest point there when Kath had left me and...."

25 A. Well, what's the "..."?

Q. Well, it apparently wasn't able to be transcribed?

A. Oh, sorry.

30 Q. I am just reading the transcript, Mr Folbigg?

A. Sorry.

Q. Well, what do you say about that?

35 A. Detective Ryan came to see me at that time in my life and expressed to me the possibilities of what my wife could possibly have done, because it was evident to him, I guess, that I couldn't accept what she may have done and, through what Detective Ryan said to me, helped me come to grasp with those possibilities and, so, by the time this conversation took place, Kathy and I were back together. 40 Kathy had made it plain to me why we were back together, and I had made the decision to myself that, as long as she didn't know that I was just spending whatever time she had left in the house getting to know who she was, that I 45 would, and hence conversations like that arose with people who were very good friends of hers.

Q. You see, so far as Detective Ryan saying things to you, you describe this in a record of interview that you 50 had with him on 19 April 2001; do you recall--

A. Is that the one where I was arrested?

Q. Yes, you were arrested and it was suggested that you would be charged with certain offences?

55 A. Yes, it was.

Q. And you said this - there was a question that was asked at 251. Detective Ryan asked this:

5 "Yeah, that's right. Was it the case that you
told a number of people that you believe it was
me. Detective Ryan you interpose with this
comment "being a harsh bastard" and the question
continued, "Who put the lies in your head about
10 what was in your original version?" Then you
go on to say, "Let me clarify that. Up until,
up until you and I had some conversations at the
car yard, my brain would get to a certain degree
of thought pattern and abort."

Then you made a noise:

15 "Too hard, too horrible, couldn't possibly be.
Yet the enlightenment I got from you was to go
beyond the boundary of the"

- again making a noise:

20 "Too hard, too horrible, and think harder about
things, so to be perfectly honest about it, yes,
I did believe that you put all those - that
horrible stuff in my head?
25 A. I did, in all sincerity believe that.
Well, what you did do more than anything was get
me beyond the"

- again, the making noise stage -

30 "or whatever a word is for that."

And then the question:

35 "Have myself or any other police officer ever
told you to say anything?"

and then you said:

40 "No, you've never coerced me to say anything
about it. You never coerced, but you gave me
possibilities in the conversations. You opened
my eyes to possibilities. You expressed
45 opinions to me that were, were just opinion, and
I was welcome to it."

A. That's correct.

Q. Is that the truth?

50 A. Yes, that's all the truth.

Q. Are you indicating there that Detective Ryan was
putting to you various probabilities and possibilities?

55 A. No, Detective Ryan was explaining to me that mothers
do kill their children. I couldn't understand that and I
couldn't accept that, but Detective Ryan told me that I
really needed to open my eyes, that it wasn't just always
drug addict mothers, housing commission women, and those

type of people that killed their children. That loving, caring mothers did it as well.

5 Q. Was he also saying things to you about Kathy leaving you, and you should reflect on that?

A. He said it was awfully sad to see not only that I had lost Laura but she had cleared out and cleaned me out and I was sitting in an empty house all on my own.

10 Q. And he was telling you to consider those things?

A. He didn't tell me to consider that. He just told me - he made me real - well, I already knew that.

15 Q. You see, can I just take you to some of the other things that you said about the detective after you made statements to the police, and again, referring to the conversation with Tanya. At page 18 you said:

20 "He's just going to try to assassinate her character."

Do you recall saying that?

A. Yep.

25 Q. And at page 19--

A. What did Tanya say to me? I'm sorry, I need to know that.

30 Q. Well, I will read it to you. I will take you to the bottom of page 17. You said:

35 "Yeah, anyway, well, he's just going to carry on this investigation. He's obviously going to talk to people who are in favour of Kathy. Not - sorry, he's obviously not going to talk to people who are in favour of Kathy."

A. But he did.

40 Q. You see, you were concerned that he wasn't speaking with persons who were going to say positive things about Kathy?

A. I beg your pardon, sorry?

45 Q. Well, at that point in time, when you said that you were concerned that he wasn't speaking with people who were going to say positive things--

50 A. No, I think, from memory, it was to lighten Tanya's air, because Tanya was, like, oh, I don't want the police round here, I don't want to say anything, I don't want to saying anything. So, from memory, it was more to settle her down, "Don't worry, he's not going to talk to anybody who's in favour of Kathy".

55 Q. You see, did you at one time also mention a concern that Detective Ryan wasn't speaking to a person by the name of Karen Hall about an incident when she was looking after Laura and Laura--

CROWN PROSECUTOR: Object to the question.

ZAHRA: I will come to that after the listening device.

5

Q. Can I take you to page 19 also of that transcript.
You said:

10

"Oh, yeah, you know, I mean, he hasn't been really, in what I gather, he hasn't been sort of following people up who we originally spoke to who had good things to say about her and how she was, as a mother, you know."

15

Do you recall saying that to the person Tanya?

A. Vaguely.

Q. And at page 20 you again passed this comment:

20

"He's not going to go and build a case that's good for her."

A. I couldn't see that he could have.

25

Q. Now, you also had a conversation with your sister Catherine on 26 July 1999.

A. I'm sorry, Mr Zahra, I don't have a sister named Catherine.

30

Q. Well, Kaz?

A. Kaz, yeah, sorry.

HIS HONOUR: It is Carol.

35

ZAHRA: Carol, yes, sorry.

40

Q. You say to her, "Oh, what, what they are, what the scenario", then you said to her at page 3, "he's going to ask you questions about when, ah, Pat was alive". Then at page 4, "He's trying to assassinate Kath's character. That's all he's doing".

A. That's all we could see at the time.

45

Q. And then at page 5 you told your sister Kaz:

"Oh, he's, what he's trying to do is trying to establish that she couldn't cope as a mother."

50

A. And that's what he managed to do.

55

Q. You see, what you were telling your sister there and at page 6 - well, can I just read this to you, the conversation that has been recorded. Your sister then says:

"No, well, I wouldn't say that. I wouldn't say that."

Let me stop there. Let me read the passage that I read to you a moment ago in this context. A moment ago I have read that you made this comment, "Oh, he's, what he's trying to do is to establish that she couldn't cope as a mother". She then said, "No, well, I wouldn't say that. I wouldn't say that." You then said, "But, but, he'll - I mean, if you say - if you say what you just said to me, he'll, he'll take that she was scared of what she was going to do to the kid".

So you were suggesting that if your sister would say those things, or confirm that she was a good mother, that he would, in fact, take it that she was scared of what she was going to do to the kid?

A. I'm sorry, that came out double Dutch to me.

Q. Well, let me read further on. She said "Oh" and you say, "That's why he bending things, you see"?

A. And you're suggesting that I did what with all that?

Q. What I am asking you is: You are having this conversation with your sister and making comment about Detective Ryan, and you're saying that, in a sense, you were concerned that if your sister was going to say positive things they wouldn't be interpreted that way, and you make the comment that he would be bending things?

A. Well, let's put it in the context that it was. Had some very emotional people, who, at that time, only a number of months after having lost Laura, were still very emotional, who had to confront the issues that - of the possibilities of, of Caleb, Pat, Sarah and Laura's mother having done it, were in complete denial of the possibilities because of the person we believed or thought she was. So those conversations should have to be taken, and I believe would have to be taken, in those contexts; not as vicious and vitriolic, as I think you're trying to.

Q. Were you telling a lie there or your opinion at the time?

A. At the time it would have been my opinion. It would--

Q. That any positive thing was going to be bent by the detective?

A. I - once again, you have to look at the context of the time and the situation. We had a man that was gung-ho, that wanted to solve this mystery of these poor little babies who - and then you had other people who were in denial of the possibilities that this man had suggested. That's the context you need to look at all this.

Q. You see, you describe the detective as gung-ho?

A. I mentioned gung-ho. I thank God that God sent Bernie Ryan the day that baby died.

Q. You also said he was trying to be famous?

A. Oh, of course.

Q. And you thought it would be good to maybe short-circuit that by maybe going, I think, on Sally Jesse Raphael?

5 A. Oh, everybody has a gob off about some stuff. You see, everybody does.

Q. It was in that context, wasn't it?

10 A. Yeah, in that context, let's fix it, let's fix his wagon. If he wants to get famous, we'll stunt him, we'll all keep our mouths shut.

Q. You see, just continuing on in this conversation that you had with your sister, Kaz. You say this to her:

15 "You know what I mean. I listened to the tapes of them gruelling Kath down at the station, you know, and they asked her to explain something that she'd written in her diary from years ago and, and then he'd say, oh, you know, like, and you could tell he wasn't happy with the what, with the answer. So he'd try and twist it all, you know? He did that with me. He planted
20 horrible things in my head and brought me to where I, like from going in there and, originally there and being horrible, but then recanting it all, you know? I mean, he started that. Come and saw me at the car yard."

30 And she said, "Yeah, well". And you said:

"Suppose you feel pretty bad, you know. I mean, she's cleaned out, and she's going out with her girlfriends and going to the gym and you're all
35 alone and got, haven't got, haven't your kid and your wife's, er, walked out on you and, you know, isn't it all pretty convenient for her and all that sort of shit?"

40 A. Yes, he said that to me.

Q. Was that the way you were thinking at the time or was that a lie?

45 A. That was what I told my sister. By that time I wasn't thinking that way anymore, but that is what I told my sister in reference back in time to the May. My family were looking for explanations as to what was going on.

Q. Can I just read this portion to you also, again from the listening device of 26/7 at 19.38 hours at page 7. This is noted as a conversation between you and a female. And you say to her:

55 "They're on this bent, mate. They're just on this bent and they're, you know, they're failing, as I said to Kaz, they're failing to see that we're victims, as well as the kids. Yeah, it's just horrible, mate. It's horrible.

5 Like, Kaz, you know, Kaz got a bit upset there tonight on the phone and she said, 'I don't know how you are coping because it's like they're not giving you any ability to, er, to sit back and say, 'fuck me, we've lost our baby', you know. Like, like, we've lost Laura and, and I said to Kaz, it's - they, they're not giving us - it's like they're taking the right off us to grieve."

10

And the female says:

"I said that to Carol earlier on tonight. They've taken away your grieving time."

15

And then you say, "Well, they've, look, oh, they're convinced Kathy has no remorse or sorrow for Laura not being with us, but they don't see what she's like here." And the female says, "Yeah, but you know" and you say, "You know, they don't see what she's like in private, which is what she is, an intensely private person. And", and the female says, "Because they don't know Kathy". And then, and the conversation goes on, the female says, "And because they don't know Kathy" and you say, "Mmm". She says, "You know, they don't know Kathy." You say, "I know." She says:

20

25

"They don't - they don't know how she operates, you know, sort of and I think that's - they're sort of trying to draw up a profile. Well, to me Kathy is a strong, intensely private feeling person."

30

And you say that, "I mean we go out" and she says, "You know, in all that time" and then you say:

35

"She holds my hand when we go out, but she doesn't hang off me, so she doesn't - I mean, she's even intensely private of her emotions and affections for me. You know, er, the affection she shows me behind closed doors here, she doesn't show me outside. She'll hold my hand, she'll give me a kiss hello and goodbye. Like, it's not even a pasho, you know?"

40

45

She says, "Yeah, well". You say:

"But the affection she shows me here, she doesn't show the world that she give - shows me that."

50

In this conversation, you are suggesting that the police were attempting to paint a picture of your wife having no remorse. Would you agree with that?

55

A. That's what it appeared.

Q. And, in fact, you were standing up for your wife at that time, saying that they just don't know, they don't

understand, that she is an intensely private person?

A. None of us really knew why she was that private.

5 Q. Well, were the police trying to suggest to you that your wife has no remorse?

A. No, that would have been a comment that came from my own brain. You see, Mr Zahra, by this time I'd read one of the diaries.

10 Q. You see, you say "they're convinced Kathy has no remorse". You were suggesting there that they were making comment to you?

15 A. It was evident to me that anybody that looked upon Kathy and saw Kathy would have saw that Kathy had no remorse.

Q. Were you, when that was said, telling the police that she was a private person and she was grieving?

20 A. I don't recall if I told them that.

Q. Did you tell others that?

25 A. I told people - people were wondering how we were both coping with the situation, that the police had made it evident that they were investigating Kathy into the events of the children's deaths. So people were wondering how we were going. I had already been and told all the lies I had told for the reason I had told them, so I was pretty much trapped by that time, so I just kept on telling people what they needed to hear, because I didn't want to tell my family that I had been to the police and lied.

30 Q. You see, Mr Folbigg, you well knew that your wife was grieving and you--

35 A. Mr Zahra, I can tell you, I came home one night from work. Can I tell you this? I came home one night from work and Kathy was sitting in the bath, she had her arms around her knees crying, I made her a cup of tea and went in and said, you know - it upset me because she was crying. To what I thought, she'd been home on her own, she didn't have Laura anymore, this stuff was going on around her and all that. Yet some time later - and I do recall going in and expressing those things to Kathy. And her agreeing that that's why she was there crying. Yet some time later, when she told me to my face, "That night you found me crying in the bath", I said, "Yep", and she said, "I was crying because I'm trapped here, cause I don't want to be here and I'm trapped here". So, you see, what appeared to be grief, and you went with that because that's what it appeared when you walked in, was never the case.

40 Q. You see, these are matters that you now are raising for the first time, aren't they?

45 A. Well, you're the only one who's ever asked me the question.

50 Q. You see, up until this point in time you were telling other people, it is clear from these listening devices,

that your wife was grieving and expressing remorse?

5 A. But at the time we had so many concerned people who didn't need to know, I didn't feel at the time, that I had told those lies to the police, that I had changed my story because of what had transpired between Kathleen and I, and that Kathleen had then made it painfully obvious to me that what she told me on that Saturday night was not the case.

10 Q. So, you are saying that when you told your family and friends about your wife grieving they were lies?

A. Yes.

15 Q. But you would agree that you told many people that your wife was grieving?

A. Yes.

20 Q. Can I just take you to page 17 of this conversation between you and this female on 26 July. She says, "I can think of , is why he wants to see me" and then you say:

25 "What he - and I think what also marks him too is anybody sitting there waxing lyrical about how good a mother she was when they saw her as a mother. You know what I mean? Cause that's like he don't want to hear that."

And you laughed?

30 A. And?

Q. Well, do you recall saying that?

A. No, I don't.

35 Q. You see, again, you're suggesting the approach of the police was that he was only looking for negative things in relation to her being a mother and you say that that marks him.

40 "What also marks him too is anybody sitting there waxing lyrical about how good a mother she was when they saw her as a mother. You know what I mean? Cause that's like he don't want to hear that."

45 Was that your state of mind at that time, or were you lying?

50 A. No, it wasn't my state of mind at the time. Bernie Ryan told me the day that I first went to the police, he sat me down and at length said to me that he didn't want anything but the truth from me, that nothing else mattered to him, only the truth. So the first time I went there I told him the truth.

55 Q. Well, Mr Folbigg, do you understand the question I asked you? I asked you whether this was your state of mind at the time about the detective, despite what you've just said that he told you to tell the truth--

A. No, it wasn't my state of mind. It was what I was

telling people.

Q. Well, were you lying to this female?

A. I'd say I was.

5

Q. Lying and laughing at the same time?

A. I'd say I was.

10

Q. You see, Mr Folbigg, it is now becoming increasingly difficult to tell when you lie and when you don't?

CROWN PROSECUTOR: I object.

WITNESS: A. But you've--

15

HIS HONOUR: Don't answer that question.

WITNESS: Sorry.

20

HIS HONOUR: Ask another question, please, Mr Zahra.

ZAHRA: Q. In this conversation you again go on to say this, at page 19:

25

"He's been up here like on Saturday trying to drive a wedge between us and that didn't work. Oh, you know, I mean, he already tried that with me on my own down the car yard and, ah, he nearly got it to work. But it - I was lucky - I got to my senses, well, a little bit too late, but soon, soon enough, you know. Silly thing I did, but you'll hear about that. But then he's here on Saturday trying to drive a wedge between us and I think he sees that divided we fall and united we stand, and that narks him, because he said to Kath on Friday night, you know, 'I suppose you're going to leave him again' and then they followed us on Saturday night, tailed us and followed us, and they're just trying to rattle our cage, you know, and like I said to Kath, he's, ah, trying to unhinge us and see whether we turn into frightened rabbits, you know, because frightened rabbits run and hide, don't they?"

30

35

40

45

Was that your state of mind at the time?

A. I was a frightened rabbit.

50

Q. Well, "driving a wedge between us", the way you speak about Detective Ryan, was that what happened?

A. Oh, it appeared that way at the time.

Q. Well, was that your state of mind or were you lying there?

55

A. No, that was my state of mind.

Q. In that passage I have just read to you, you used this expression "he nearly got it to work". What did you

mean by that?

A. Oh, I'm sorry, I lost the context of it.

5 Q. I will read it. "You know, I mean, he already tried that with me on my own down the car yard and he nearly got it to work".

A. Mmm-hmm.

10 Q. And going on, "Silly thing I did"?

A. Yeah, told the lies.

Q. Well, you're here saying, in fact, that you, in a sense, were--

15 A. Silly thing I did. You'll hear about that. Told the lies.

Q. What did you mean by "he nearly got it to work"?

20 A. What, the first time when he first started to talk to me?

Q. Yes.

A. I don't really know.

25 Q. What about "driving a wedge between us"?

A. Well, he was always trying to do that.

Q. And you say this, at page 26:

30 "As Kath said, he's just doing his job like a bull dog would, and he's full of all, he's full of um - vinegar and bloody he's on a mission, you know. Think he's got hold of something and it's going to make him famous."

35 The female said, "Well, it would make him famous if it were true" and you said, "Yeah I suppose". Sorry, she says "Well, it would make him famous if it was true" and you said, "Yeah, I suppose" and you laugh at that time. She then says, "God, we've got like a fucking
40 multi-murderer on our hands, if it's true" and you laugh and the female says "Christ, you know, he's going to be in every paper in the fucking world" and you laugh again. She says, "And, you know, Women's Day will be knocking on his door for the story" and you say, "Yeah, but I'm going
45 to hire Harry M Miller" and she laughs and says, "Yeah, beat him at his own game" and you say, what sounds like, "It's a bit of a joke, isn't it?" And she says, "Well, suppose, you've got to find humour in situations otherwise you go mental, don't you?" Do you recall saying that?

50 A. Oh, I don't recall that conversation, but I do recall the Harry M Miller comment. And were the laughs nervous laughs or hilarious laughs, because that makes a difference how you laugh.

55 Q. The transcript doesn't reveal that, Mr Folbigg. It just says "laugh" here?

A. Sorry.

Q. Can I just read page 28. You say:

5 "Yeah, I mean, we're getting that, like, like,
he's looking down his nose at Kath especially,
but the both of us. Like, because she goes to
the gym, she works part-time, we go out and
dance and drink and socialise with people and
all that, and that's like, you know, what are
10 you supposed to do, crawl up and die?"

Do you recall saying that?

A. No, not really.

Q. Well, you see, you there were expressing concern that
15 the detective was reading the fact that she went to the
gym, that you went out and socialised, that he was reading
those things wrongly?

A. No, I think he read them correctly.

Q. Well, do you understand what I put to you? I am
20 suggesting in the answer to that, and I could read it to
you again if you wish, what you are saying there is he was
reading the wrong messages?

A. What I was saying there is he was reading the wrong
25 messages, there, from the sounds.

Q. You were lying?

A. No, because I'm pretty sure he pretty much figured
her out.

Q. Were you lying at that time or was that your state of
30 mind at the time?

A. Well, I don't recall the conversation. You say it is
a listening device of me, so it is a conversation of mine.
35 I do recall feeling like that from time to time, so, no,
it wouldn't be a lie.

Q. Well, can you take it from me that I am reading a
40 certified transcript that has been provided to us and,
obviously, if I am reading it in any way incorrectly, the
Crown will raise that. Can you take it from me I am
reading from this transcript and what I have read to you
of this particular passage is what you said? You
understand what I am saying to you?

A. Yep.

Q. In fact, at that point in time, on 26 July, you were
concerned that the detective was reading the wrong
50 messages from the fact that she went to the gym, that she
went to work, and that she socialised with you. You would
agree with that?

A. So, yes, this is in the context of what I mentioned
before then, yes.

Q. You see, that is the case, isn't it, that the
55 question of her going to the gym and working part time did
not indicate that she wasn't suffering--

OBJECTION. QUESTION WITHDRAWN.

Q. You see, you are saying clearly there that the detective was drawing the wrong messages from that?

5 A. Yep.

Q. And now you're saying the detective was right?

OBJECTION. QUESTION WITHDRAWN.

10

Q. You see, you then go on, "Well" - she says "Well, see" and you say, "Life's fucking got to go on and you know what I mean and they don't see how hard it is to go on with that". Was that your state of mind at the time?

15 A. Well, life had to go on.

Q. You see, again you were saying that the police had the wrong message about this?

20 A. Life had to go on and the people on the outside of the circle couldn't see why - and there were people on the inside of the circle who couldn't see why - socialising, partying, and generally not even looking back, as if Laura had never existed, was happening and Laura's existence wasn't like - the acknowledgment of Laura's existence wasn't happening.

25

Q. But you could see at that time the importance of continuing part of one's life?

30 A. Oh, look, life goes on, life has to go on, if - you know.

Q. And the fact that merely going to the gym, working part time, and socialising didn't mean that there wasn't grieving?

35 A. Well, well, there wasn't grief because all that then became life and that's the part that troubled people looking in.

Q. But on this day, on 26 July, that you were expressing the view that obviously you, being in the relationship at that time and making the observations and feeling the emotions that you did, that this was a necessary part of getting on with life?

40 A. It was a part of getting on with life. I'm not saying that it wasn't troublesome to me or distressing to me.

45

Q. You see, you were trying to get across to this female that people didn't understand that, despite what happened, there are some things that had to go on; that this was--

50

A. Others - I didn't understand either. I was in that situation, I was in that relationship, and that is - that was how life went on when - life was with Kath. But I didn't understand, myself, why Laura had to have been just forgotten and that life wasn't looked back at.

55

Q. But at this point in time, you well-understood that going to the gym, working part time, going out with you,

was, in fact, part of getting on with life?

OBJECTION.

5 CROWN PROSECUTOR: It is a reference to somebody else's emotions.

HIS HONOUR: Yes, I think that is right, Mr Zahra.

10 ZAHRA: Q. See, she then says, "You know, oh," and you say, "What do you do? Sit in the house and fester, and, you know, it is hard being in the house for both of us" and she says, "Mmm" and you say, "You know, she's not here, fuck this, let's go out". You see, that is the state of mind that you are expressing to this female person that you had of 26 July. Was that your state of mind?

15 A. With Kath, it was either go out with her or she'd just go out on her own, and Laura wasn't there, so - and I'm not going to use that word, I'm sorry. So, Laura wasn't there, so, it was, yep, "F this, might as well go out".

Q. That was your state of mind?

20 A. But when Laura was there I never went out. So - sorry, I tell a fib. I had one night out with a bunch of guys.

Q. I will come to that in a moment, Mr Folbigg. But what I am asking you here is that at this point in time you are trying to convey to this female your state of mind that there comes a time when you just can't sit in the house and fester, "it is hard being in the house for both of us". Well, was that your state of mind at that time?

30 A. I was expressing what it appeared to Kathy, and I knew what it felt like for me.

Q. You see, you are putting now quite a different impression on your wife's going to the gym and going back to work now, aren't you?

40 A. I am putting on the impression that I always have.

Q. Well, it is not clear there, is it, Mr Folbigg, that you had that impression at this point in time?

45 A. In a conversation with someone on the phone?

Q. Yes.

50 A. Someone on the phone who I was talking to about what was going on in my own house, or what was supposedly a private house.

Q. You see, you go on to say this, also at page 29:

55 "I said to him, on Saturday, you know, what amazes me, people come up and go 'I see that little fellow there of mine. If I lost him, I couldn't cope. I think I'd fucking kill myself.' I say to him 'Bullshit. Bull fucking

shit, mate. You wake up every day. It's another fucking day.'"

Now, were you making that up, were you?

5 A. No, ever since 20 February, 1989, I have had a daily edict that I tell myself when I wake up and that's it's another day. I'm alive. I'll get out and see what the day brings me, and see what I can bring the day. So it is just another day, isn't it?

10

Q. You see, this was the approach of both yourself and your wife at the time, wasn't it?

OBJECTION.

15

HIS HONOUR: Don't answer that question, Mr Folbigg.

ZAHRA: Q. Can I take you to another recorded conversation of 26 July, 1999 at 19.38 hours? Can I take you to another conversation - this is of 26 July 1999 at 19.12 hours. It is noted here as a conversation between a female and yourself, but it appears from the second line that you say:

20

25

"Hi, Kaz, how you're doing?"

So it appears to be a conversation between you and your sister?

30

A. Okay.

Q. Now she says this to you, and she was the sister who was at the house when Patrick died?

A. When I got to the house?

35

Q. Yes.

A. Yes.

Q. And she says this in this conversation:

40

"You know, I mean, as far as the morning of--".

OBJECTION.

45

CROWN PROSECUTOR: Your Honour, if my friend just wants to get in somebody else's comment, that doesn't make it admissible.

ZAHRA: No, I want his comment.

50

CROWN PROSECUTOR: There must be some reaction from this--

55

HIS HONOUR: I am finding it difficult to deal with these objections because I don't have this material that is being read from. Do you press this, Mr Zahra?

ZAHRA: Yes, I do.

HIS HONOUR: I better see it then.

5 ZAHRA: I can hand to your Honour this particular page.

(A page of transcript was handed up.)

10 HIS HONOUR: I have page 8 from a document.

ZAHRA: The passage I have commenced to read is just after point 5, starting with, "You know, I mean".

15 HIS HONOUR: What is the entirety of what you intend to read?

ZAHRA: V1 and V2, the next comment by the person V2, who is Craig Folbigg.

20 HIS HONOUR: Then you want to ask a question based on those two statements?

ZAHRA: Well, his statement at V2 in relation to that comment, your Honour.

25 HIS HONOUR: Why can't that be asked, Mr Crown?

CROWN PROSECUTOR: Because he is not adopting it. He is not saying: I remember that, or that's true, or I believe that.

HIS HONOUR: I don't know. I will allow it.

35 ZAHRA: Q. You see your sister made this comment and she was there, as you say:

40 "You know, I mean, as far as the morning of - of Pat, I remember him feeling a very lost person. And I still remember her crying. I still remember yous both crying."

And you said:

45 "You know, he needs to hear that."

Do you recall that?

A. Yes.

50 Q. You see, your sister was making this comment and you were acknowledging, acknowledging what she said?

A. Yes.

55 Q. About your wife crying in reference to the morning of Pat--

A. Yes.

HIS HONOUR: I must say, I don't understand what that evidence means.

WITNESS: Well, I don't either.

HIS HONOUR: Just a moment.

5

ZAHRA: It is a piece in relation to the issue of grieving.

HIS HONOUR: I understand the relevance of it. I don't understand what the answer means. What is meant by "acknowledge"? Is it being suggested to Mr Folbigg in the question "and do you understand him to have agreed with the proposition that he agreed with what his sister said to him?"

10
15

ZAHRA: Your Honour, I can put it to him in another way, to make that clear.

Q. You see, what you are doing in that answer is accepting the truth of what your sister said about her observations, aren't you?

20

OBJECTION. ANSWER SPEAKS FOR ITSELF.

25

HIS HONOUR: The question may be answered.

WITNESS: A. No, I'm not. I'm simply stating what was obvious and that I've also already said that at the time of every one of these little baby's deaths she cried that day. I've never said she didn't.

30

ZAHRA: Q. Are you now disagreeing with your sister's observations?

A. No.

35

Q. That's your recollection also?

A. Yes. I remember Kathy was crying when I got home and found Patrick dead and couldn't resuscitate him.

40

Q. At page 12, your sister makes a comment, "and it all makes it just so much - just when do you get on with it and, and" and you say, "Well, er, they're even casting aspersions on the fact that we're just trying to get on with our lives". Do you recall saying that?

45

A. No, I don't.

Q. Well, was that your state of mind at the time that the police were negatively interpreting the fact of you and your wife just trying to get on with your lives?

50

A. I can't remember my state of mind at that time.

Q. And you go on, at the top of page 14, to your sister:

55

"I mean, do you think I'd want to get back together with Kathy, if I even, even had, even the slightest feeling that she did this?"

Do you recall telling your sister that?

A. You see, that is not something I might have said to Carol at times.

5 Q. You were very close to your sister?

A. Carol, yes.

Q. You could share with her your emotions?

A. Emotions.

10 Q. Was that your state of mind or were you lying to her?

A. That was - that would have been my state of mind. That would have been one of the reasons that I got back with Kathy. But, by then, knew other things, so--

15 Q. Did you have a conversation with a person Lea Bown, where she phoned you after a police officer had contacted her?

20 A. Lea Bown's Kathy's adopted sister. I've spoke to Lea Bown a lot over the years. I don't exactly recall when I spoke to Lea Bown.

Q. Did you say to her, "I have been down there to retract some of the things I said as I was angry at the time and I told a few lies. It was able to be changed as it was only down on paper and it wasn't recorded. Bernie told me everything would be all right."

25

Did you tell her that?

30 A. I told Lea Bown that because she was Kathy's sister, yes.

Q. And that was a lie?

A. Sorry?

35 Q. And that was a lie?

A. The part about I'd been down there and told some lies was a lie.

40 Q. Can you recall this part of listening device material which, in fact, is a conversation of 23 July 1999, at 22.12? It is a discussion between yourself and your wife, Kathy Folbigg. Your wife said this:

45 "Bernie said something about the night Sarah died."

Your wife is recorded as saying this:

50 "Bernie said something about the night Sarah died."

Now, this was a conversation after she had engaged in an interview with the police.

55 "Bernie said something about the night Sarah died. I recalled that I put her to bed, to bed okay and the major difference between what you said and what I had totally forgotten about

5 trying to put her to bed in the room and you come in and you confronted me because she wouldn't go to sleep, I wasn't totally - had a go at me and then something along the lines of you said that I had walked into the lounge room and threw at you."

CROWN PROSECUTOR: "Threw her at you".

10 ZAHRA: Q. "Threw her at you. My first response was that I never threw my children anywhere, thank you very much. And then I basically had to say, I don't remember a conversation and I don't remember even doing that."

15 And then you said:

20 "Yeah, I, I mean, I can remember the night she wouldn't go to sleep, so I walked up the hallway and then I just told - I mean, that they are interpreting the words 'throw' from what I said. I, I was sitting on the lounge and you were about a foot away from the edge of the lounge and just went to - and, ah, then you went to bed and then I sat up and then you came in."

25

Now, can you follow that?

A. Vaguely. I think I know what you mean.

30 Q. Can I just hand to you the transcript of this page 2? (Handed to witness.) You can see, just before halfway down the page, that there is a note that says, "Kathy"? Can you see that I have just read her comment and then your comment?

35 A. Yep.

Q. You see, that is what I have just read.

Let us get the scene right here. This is the conversation between you and Kathy?

40 A. Yep.

Q. After she had gone to the police to make an interview?

45 A. After I - yep.

Q. And in fact she is raising with you the fact that it was said that you told the police that she threw Sarah?

A. Yep.

50 Q. And she is clearly saying there, "My first response was that I never threw my children anywhere, thank you very much. I don't remember even doing that." Can you see that?

55 A. Yep.

Q. And you go on to describe, again, what happened about the throwing and you say this:

5 "I mean, they are interpreting the words 'throw'
from what I said. I was sitting on the lounge
and you were about a foot away from the edge of
the lounge and just went to and, ah, then you
went to bed and I sat up and then you came in."

You see, isn't that what I put to you earlier today and
you said, "No, it wasn't just a foot away". Do you
remember that earlier today?

10 A. Well, you've just confused the first part of that
with that second part. Sorry.

15 Q. I will ask the question again. Do you remember
earlier today that I was putting to you a sequence which
involved obviously the throwing; remember I took you
through various passages and asked you to comment about
it?

A. Yep.

20 Q. Remember I asked you about it was one foot away and
you said "No"?

A. Well, a foot's about that far, isn't it (witness
indicated)?

25 Q. Indicating about two foot now?

A. Whatever.

Q. And then gradually reducing might the record show?

30 A. So, are you splitting hairs on the length away from
me when she was - when she threw this baby at me.

Q. What I am putting to you - and these are your words?

A. To Kathy on this hearing thing?

35 Q. Yes.

A. I didn't have the luxury of having that, so I had to
try to answer what she was saying to me of what Bernie
Ryan had said to her. I had to try to remember what I
said the first time and then the second time.

40

Q. Mr Folbigg--

A. And that's obvious by my stuttering and faltering in
the thing.

45 Q. Mr Folbigg, let us again picture the scene, that she
then says to you, "I never threw my children anywhere,
thank you very much"?

A. But I didn't agree with her.

50 Q. Well, you give a version there which is the version I
put to you this morning and you said, no, it didn't
happen?

OBJECTION.

55

CROWN PROSECUTOR: My learned friend is cross-examining
the witness about two completely different things. In
fairness to the witness, one question is about what he is

alleged to have said to Kathy in this tape. Another question is about what actually happened on that night with Sarah. My learned friend's questions this morning were about the latter. They were questions about what had happened with Sarah. They weren't questions about: Did you say to Kathleen in a conversation in July X?

ZAHRA: I am not suggesting that but I will clear that up.

Q. Mr Folbigg, what I am putting to you is that when you clarified this with Kathy, after she said to you "I never threw the children anywhere, thank you very much", that you then said, one, "They are interpreting the word 'throw' from what I said".

Let us split up. Are you there saying that, in fact, it was the police who used the words "throw", not you?

A. No.

Q. Well, does it read that way?

A. It reads that way.

Q. But you are saying that that's not what you meant?

A. I told the police she threw the baby at me.

Q. You told your wife Kathy who appeared to be indignant at that time when you suggested that she threw the child and you said it was the police who were interpreting the word "throw", not you?

A. It's evident to me, by what I read here, that I was covering my arse what I was telling her.

Q. You see, you go on to say, "I was sitting on the lounge and you were about a foot away from the edge of the lounge and just went to". Now you recall that I put to you this morning that that, in fact, was what happened; that when she handed the child to you, it was from about a foot away from you, she handed her to you abruptly?

A. She didn't hand her to me; she didn't hand her to me abruptly. She launched her at me, which was a throw.

Q. I understand that is what you said in this Court, but what I am saying to you in this listening device what you said is completely different. You said to her, when she raised this in an indignant way, "I never threw my children anywhere, thank you very much." And you then--

A. I didn't agree with her--

HIS HONOUR: Just listen to the question.

ZAHRA: Q. Not from anything she said, but you said, your own words, "I was sitting on the lounge and you were about a foot away from the edge of the lounge". They were your words, Mr Folbigg. Where did they come from if it wasn't the truth?

A. There's a little part of everybody that lays deep inside of them called self-preservation.

Q. Well, would you agree, Mr Folbigg, that they are the words that you used to describe this incident to your wife?

5 A. To my wife.

Q. Who appeared indignant that there was any suggestion--

10 A. I didn't care at the time. I probably didn't care at the time that she was indignant that Bernie Ryan had said that about her, what she had done and said things by this time that had destroyed anything in me that you would consider concern.

15 Q. You see, that was the truth about what had happened, about what you said to your wife at that time that you were sitting on the lounge and that she was about a foot away; that was the truth, wasn't it?

20 A. I don't recall how far away from me she was when she threw that baby at me.

Q. Well, you use the words "about a foot" at that time?

25 A. A foot, six inches, three foot, or three metres, a throw is a throw and having to catch a baby is having to catch a baby.

30 Q. You see, what I am putting to you, Mr Folbigg, is it was you who introduced the distance as a piece of evidence and addressing that, I am putting to you, that, in fact, you have conflicted that in what you have said about the distance; you understand what I am putting to you?

OBJECTION. DOUBLE QUESTION.

35 ZAHRA: It probably doesn't need to be asked anyway.

WITNESS: A. Well, do you--

40 HIS HONOUR: No, just wait for the next question, Mr Folbigg.

WITNESS: Sorry.

45 ZAHRA: Your Honour, is that a convenient time?

HIS HONOUR: Yes, we will take the morning tea adjournment, ladies and gentlemen.

50 SHORT ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: There is some further information we
would like to bring to your attention. During the morning
tea adjournment, at the suggestion of my learned friend, I
and my learned junior spoke to a lady by the name of
10 Annabel Smythe, who, we understand, as my learned friend
said earlier, was at one earlier stage, but not now, doing
some transcribing for my learned friend from some of these
LD tapes.

15 What she has told myself and my learned friend is that she
has a girlfriend - she herself was, until very recently, a
law student - she has a girlfriend who was also a law
student, who was in her same study group, whose boyfriend
is on the jury. She does not have a specific
20 recollection, but she feels she would have discussed the
case with her group. She assumes that her girlfriend would
have been in that group at one stage or another. She does
not have any recollection of the boyfriend being there.

25 The last time she had any contact at all with the
boyfriend was, I think, in late January. She does not
recall any discussion about the case with the boyfriend.
She thinks that she might have expressed a view to her
study group; her view being that the accused was guilty of
30 the charges. She does not have a specific recollection of
that. She has, by assumption, come to that view.

35 We take the view that this is of a similar vein to a juror
having a conversation during a trial with somebody who has
read the newspaper, for instance, and expresses a view
about the guilt or innocence of the accused. We submit it
is something your Honour could give appropriate directions
to the jury about, if your Honour thought it appropriate.

40 What we would suggest is that perhaps the young lady
concerned could be brought into the back of the Court.
Without identifying any particular juror, your Honour
could bring the jury in and say that you understand there
is one member of the jury who knows that particular woman,
and she could stand up.

45 If this juror is aware of anything about the case from
having heard anything from that young woman, or directly
or indirectly through other people, that any such material
is the kind of material that your Honour has already told
50 the jury they should completely dismiss from their minds
and disregard. Perhaps your Honour could again give the
warning that your Honour has already given many times
about dismissing things in the media, things they might
have heard about this case beforehand, and the like.

55 We do not have any apprehension that this is a case where
it would be appropriate to discharge the juror, or even to
question the juror at this stage, let alone the whole

jury. That is the view that we take.

HIS HONOUR: Mr Zahra, do you want to say anything about this matter?

5

ZAHRA: Yes.

10 The difficulty is that the person who has made the comment is not a person from the street, or a person not having anything to do with the trial itself. Regrettably, she is a person who has been identified as being part of Legal Aid. She was not a typist. She was, in fact, a person who was undertaking her legal training there after completing a law course. This was not just a typist.

15

This was a person who, in fact, as I understand it, expressed that that was her case, or words to that effect. She identified it as a case that she was working on. It is quite different from someone far removed from the case who might make a comment about the media. This is a person who can be identified as being part of the accused's legal representation.

20

25 That is where the concern is. The concern is, obviously, of the potential of a remark, expressing a view about guilt, from a person closely aligned to the accused's legal representatives.

30 From what I can understand, the conversation that she had with a group of persons was not that she might have said these things. She did say these things. She did express a view, as I understand it, that the person was guilty, but she did not think in the circumstances that the person should go to gaol.

35

40 She proffered a view that the person was guilty. She does not know for certain whether this particular girlfriend of the juror was there, but she assumes that that was likely to be the case because of the group of persons that she mixed in, and the people that she was from time to time talking to about this case that she was involved in. It is quite different from a person who is removed from the case.

45 HIS HONOUR: When is this said to have taken place?

ZAHRA: February.

50

HIS HONOUR: This year?

ZAHRA: Yes.

55 This is all unfolding as I speak. I am happy to assist, but your Honour might bear with me. This is devastating for us. As I understand it, it was not a view that either my friend, Mr Cook, or Mr Krisenthal, held that view, but she, as I understand it, identified herself as a person who was, in fact, working on the case.

It is the potential. Quite clearly, we can only surmise. I cannot put to you direct statements that this is what is likely to have occurred. I can put it no higher than
5 the potential. But the potential that some comment is made to other jurors that persons attached to the defence of the accused have a view that she is guilty is, in fact, fatal. It is the potential of that that concerns us.

10 We cannot indicate what has happened in terms of likelihood or probability. We can probably only put it as high as the potential. But the potential in such a case, the serious nature of the charges, the consequences that flow on, we cannot live with the potential. On that basis
15 we would have to ask that the jury be discharged, regrettably.

Clearly, as your Honour can see, it takes a fair bit of effort for us to get to this stage. The nature of the
20 charge, the nature of the consequences that arise, even the mere potential in a situation like this is fatal. If even some idle comment is made that parts of her legal representation, be it this person, has a view that the accused is guilty, has very serious consequences on the
25 overall credibility of anything that we might ultimately say to the jury. It would undermine any credibility that we would have if, at any time during the course of the trial, an idle comment is made about the fact that there are parts of the Legal Aid representation of the accused
30 who think that she is guilty.

I cannot put it higher than the potential. It is the potential, bearing in mind the serious nature of the charges and the consequences.
35

HIS HONOUR: Why cannot an enquiry be made? Why do we have to deal with this on this vague basis of potential?

ZAHRA: I have discussed this with my friend. We have
40 discussed, no doubt, the alternatives. One of the alternatives is very much that. As I say, this is just unfolding. We have discussed this. That may be a suitable course if that is what your Honour desires. I make the submissions on the basis of what we know. I can
45 understand, under the Jury Act, your Honour has the power to do those things. This is a matter I have discussed with my friend. It may be that your Honour needs to go to the next step. I can only, in outline, indicate what the application would be at this stage.
50

HIS HONOUR: Let me see if I understand this. This is a young woman who was doing some work while she was a law student in transcribing listening device tapes. She was, in February, a member of a class, a group, of similarly
55 minded young people. One other member of the group was a young woman. The young woman had a boyfriend. The boyfriend is a member of this jury.

5 The first young woman, the transcriber of the tapes, believes she probably expressed a view and you, I think, impliedly invite me to deal with the matter upon an assumption that she did express the view that the accused
10 was guilty, anybody present in the group at the time would have heard the expression of that view and would know that it had been made by somebody working for Legal Aid who would be identified with the accused. The transcriber does not know whether the girlfriend of the juror was
15 present. I do not know whether you are asking me to assume that that person was present. That is perhaps the first question that arises.

15 There is no direct evidence that anything else has been done or said, which would bring to the notice of the juror any of this material. Does that encapsulate the facts?

ZAHRA: Yes.

20 Only if I can indicate that the status of the girl was not just as a typist. She had completed a law degree and was, in fact, at the Legal Aid as part of her practical legal training, as part of her qualifications as a solicitor.

25 HIS HONOUR: Anybody hearing her expression of opinion would have regarded it as an expression by somebody who knew what she was talking about.

30 ZAHRA: Yes. She had completed her law degree. She was there as part of - similar to the article system. There is a component of the College of Law lectures and/or legal training. It is similar to the articles.

35 CROWN PROSECUTOR: Could I point out two further salient features? If my memory serves me correctly, your Honour did invite the panel, before the selection of the jury, to indicate if there was anybody who knew any of the people involved in the case and felt that that might prevent them from deciding the case objectively, they were given an
40 opportunity to voice that. Secondly, we would submit that the appropriate test is not that there is a potential for prejudice. I am not sure of the actual wording, but it is something like that there is a real possibility.

45 HIS HONOUR: But as I said to Mr Zahra, Mr Crown, sometimes one may have to deal with a problem on the basis of potential, but one does not have to do that here, because we can ask.

50 CROWN PROSECUTOR: I would have no objection to the juror being in some way identified, not by name obviously, but in some other way. Perhaps your Honour could call the whole jury in, have the woman sitting there, and ask the juror who knows the woman to remain in the courtroom,
55 whilst the others go out. Then the appropriate procedure would be for your Honour to ask questions of the juror. I take it that is what your Honour has in mind.

HIS HONOUR: I am not sure what I have in mind. I am not prepared to deal with the matter without finding out whether this risk, let us call it, has materialised in any way.

5

CROWN PROSECUTOR: We would endorse that approach. We would submit that the juror should be in some way identified, should then be sworn, should then be asked questions by your Honour as to whether he has been told anything, or heard anything, directly or indirectly, about the case from this person or from his girlfriend. If so, what?

10

If there is material that he has been made aware of, then the next step is to what extent has he disclosed that to other members of the jury.

15

HIS HONOUR: Quite so.

I am inclined to do something of that kind. Do you want to put anything against that?

20

ZAHRA: No. I think that makes quite some sense.

25

HIS HONOUR: Is it realistic for me to suppose that if the juror is present and the young transcriber is present, he is likely to recognise her.

ZAHRA: I presume so.

30

Can I indicate that she did quite a bit more than just transcribe the listening device. She was involved in the presentation of the brief. She was involved at a number of different levels of organising the brief. She had read the material. In other words, she was involved, in a sense, in preparation as a solicitor. These are articles of clerkship. They are not free labour. They are persons who, in fact, are involved in their capacity as solicitors. So she was involved, as I understand, in the process of the preparation of the case, not merely just as a transcriber. That was one part of it.

35

40

I understand, from speaking to my learned instructing solicitor, that it did involve discussions as to matters of law, discussions as to the issues involved in the case. It was, in fact, as a solicitor that she was essentially involved, as a trainee solicitor. In other words, getting an understanding of the role as a solicitor, not as a transcriber.

45

50

HIS HONOUR: What I think I should like to happen is this: We might first have the young woman, Annabel Smythe, brought into Court and have her identify herself. We might ask her to leave the Court. We might have the jury brought in. I will say to the jury that I am about to ask for a young woman to be brought into Court and that when that has happened I propose to ask the jury to look carefully at her and, without saying anything, decide for

55

themselves, each juror for himself or herself, whether that juror recognises the woman.

5 CROWN PROSECUTOR: Perhaps if the name is mentioned as well.

HIS HONOUR: Yes, the name should be mentioned, I think. I will then invite the jury, as a body, to leave the Court, except for any juror who recognises Annabel Smythe.
10 Assuming one of the jurors remains, I will ask that juror some questions. It seems appropriate that the oath be administered to the juror for that purpose.

15 CROWN PROSECUTOR: In the jury box.

HIS HONOUR: Yes. That is what we should do then.

Officer, there is a young woman in the precincts of the Court called Annabel Smythe. Would you ask her to come in?
20

ZAHRA: She is here already.

HIS HONOUR: Miss Smythe, you may stay there for a moment. I will not artificially ask you to go out and come in. I think you have heard what we have been saying. Have you heard everything?
25

SMYTHE: I have not heard everything. I have just been told to come in.
30

HIS HONOUR: Miss Smythe, what I am going to do, when the jury is here, is to ask you to stand and walk forward and stand here on the side of the Bar table opposite the barristers, directly in front of the jury box so that the jury can all see your face, see what you look like. I will tell them your name. What I am going to do then is to ask them to leave the Court, but that any member of the jury who recognises you by face or name to remain.
35
40

CROWN PROSECUTOR: During the questioning of the juror, it would be best if Miss Smythe was not in the courtroom.

HIS HONOUR: Yes. We have to go through the recognition process first.
45

CROWN PROSECUTOR: Yes, quite so.

ZAHRA: There was one other matter that has just been brought to my attention. I understand Miss Smythe has said something further to my instructing solicitor. There was, in fact, another person also working at Legal Aid in this capacity as part of the practical legal training. That person has not read this brief, but she had a discussion with her and expressed to her also her opinions about the guilt of the accused and that person also mixes in this circle of friends with the juror and that juror's girlfriend.
50
55

5 I am sorry that this is coming out this way. This is how
it is being revealed to us. There is, in fact, another
person who she has expressed an opinion to in the capacity
of a practise legal training course who worked for Legal
Aid who is part of this group, who may be known to the
juror.

10 HIS HONOUR: Can the person's name be ascertained?

ZAHRA: Melinda Leong.

15 HIS HONOUR: I take it not to be suggested or implied that
Miss Leong, if she said anything to anybody, is likely to
have any connection with any juror other than the juror
whose girlfriend was a member of this group.

ZAHRA: Yes, your Honour.

20 HIS HONOUR: Assuming we get to that stage, when I am
questioning the juror, I will give counsel an opportunity
to suggest anything else that I should ask the juror.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Something has been brought to my attention by
counsel that needs to be dealt with straightaway. You
remember that, at the beginning of the trial, I told you
that you were not to allow yourself to be influenced in
10 coming to your decision in this case by anything other
than the evidence given in Court, the submissions made on
that evidence by counsel, and your own discussions when
you were all together in the jury room.

15 I warned you about talking to people who are effectively
strangers to the trial and I warned you about the risk of
being misled if you placed any weight on material
broadcast electronically, printed in the newspapers and so
on.

20 It is in that context that I want to say what I shall now
say to you. There is in Court a young woman called
Annabel Smythe. It appears from what counsel have said to
me that she may be known by name or face or both to one of
your number. By way of further explanation I should tell
25 you that Miss Annabel Smythe was a law student, or perhaps
a law graduate who was working for the Legal Aid
Commission and engaged in the task of transcribing
listening device tapes about which you have heard some
questions and answers this morning.

30 What I am going to do now is to ask Miss Smythe to come
forward into the well of the Court, so you all can get a
good look at her. When that has been done, I am going to
ask you, as a jury, to retire, to go back to the jury
35 room, but that any of you who recognises Miss Smythe
should stay because I want to ask that person some
questions.

Now, Miss Smythe, would you please come forward?

40 (Miss Smythe came forward into the body of the
courtroom.)

45 If you would please stand there with your back to the Bar
table, so that all the members of the jury can have a look
at you?

(Miss Smythe complied.)

50 I think that is sufficient now.

Thank you, Miss Smythe. Would you mind going and, for the
moment, retaining your seat, where you were?

55 (Miss Smythe left the body of the courtroom and
resumed her seat in the public gallery.)

I want the jury now to leave the Court, but I want any one
or more members of you who may have recognised Miss Smythe

or thinks that she or he may have recognised Miss Smythe to remain. Will you please now leave?

JURY EXCUSED. ONE JUROR REMAINED.

IN THE ABSENCE OF THE JURY

HIS HONOUR: Now, Miss Smythe, would you wait outside the Court for us, please?

5

(Miss Smythe left the courtroom.)

CROWN PROSECUTOR: We should get his number.

10 HIS HONOUR: Sir, I am going to ask you some questions. I do not want you to tell us your name and I do not want you to give us any information that will enable you to be identified. Do you have your juror card there?

15 JUROR: Yes.

HIS HONOUR: Can you just read out to us the number of it, please?

20 JUROR: 44--

HIS HONOUR: I am sorry. Hand it to the officer.

25 (The juror handed his jury card to the Court Officer.)

I will return your card to you.

30 (The jury card was returned to the juror.)

Officer, I should like you to administer the oath to the juror, please.

35 JUROR(12.33PM)
SWORN AND EXAMINED

40 HIS HONOUR: Q. Rather than my asking you leading questions about why I think you might know Miss Smythe, would you like to tell me how you know and recognise Miss Smythe?

A. I recognise Miss Smythe through my girlfriend who attended uni, who is graduating in law. She was in her class. That's the only--

45 Q. Did you ever attend any group of students of which your girlfriend and Miss Smythe were members?

A. Um, I did partake in dinners and lunches with the group, but that's as far as it went, yeah.

50 Q. When did you first meet or know about Miss Smythe?

A. It was around about last year, this time.

Q. Were you ever present at any gathering in which Miss Smythe mentioned work that she was doing?

55 A. No. Not that I'm aware of.

Q. Have you ever known before today that Miss Smythe was

engaged in transcribing voice tapes for a criminal trial?
A. Um, I found out yesterday, when she walked into Court,
that she had phoned my girlfriend and my girlfriend passed
on the information to me, saying that she works for Legal
5 Aid, which I thought there was no apparent reason - if I
don't see her or don't speak to her for the duration of
the ten weeks, then everything should be fine, because my
girlfriend has now finished uni and I can't see any other
reason why I would meet her or be seen with her.

10

Q. I understand. Until your girlfriend telephoned you
yesterday--

A. Uh-huh.

15

Q. --you did not know the nature of the work that Miss
Smythe was doing?

A. That's correct, I did not know.

20

Q. What exactly did your girlfriend say to you?

A. She told me that she recognised me as one of the panel
on Court.

25

Q. Your girlfriend told you that Miss Smythe recognised
you?

A. That's correct, yes, and that she was concerned
because she is studying law as well, that, if anything, if
we were to meet, that it might jeopardise the case in some
sort of way.

30

Q. Did your girlfriend tell you anything else about Miss
Smythe?

A. That she worked for Legal Aid. That's all.

35

Q. Did she tell you anything about whether Miss Smythe
had been engaged in this case against Mrs Folbigg?

A. No. I thought she was here just through work, to get
practice of some sort.

40

Q. Have you said anything to your fellow jurors about
this?

A. No, I have not.

45

Q. Do you know a person called Melinda Leong?

A. That name I do not recall, sorry.

50

HIS HONOUR: Mr Crown, do you want to suggest anything
else that I should ask?

CROWN PROSECUTOR: No, I think your Honour has covered it
quite completely.

55

HIS HONOUR: Mr Zahra, do you want to suggest any question
that I should ask?

ZAHRA: Your Honour would be mindful of asking whether the
girlfriend has expressed any opinion about the matter.

HIS HONOUR: Yes, I asked whether the girlfriend had

relayed any opinion.

5 Q. Have you ever been made aware, directly or indirectly,
that is through your girlfriend or through Miss Smythe or
by any other means, of any opinion that Miss Annabel
Smythe might have had about the merits of this case?

10 A. None whatsoever. I know what you have said at the
beginning, not to tell anyone. If I was to tell someone,
it will jeopardise the case. I know this is something
important and it's no laughing matter, and I understand
and I respect that. So, no, there was no indication.

15 HIS HONOUR: I am going to ask you to retire in a minute
and, subject to anything counsel say, to rejoin your 11
fellow jurors.

First of all, do counsel have any objection to my doing
that?

20 CROWN PROSECUTOR: No.

ZAHRA: No.

25 HIS HONOUR: When you get back to them, they will be
curious?

JUROR: I imagine so.

30 ZAHRA: It might be best if the juror remains separate to
the other panel and your Honour would take submissions at
this stage. That is the preferable course.

35 HIS HONOUR: Sir, I will ask the Sheriff's Officer to just
take you outside and look after you there. You will not
rejoin the other 11 for a moment. I just want to listen
to what counsel want to say to me about it.

JUROR: Sure.

40 <JUROR RETIRED

45 CROWN PROSECUTOR: The juror has been extremely frank,
open, precise in his account to your Honour, endeavouring
to convey every skerrick of information that might be
relevant to this issue and it is apparent that there is
nothing that he is aware of that would prevent him from
continuing to serve on this jury and nothing to prevent
the rest of the jurors from continuing to serve. We would
50 submit that he should rejoin the jury and the trial should
go on.

55 ZAHRA: Your Honour, obviously I would agree with my
friend's submissions about how the juror presents and how
he has given his evidence. I cannot obviously suggest
that he is not telling the truth. Quite clearly there is
no foundation for that.

But, again, obviously the question of the potential of

5 some comment being made about it at some time in the future. He is, no doubt, going back to the community, back to his girlfriend. It may be that, even if he does not ask the question, she may say something to him or someone else in this group might say something to him. Whilst he is doing his best, if obviously that seed is planted there that she has expressed a view that could be quite something that will affect his objectivity in the case.

10 It is the concern now, having gone through this process, that if something is mentioned to him, I presume he is still not going to quarantine himself from those people that he mixes with. We know, in fact, that there are two
15 persons who mix in the group who may come into contact with him. It is that potential, as to whether it would colour his view, regardless of whether he mentioned it to some other member of the jury or not. It is probably in the air of more abundant caution that we remove any
20 potential of that in the future, what happens in a month's time.

HIS HONOUR: Are you asking me to give him a special warning?

25 ZAHRA: It may be that your Honour has no other choice, but to discharge that member of the jury because of the potential.

30 HIS HONOUR: What are you asking me to do?

ZAHRA: I ask your Honour to consider that.

35 HIS HONOUR: You want me to discharge the juror because he might talk to somebody in the future?

ZAHRA: Or someone may say something to him, someone who may have been privy to this statement.

40 HIS HONOUR: No, I am not going to do that.

If you want me to give him a warning, if it is something that obviously concerns you--

45 ZAHRA: No, it will only highlight the issue. I do not require an additional warning to be given separately to him.

50 HIS HONOUR: If you are so worried about the potential, why is not the warning appropriate?

ZAHRA: Only because your Honour has already done that. I do not require it.

55 HIS HONOUR: I have impliedly done it for the future. All I have been doing is enquiring into the history of the matter. I did warn the jury generally and I did that at the beginning of the trial.

5 CROWN PROSECUTOR: I have had situations where the spouse
of a juror has been in the public gallery during a voir
dire hearing. There is nothing that the Court can do
about that, other than warning the spouse and the juror
that they ought not to discuss the case at all. It would
be an appropriate situation for your Honour to remind the
juror that he ought not to discuss this case at all with
his girlfriend.

10

HIS HONOUR: Yes, I think I will do that.

15 ZAHRA: Can I say, for the record, my friend's analogy is
not a correct one. This is another instance he has given
of a person who is far removed from the case, not a person
involved with the legal representation.

20 HIS HONOUR: Whether or not the Crown is correct, I am
going to give the warning.

20

ZAHRA: I only say that if your Honour is relying on what
the Crown said.

25 HIS HONOUR: Do you want me to tell the juror what, if
anything, he should say to his fellow jurors? I will not
discharge him. I will require him to take his place among
the 12.

30 CROWN PROSECUTOR: There is nothing that has been said
that is prejudicial to the juror at large, so we would not
suggest that there be any restriction.

(The juror returned to Court.)

35 HIS HONOUR: Sir, thank you for your frankness in this
matter. I just wanted to give you a special warning,
really along the lines of the warning that I have given to
you and your eleven fellow jurors in the case generally;
40 that is, that you should take care, in accordance with
your oath, to avoid influence from anybody other than the
barristers and your fellow jurors in coming to your view
about the issues raised for your consideration in this
trial.

45 We now know that in your case there may be a special
reason to remain on guard. I counsel you to be very
careful when speaking to your girlfriend not to let her
talk about this trial at all. If directly or indirectly
any mention comes up of Annabel Smythe, or Melinda Leong,
50 or any other member of the student group, and about any
opinion that any of them might have expressed, you must be
specially on your guard to avoid references to those
matters.

55 I assume that you will be speaking to your girlfriend
soon. I think that the first thing that you should say to
her is that matters were reported to the Court that gave
rise to an initial concern that views expressed by Annabel

Smythe might have come to your attention; that the Court is satisfied that they did not; and that it is important that they do not. Tell her that and tell her not to talk to you about the trial.

5

Again, thank you for your frankness. Now, would you go back to the 11 jurors please?

(The juror left the courtroom.)

10

IN THE PRESENCE OF THE JURY

HIS HONOUR: Eleven of you are wondering what has been going on, so let me tell you.

5

Counsel reported to me a matter which suggested the potential for one of your number - there is no secret about who that is, it is the gentleman who stayed behind - may have inadvertently come by information which might have influenced his decision in any of the issues raised for your decision at this trial.

10

I have examined your fellow juror and I have satisfied myself that no such thing has happened and I have taken precautions to ensure that no such thing will happen. That is really all that we need to say about the matter.

15

I am confident that your fellow juror is and remains inviolate as you all do from inappropriate influence.

20

We will now get on with the trial with you 12 jurors.

(The witness was asked to return to the courtroom and did so.)

25

ZAHRA: Q. Can I take you to your evidence that you say that at, or about 1 o'clock, on the morning that Sarah was found deceased you gave evidence that your daughter was not in her bed at 1 o'clock?

30

A. That's correct.

Q. I put it to you that she was, in fact, in her bed at that time?

A. That's not correct.

35

Q. You have said a number of different things about whether she was in the bed or not on previous occasions?

A. I'm aware of that.

40

Q. Can I take you to those? Do you have your statement still with you? Can you go to paragraph 44?

A. (Witness complied.) Yes.

45

Q. Can you see that it reads "about 1am"?

A. Yes.

50

Q. "The following morning, which was Monday, 30 October 1993, "I awoke in bed which was unlike me. I looked at the clock in the bedhead and saw it displayed approximately 1am."?

A. Correct.

Q. Not 1.10am, "approximately 1am"?

A. That's what it says.

55

Q. Did you ever change that time?

A. Not in this statement, no.

Q. But at this time you referred to it as "approximately 1am"?

A. Approximately 1am.

5

Q. Bearing in mind what you say that you looked at the clock, was there any reason why you described it as "about 1am" and "approximately 1am"?

A. I guess, when I was doing this I was - I probably just said it was about 1am.

10

Q. You then go on to say, "I saw that Kathy was not in bed and I am sure that Sarah was in her bed". Would you agree with that?

A. That's what it says.

15

Q. You go on: "There was a street light in our street that supplied sufficient light in our room that allowed me to see inside"?

20

A. Yes.

Q. "I remember seeing Sarah laying in the bed"?

A. Yes, that's what it says.

25

Q. "I saw that the door to the bedroom was closed and I could see light coming through the bottom of the door which indicated that a light was on in the other part of the house"; is that right?

A. Yes.

30

Q. "It looked to me like the light was on in the vanity area of the toilet directly across from our bedroom door"?

A. Yes, that's what it says.

35

Q. Can I firstly take you to that last part; is that true?

A. Yes.

40

Q. That you believe the light was coming from the vanity area of the toilet?

A. For it to have lit the doorway up that much.

Q. Is that still your belief?

45

A. It was coming from outside of the bedroom and I - well, I assumed it was from the vanity area.

Q. In the toilet?

A. Yes.

50

Q. Can I take you back? Obviously you clearly state here that you were sure that Sarah was in her bed?

A. Yes.

Q. And I remember seeing Sarah laying in the bed?

55

A. Yes.

Q. I take it that you are going to say that that is a lie?

A. Yes.

Q. And that you put that to soften the situation?

5 A. It's certainly less damning than that. Sarah wasn't in the bed and Kathy wasn't in her bed.

Q. Well, what was your recollection at that time? Were you sure that she was in the bed or not?

10 A. On 19 May, when I made the original statement, she wasn't in the bed was what I told Bernie Ryan, which was my recollection.

Q. So, your recollection at that time, when you made the statement, was that she was not in the bed?

15 A. In the original statement, yes.

Q. Did your recollection change?

A. No, my recollection didn't change.

20 Q. You decided to lie?

A. I decided to change the words that I'd told Bernie Ryan.

25 Q. Was this part of the process that was previously typed differently?

A. Yes.

Q. Are you saying that, in fact, you gave this account on the first sitting?

30 A. I gave an account on the first sitting that was changed to this account on the second sitting.

Q. This was being typed up on a computer?

35 A. On a computer screen.

Q. Are you saying that--

A. I watched Bernie Ryan change the words.

40 Q. And, originally, you say that you said that you were sure that Sarah was not in her bed?

A. Originally I stated to Bernie Ryan that Sarah was not in her bed.

45 Q. This was on the 23rd, some days after you first started making the statement?

A. Originally it was the 19th.

Q. Do I understand that what you are saying is that at all times you were certain that Sarah--

50 A. At all times I was certain that Sarah was not in her bed. On 23 May I went back and had Bernie Ryan remove those words and put those words in their place.

Q. That didn't remove your certainty?

55 A. That didn't remove my certainty.

Q. There was no time since you have made your observations that you have ever doubted your recollection

about that?

A. Not to the best of my knowledge.

Q. Can you answer the question?

5

OBJECTION.

HIS HONOUR: You have an answer, Mr Zahra.

10 ZAHRA: Q. What is your memory? Has your mind wavered as to whether she was or wasn't in bed at this time?

A. No.

15 Q. Do you recall making the record of interview? This is when you were arrested by Detective Ryan?

A. On tape, uh-huh.

Q. Can I take you to some of the things you said there?

20

A. Yes.

Q. Again, do I understand that when you made this record of interview, you were no longer with your wife?

A. That's correct.

25 Q. You had been separated for some time?

A. That's correct.

30 Q. You had the state of mind to tell the police the truth at this time?

A. Yes.

Q. Well, you have had to think about that. Yes or no? Were you telling lies or telling the truth when you made this record of interview?

35 A. I was trying to tell the truth.

Q. What does that mean? That sometimes you lied?

40

A. No, I told the truth all the way through that, but it was a very frightening experience, and a very scary day and a very stressful day.

Q. When you made this, your recollection was as certain as you say it is now?

45

A. Yes.

Q. You have a mental picture of seeing the child in the bed?

A. Yes.

50 Q. And your mind has never wavered about that?

A. No.

Q. When you made this statement, you were not telling lies?

55

A. Sorry, which statement?

Q. The interview?

A. The interview?

Q. Yes.

A. No, I wasn't.

5 Q. At that point in time your recollection was a strong
recollection?

A. When?

Q. When you made the interview?

10 A. Yes.

Q. Can I just take you to--

15 HIS HONOUR: If you are going to go to the detail of it
and you are going to be more than a couple of minutes--

ZAHRA: Yes. Could I just take him to one of them?

HIS HONOUR: Complete what you want to do.

20

ZAHRA: Q. This is question 95:

25 "Q. Okay. Do you agree that you told - you are
now saying that when you woke at 1am, the
morning of Sarah's death, that Kathy was in bed,
that - that Kathy was up, sorry, and that Sarah
was still in bed?

A. Yes.

30 Q. Okay. Do you agree - do you agree that
answer--

A. Oh, when I woke?

Q. Yeah.

35 A. And the light was coming through the
doorway?

Q. Yeah. That Sarah was in bed?

40 A. I can't be sure that Sarah was in bed."

Now, they are your words?

A. Yeah.

45 Q. You see, you are saying that when you made this, your
recollection was as strong as it is today?

A. He asked me the question and I thought: Oh, my God,
they're going to pin me to the wall on this because this
is one of the things I pulled out and how bad's this going
to be for her.

50

CROWN PROSECUTOR: In fairness to Mr Folbigg, he continues
that answer in answer 99.

ZAHRA: I intend to take him to that.

55

CROWN PROSECUTOR: The whole answer should be read to him,
in fairness.

ZAHRA: I intend to take him to all of that.

Q. You say "I can't be sure that Sarah was in bed".

5 "Q. Okay. I will just show you something.

A. When I - when I woke the first time, I
couldn't see Sarah in the bed in the dark. I
could see the silhouette of the light around the
door and I assumed"

10

- the Crown wants me to read this. I intended to come to
this -

15

"I assumed, and that's why I comfortably went
back to sleep, that Kathy was up administering
to Sarah's needs. Yes. Some time later I was
woken to that."

20

Do you see? "I can't be sure that Sarah was in bed."
Then you go on to talk in terms of assuming. Do you
agree?

A. That's how - they're the words I used, yes.

25

Q. Why would you ever say--

A. Because I was all over the place emotionally.

30

Q. Does that mean you lie?

A. I have been all over the place emotionally all the
time.

35

Q. Does that mean you lied?

A. No, I didn't lie. I didn't know what to say. If I
told this man: This woman was not in the room and that
baby was not there, the realisation to me, where they
were, the thought I have carried in my heart for years,
when I found Sarah dead at 1.30, what happened at 1.10,
and why did I wake up? I never wake up. What woke me?
Was it something? Was it a noise that I woke up? Oh,
God. Go back to sleep.

40

I'm trying to explain. Sitting there, with cameras on you
and police officers staring at you and pointing at you and
asking you questions, and they're coming at you
doubled-up, how scary it was, of what you knew you had to
45 tell him, and what it meant for her, and don't begin to
make light of how much I loved her, because even then I
still loved her.

50

Q. You see, but you told Detective Ryan on the 19th--

A. That that baby was not in the bed.

55

Q. You had no trouble telling him then?

A. He asked me a question in a very casual, comfortable
way. It was a little bit laid back. It was a fairly
stressful day, but he asked me, "Just tell me word for

word what life was like. What did you live like? What did the babies live like? Et cetera, et cetera, et cetera, et cetera. I just waxed on.

5 Q. He was laid back. You were laid back. Is that what you are saying. You waxed on?

A. Waxed on. Talked at length.

Q. Was that the mood at the time? Just waxing on?

10 A. I was nervous but I was waxing on a bit, like I am now.

Q. Are you waxing on here?

15 A. I just told you.

Q. What was so difficult about the question?

A. The ramifications.

Q. You say "I can't be sure"?

20 A. I didn't know whether I should tell him or not--

• Q. I will take you to some of the others after lunch?

A. --because of the ramifications.

25 Q. I will take you to some of the others after lunch.

JURY EXCUSED

LUNCHEON ADJOURNMENT

30

RESUMPTION

5 ZAHRA: Q. Mr Folbigg, just before lunch I was taking you to parts of the record of interview, one particular part in relation to your statements whether Sarah was in bed or not around 1am; you recall that?
A. I do.

10 Q. I have taken you to one, but can I now, in fact, take you to the sequence of the answers in the record of interview, starting from the beginning of the record of interview and just taking you to the questions and answers that relate to whether you observed Sarah in bed or not; do you understand what I am about to do?
15 A. Yes.

20 Q. Looking at the history, prior to your engaging in this record of interview, on 14 May 1999, I think you say that you told Detective Ryan that you saw that Sarah was not in the bed; is that right?
A. Is that the statement of 19 May?

25 Q. No, before you made the written statement, did you tell Detective Ryan--?
A. At my home at Millard Close.

Q. And you told him there that Sarah was not in the bed?
A. Yes, that's correct.

30 Q. Then, when you make the statement on 19 May, the first sitting, you again say that?
A. Yes.

35 Q. Are you sure that you referred to that at the first sitting?
A. On 19 May?

40 Q. Yes.
A. Yes.

Q. You have got a recollection of going back and changing that?
A. On the 23rd, yes.

45 Q. And so you start on the 19th. Four days later you changed. In your statement you say you are sure Sarah was not in the bed. That is how the statement eventually, as you signed it on the 23rd of May, that Sarah was not in the bed--

50 CROWN PROSECUTOR: I object.

ZAHRA: Let us go to the statement itself.

55 Q. You agree you have got the statement there in front of you, and I have read to you parts of paragraph 44?

CROWN PROSECUTOR: I don't require it to be read. I just

think my friend got that last question wrong.

HIS HONOUR: I think that Mr Zahra recognises that and he is going back to it.

5

ZAHRA: I will take him to the precision.

Q. You say here, "I remember seeing Sarah laying in the bed and I am sure that Sarah was in her bed". So, when you left her on the 23rd, four days later, you were sure that Sarah was in her bed?

10

A. On the 23rd?

Q. Yes.

15

A. That's - yes.

CROWN PROSECUTOR: Your Honour, that was an ambiguous question. I think the way the question was understood by the witness was what the witness told the police, but the way the question was asked "you were sure that Sarah was in her bed" - now the ambiguity in that is: Is that what he is asking the witness he told the police, or is that what he is asking the witness was his recollection then, or is his recollection now. It is a totally ambiguous question.

20

25

ZAHRA: I will clear it up. I thought I pre-empted it: When you left it there, this is what you said.

Q. Can I ask you the question this way? When you left that statement at that point in time, that the statement still contained that expression by you that you were sure that Sarah was in her bed?

30

CROWN PROSECUTOR: I object, your Honour. My learned friend knows perfectly well what the sequence of events is. Now, the question, "At that point in time that that statement still contained", thereby implying that there was some previous assertion that had been made consistent with it, and my friend knows perfectly well that is not right.

35

40

HIS HONOUR: Are you asking him about his state of mind on the 23rd?

45

ZAHRA: No, your Honour. I am asking him about the statement, the statement, as it read, of 23 May. I thought I made that clear.

CROWN PROSECUTOR: My friend made that perfectly clear but by using the words "that it still contained" in it, he is implying that is what was in it before, and he knows it wasn't.

50

HIS HONOUR: It was changed.

55

CROWN PROSECUTOR: It was changed indeed.

ZAHRA: Q. When you left the police station, that statement contained that phrase?

A. It did.

5 Q. Now, it wasn't until some time later, 19 April 2001, that you changed that statement, or told the police anything different?

A. That I faltered when asked the question again?

10 Q. I am just putting to you, historically, the sequence leading up to this record of interview; that is, there is no other statement that you made to the police between 23 May 1999, and almost two years later, April 2001?

A. Not that I can recall.

15 Q. So, you let that statement stand for almost two years?

A. Yes.

20 Q. And when you made this statement when you were told that you were under arrest--

A. Yes.

Q. --and that you were possibly facing charges--

25 A. Yes.

Q. --did that influence your decision whether to tell the truth or not in this statement?

30 A. On top of all the anxiety, stress and fear of that day, there was also a sense of relief. So, no, it didn't influence me that day that I was possibly facing charges. I was prepared, at that time, to pay the piper.

Q. I asked you before lunch whether you intended to tell the truth when you went to the police station to make this interview?

35 A. Yes.

Q. And that you told the truth in that record of interview?

40 A. I did.

Q. See, can I take you to the sequence when you were asked these questions about whether Sarah was in the bed or not. Question 53:

45 "Q. Do you remember telling me that she carried Sarah up to you and threw her on to your lap?

50 A. Yes.

Q54. Do you remember telling me that at 1am on the morning when Sarah died, you woke up in your bed and saw that Kathy and Sarah weren't in their beds in your bedroom."

55 The transcript notes that you don't reply to that, or no audible reply. And then question 55:

"Q. Do you remember telling me that?

A. I don't recall telling you that. I can recall the night."

5 Was that the truth?

A. I didn't recall, when pressed, having previously told Bernie Ryan that, but I could recall the night.

10 Q. I will just read the next question, 58. I will read 57:

"Q. But I just, I want to go stage by stage so we - so we don't lose track here. Okay, Craig?

15 A. Yep."

Question 58:

20 "Q. Do you remember telling me that, if you don't remember that's fine, but do you remember telling me, at that point, on that night, that Detective Frith and I came and saw you?"

25 Then you say, "I assume - I recall assuming, when I woke up and Kathy wasn't in the bed and the light around the edge of the door, I couldn't see."

Now, were you telling the truth at that time?

A. Yes.

30 Q. Why did you qualify your answer? Why did you say, "I assume - I recall assuming"? Why would you use those words if, what you said before lunch, was right, that you were certain at that time of what had happened?

35 CROWN PROSECUTOR: I object. Your Honour, the words "I assume - I recall assuming" don't refer to the absence of Sarah from the bedroom. My friend is assuming that they do, but I assume that they refer to something else.

40 ZAHRA: Well, I will re-read the questions I read to him a moment ago to put it in context, or not.

CROWN PROSECUTOR: Whether he reads it or not--

45 HIS HONOUR: Whether you re-read them or not, they don't contain any reference to the subject matter you now say has been dealt with inconsistently, Mr Zahra.

50 ZAHRA: Your Honour, if your Honour goes back to 54 and 55, your Honour can see the sequence of the question. It relates clearly to this issue, whether they weren't in their beds. 54, 55--

55 HIS HONOUR: Yes, but 58--

ZAHRA: Your Honour, 56 and 57, okay, I have got to go through the sequence.

CROWN PROSECUTOR: He has done that, your Honour.

ZAHRA: "Do you remember telling me that?"

5 HIS HONOUR: You are putting the emphasis where it is convenient for you to do so on the letters. "Do you remember telling me that?" I don't know.

10 ZAHRA: I am putting it in the context. I have already read, 54, 55. I can read the whole lot, so the jury can understand the context.

15 HIS HONOUR: In my view, the answer to question 58 does not imply any reference to the child.

ZAHRA: Well, your Honour, I press putting to the witness that very fact, and in the context of 54 and 55. I will read to the witness the whole sequence.

20 HIS HONOUR: Well, you have already done that, haven't you? What will you do which is different from what you have already done?

25 ZAHRA: Your Honour, if there is any doubt about what the context of question 58 is, so far as the witness is concerned, I want to read 54, 55, 56, 57 and then 58.

30 CROWN PROSECUTOR: Your Honour, it is not the context that is in dispute. It is my friend is assuming that the answer "I assume - I recall assuming" refers to Sarah, and that is not necessarily the case.

HIS HONOUR: In terms it does not.

35 ZAHRA: Maybe the witness can clear that up, your Honour. I am asking what he means by that.

40 HIS HONOUR: You can ask him what he meant by it, whether he was referring--

ZAHRA: Your Honour, there are a number of different interpretations, a matter ultimately for the jury to draw whatever inferences, but I am entitled to put one of those--

45 HIS HONOUR: I am letting you go.

ZAHRA: Thank you, your Honour.

50 Q. Let's go back, Mr Folbigg, so we can make this very clear. Question 54 is where the questions are going. 53, remember, I read to you a moment ago about throwing in the lap. 54:

55 "Q. Do you remember telling me that at 1am on the morning when Sarah died you woke up in your bed and saw that Kathy and Sarah weren't in their beds in your bedroom?

A. No audible reply.

Q55 Do you remember telling me that?"

5 "That" meaning the previous question, "when Sarah died, you woke up in your bed and saw that Kathy and Sarah weren't in their beds?"

10 "Do you remember telling me that?"
You said:

15 "A. I don't recall telling you that. I can recall the night."

The next question:

20 "Q. Okay. But I'll go on to the night. Okay, Craig, are you right to continue?"
A. Yeah.

25 Q. But I'm just, I want to go stage by stage, so we - so we don't lose track here. Okay, Craig?
A. Yeah.

30 Q. Do you remember telling me that?"
You see, in the context of that meaning--
OBJECTION.

35 HIS HONOUR: You musn't explain what you say the questions mean. Just put the questions and answers to the witness, Mr Zahra.

ZAHRA: Q. The question is this:

40 "Q. Do you remember telling me that? If you don't remember, that's fine. But do you remember telling me, at that point, on that night that Detective Frith and I came and saw you?"

45 And you answer, "I assume - I recall assuming when I woke up and Kathy wasn't in the bed and the light around the edge of the door. I couldn't see."

50 Now, what did you mean by that, "I assume - I recall assuming"?

A. Did the conversation end at "I couldn't see", or were there more words?

55 CROWN PROSECUTOR: Perhaps it might be given to him.

ZAHRA: Yes, I am happy for that.

HIS HONOUR: Yes, Mr Folbigg ought to see the transcript.

(Transcript given to witness.)

5 HIS HONOUR: Q. What has just been read to you, Mr Folbigg, goes from page 7, just below halfway down, to page 8, just above halfway down.

10 ZAHRA: Your Honour, I am happy to have those two pages tendered. I don't know what my friend's attitude to that is.

CROWN PROSECUTOR: Perhaps we might see what his response is first, your Honour.

15 WITNESS: A. Can I answer?

ZAHRA: Q. Well, can you see question 58 there, Mr Folbigg?

20 A. Yes, I can.

Q. Well, what did you mean by "assume - I recall assuming"?

25 A. What did I mean by "I recall assuming"? That Kathy was outside with Sarah tending to her needs.

30 Q. Well, you see, you've used the word "I assume - I recall assuming" in relation to the question "do you remember telling me that they weren't in the bedroom". Nothing to do with--

OBJECTION. COMMENT.

35 ZAHRA: Your Honour, that may be a matter for address. Your Honour, I will continue on.

Q. Question 59:

40 "Q. No, but what I am talking about is that day, okay, the day that I came and saw you. Do you remember saying - telling me...?"

A. I don't recall telling you that, no."

And then question:

45 "Q. Okay. Do you remember telling me you went back to sleep and half an hour later you were awoken by Kathy standing in the doorway, the light to the room was on and Sarah was apparently deceased in her bed?"

50 Have you been able to follow that?
A. Yes.

Q. You can see the whole sequence of questions there?

55 A. I can see where you had the problem with question 58.

Q. Well, it is a matter for you to answer the questions, Mr Folbigg, not to make a commentary about my opinion or

views. Do you understand that, Mr Folbigg?

A. I do.

5 Q. At that point in time you did not recall telling the police on the first occasion that Sarah was not in the bed?

A. It was pretty hard to remember everything, what with the way everything was coming at me.

10 Q. You recall I read to you, earlier on, parts of a listening device where your wife raised with you the fact that you told the police about throwing the child on to your lap and that she became indignant about your saying it; remember that passage?

15 A. I do.

Q. You see, wasn't it the case that your wife told you about going to the police and making this statement: That you've got to go back and tell the truth?

20 A. Her truth.

Q. Well, I put it to you that she told you to go back and tell the truth about what had happened?

25 A. It didn't just end there, the comments that she made, at that point.

Q. You see, she told you that, didn't she; to go back and tell the truth? Yes or no, Mr Folbigg?

30 A. Yes.

Q. You see, because you say, in this record of interview, that that's what she told you to do. Can you go to question 93? Question 93:

35 "Q. Did you tell her what you, what you told me about her being up with Sarah?

40 A. I didn't tell her specifics of the conversation with you. I told her that I had been to talk to you and told you what life had been like and it - well, it wouldn't have been word for word what I told you - excuse me, but to a certain extent I would have said, well, in the conversation when I was trying to justify why I had come to you, I'd said to her, you know, what about when - when - how - what you were like after Pat died, what about when, leading up to before Pat died, what about this and what about that, you know, and, and got her views back, or her opinions back, or whatever, 45 that, you know, and she said to me, 'Well, you're just going to have to go and tell them the truth. I was a good mother, I was a loving mother, and all that.'"

55 And you go on:

"And, and, you know, 99 per cent of the time, she was, you know, the children were always

neat and tidy and clean and fed and, and all that, you know, and you just have to get to a stage where you think, well, you just get fuzzed out on the bad times."

5

Have you been able to follow that?

A. Yes.

Q. You don't qualify your wife's statements there about her telling you to go and tell the truth, do you?

10 A. No, because I pretty much figured they figured what I meant.

Q. You figured they figured what you meant?

15 A. Yep.

Q. Well, you didn't say that she told you to do anything but that, did you, Mr Folbigg? You didn't say anything to suggest that, other than her telling you to go and tell the truth?

20 A. "Well, you're just going to have to go and tell them the truth. You're going to have to go and tell them the truth. I was a good mother, I was a loving mother and all that." Kathy's truth.

25

Q. You understand what I put to you?

A. I did.

Q. You see, you didn't qualify it there in any way?

30 A. I did. Her words. She said, "I was a good mother, I was a loving mother".

HIS HONOUR: You may be at cross-purposes about what the word "qualify" means.

35

ZAHRA: Q. Can you read the rest of it?

"You're going to have and go tell them the truth, I was a good mother, I was a loving mother and all that. And, and, you know, 99 per cent of the time she was, you know, the children were always neat and tidy and clean and fed and, and all that, you know, and you just have to get to a stage where you think, well, you just get fuzzed out on the bad times."

45

A. I qualified that. 99 per cent of the time she was a good mother.

50 Q. Are you suggesting that she told you otherwise, at any time, other than to tell the truth?

A. She didn't tell me specifically what to go and change. She didn't know what was in there.

55 Q. You see, she never told you to do anything but go and tell the truth, did she?

A. No.

Q. Can I take you now to question 95? Can you go to that? These were the questions I was asking you just before lunch; can you see those? 95, 96, 97 and then 98.
5 You recall me reading that to you?
A. Yep.

Q. So, the sequence is that you say you don't recall the first conversation that you had with Detective Ryan on the
10 14th. You then, now, here, say "I can't be sure" at 98. You agree with that as the sequence?
A. Yes.

Q. Again, in question 99, you use the words "I could see the silhouette of the light around the door and I assumed, and that's why I comfortably went back to sleep, that
15 Kathy was up administering to Sarah's needs". You agree with that?
A. Yes.

Q. Question 105, the first question 105:
20

"That will do. Now, do you agree that that statement that you just read there on page 40 on
25 paragraph 44..."

Have you got your statement there now? Now, paragraph 44, as it reads: "I am sure that Sarah was in her bed and I remember seeing Sarah laying in the bed", okay?
30 A. Yep.

Q. So, question 105 takes you to what you said there, and 105 says:

35 "That will do. Now, do you agree that that statement that you've just read there on page 40 on paragraph 44 is different to what you told me--"

40 and then you say, "On the Thursday" and then Detective Ryan says, "On the 14th of May and on the 19th of May" and then you say, "Yes" and he asks, "Do you wish to make a comment about that?" And you say:

45 "I've got nearly an elephant's memory. It's nearly a videotape in my head of - of so much in my life. Time dwindles a bit of it - but some of it stays desperately clear."

50 107:

"Q. Craig, what is the truth?
A. I'm fairly sure when I woke up that morning that Sarah wasn't in the bed. I was convinced.
55 You could see - I can see her bed there. You could see there - it used to bug shit out of me. I'd go to bed, turn the light off, and then the whole bloody room was lit up, like a frigging

5 disco or something, with all the street light.
Mate, she wasn't in the bed. Her mother had her
out there. I went back to sleep, thought, oh,
well, she must be feeding her or something, so I
went back to sleep. I wish I had got up. I
went back to sleep. I worked. That was the
deal. You go to work, you have the money, you do
what you do when you get home. You do as much
10 as you can to help them and then you get some
sleep, mate. So I went back to sleep."

Now, you see I have read that answer to 107?

A. Yes.

15 Q. And you start off by saying, "I'm fairly sure"?

A. It's a word I use.

Q. You see, you weren't certain at that time, when you
said "I'm fairly sure"?

20 A. I was certain. It was just the word I used.

Q. It's just a word that you used that you were fairly
sure?

25 A. (Witness nodded).

Q. And you are saying that that word means that you were
certain, by the use of that phrase?

A. No, the rest of it says that I was certain.

30 Q. You say that the phrase "I'm fairly sure" is a way
that you say that you were certain?

A. No, I don't say that word says that.

Q. Well, it says less than convinced, doesn't it, Mr
35 Folbigg?

A. No, a little bit after that I said I was convinced.

Q. No, but I am telling you that in the one answer you
also start this answer by saying "I'm fairly sure"; do you
40 agree with that?

A. Yeah, that's how I started it.

Q. Did you change your mind during the answer?

45 A. No.

Q. And 110:

50 "Q. Craig, I want you to get one thing very,
very clear. I don't want you to be thinking
about suspicious aspects of Sarah's death. Was
she - was Sarah in that bed when you woke at 1
o'clock or was she not?"

And the answer you've got:

55 "I don't believe she was."

A. He double-dutched me on the question. Totally

confused me.

Q. Because clearly that answer doesn't indicate that you were certain, does it?

5

HIS HONOUR: It doesn't in the way you read it, putting the emphasis on "believe". That is the difficulty about translating live words into cold text, Mr Zahra.

10 ZAHRA: Q. Can you read that answer and tell us what your concern is that it doesn't read that way?

A. It's like a double, double negative sort of thing. It leads you only to a "yes" or something. It's very confusing. "Was she or was she not". Very confusing.

15

Q. You see, and then the question 111:

"Q. Can you recall in your memory?

A. I--

20

Q. Not seeing her there?

A. I definitely believe she was not in that bed. I could not, and I definitely cannot, picture her in that bed."

25

Okay? So there is an expression "I don't believe she was", and then "I definitely believe"?

A. Well, the question came out clearer.

30 Q. Do I understand that what you have said before lunch in relation to - can I take you back to 98?

35 HIS HONOUR: While you are just pausing there, Mr Zahra, I should have something recorded which will make comprehensible a remark I made a few moments ago.

40 When Mr Zahra read to Mr Folbigg the answer to question 110, "I don't believe", "I don't believe she was" - and I try not to emphasise any word in that sentence - Mr Zahra put strong emphasis on the word "believe", and no particular emphasis on any other part of the sentence.

45 The sentence might possibly have a different meaning if the emphasis is placed elsewhere. That is all that I meant. I am sorry, Mr Zahra.

ZAHRA: I am grateful for that, your Honour.

50 Q. Can I take you back to 98? Remember this is what I was asking you before lunch, when you said "I can't be sure that Sarah was in bed"; that answer; can you see that there?

A. Yes.

55 Q. And do you remember saying before lunch that, in a sense, when you were faced with answering that question, you hesitated because, at that point in time, the enormity of the question was such that you still had this sense of

wanting to protect your wife and not tell the police that?

A. Basically, yes.

5 Q. So, when you gave that answer, you were intending somewhat to protect your wife at that time?

A. I was still torn.

10 Q. But intending to protect your wife?

A. I didn't know what to do.

10 Q. Well, do you understand the question?

A. I do.

15 Q. You were intending to protect your wife at that time?

A. Yeah.

CROWN PROSECUTOR: He has answered that.

20 HIS HONOUR: I don't think he has, Mr Crown.

CROWN PROSECUTOR: His answer was "I was still torn".

ZAHRA: Your Honour, the question was--

25 HIS HONOUR: I don't see that as a complete answer to the question.

ZAHRA: Thank you, your Honour.

30 WITNESS: A. Yes.

Q. You were protecting her? You're nodding yes?

A. (Witness nodded).

35 Q. Can I take you to question 112? Question 112:

"Well, why change your story when you come back to me on, on the - what was it, 23 May 1999?"

40 And you answered:

45 "Kathy said that she was in the bed, that she, she got up, gone to the toilet, she was in the bed. And I said, 'but I don't remember seeing her in the bed'. Kathy said 'She was in the bed'."

Can you see that?

50 A. Yes.

Q. Do you see the next question:

55 "Q. Were you trying to protect your wife? ?
A. I don't believe that I was trying to protect my wife. I, I don't believe I was. What I think I, more than anything, is that you have to work on the basic principle that time dims things and maybe you are wrong, maybe, maybe you

are wrong, maybe, maybe it wasn't the pillow that I saw, maybe it was the baby. Got to go the benefit of the doubt."

5 Have you been able to follow that?

A. Yes.

10 Q. Well, you see, you were asked a direct question at that time about when you decided to change to saying that the child was in the bed; that you weren't trying to protect your wife; that you had doubts about what you saw?

A. I beg your pardon, sorry?

15 Q. Well, you were asked the question, "Were you trying to protect your wife?" , at that time, and you said:

20 "I don't believe that I was trying to protect my wife. I don't believe I was. What I think I, more than anything, is that you have to work on the basic principle that time dims things and maybe you are wrong. Maybe, maybe you are wrong. Maybe, maybe it wasn't the pillow that I saw. Maybe it was the baby. Got to go the benefit of the doubt."

25

A. This was in reference to 23 May, some years before. When I went back on 23 May, this is what this question pertains to; is that correct?

30 Q. Didn't you, in answer to a question earlier on, say that you at no stage had any doubt that you saw Sarah out of the bed?

A. Yes, I did.

35 Q. Well, you see, it is not the case, is it?

CROWN PROSECUTOR: I object.

40 HIS HONOUR: I don't understand what the question means, Mr Zahra.

45 ZAHRA: Q. You said there, in answer, that maybe you were wrong? Why did you say that? Was it a lie? Were you still trying to protect your wife at that time?

CROWN PROSECUTOR: I object. Double question.

ZAHRA: Q. Well, were you lying?

50 A. When?

Q. Well, at this time when you answered this question?

A. No.

55 Q. Well, I have tried to keep my voice very monotone. But that expression "maybe you are wrong"--

A. Well, there is always two sides to a story, and conversations I had with Kathy, it just seemed easier to go to the second side of the story.

Q. You see, you say "time dims things and maybe you are wrong, maybe you are wrong". Now, how does that stand, Mr Folbigg, with your previous assertion that you, at no
5 time, were any less than convinced that your child was out of the room?

CROWN PROSECUTOR: I object.

10 HIS HONOUR: Why, Mr Crown?

CROWN PROSECUTOR: How does it stand? That is asking for a comment on an interpretation of whether they are ambiguous or not.

15 HIS HONOUR: I will allow the question.

ZAHRA: Q. I will ask it this way: How does that stand, that expression there, "maybe you are wrong", stand
20 with what your previous assertion was that, at no time, were you other than convinced that Sarah was not in her bed?

A. It's fairly wishy-washy.

25 Q. Because it indicates your state of mind, doesn't it; maybe you were wrong?

A. No, no, it pretty much indicates that I was frightened. That's the way I read it.

30 Q. Well, why do you say that?

A. Well, it was a terrible predicament to be in.

Q. You see, just beforehand, you - it had come out - had clearly said "I definitely believe she was not in the
35 bed". But then, when you were taken back to what you had previously said, so you had got that part off your chest, then you were taken back to why you said these things previously?

40 A. Well, he said "Are you trying to protect your wife?" on 23 May.

Q. That's right. But then you, using your words, introduced this concept that maybe you were wrong?

45 A. That's why I went back on 23 May.

Q. But, see, they're your words, Mr Folbigg. No-one else's. They are an expression at that point in time that you weren't protecting your wife, that time dims things, and you questioned whether you were right or wrong?

50 A. Fine.

Q. Can I take you to a transcript of a listening device of 26 July 1999, time 7.31? Mr Folbigg, what I am about to read to you is a conversation between yourself and your
55 wife.

CROWN PROSECUTOR: I object, your Honour. I would need to make submissions to your Honour.

HIS HONOUR: I might need to see a transcript too.
Ladies and gentlemen, this may not take more than a few
minutes, but I do need to ask you to withdraw. Would you
5 mind doing that, please?

JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Is there a transcript available of the material?

5

CROWN PROSECUTOR: Yes, it is under tab 16.

ZAHRA: Your Honour, might the witness wait outside?

10

HIS HONOUR: Would you mind waiting outside?

(The witness left the courtroom.)

15

CROWN PROSECUTOR: I can hand up a copy here, your Honour.

HIS HONOUR: Does the question end, "What I am about to read to you?" And then the objection is taken?

20

CROWN PROSECUTOR: Your Honour, I object to my learned friend cross-examining on this tape. If your Honour reads the first page and a half, it should give your Honour a flavour of it.

25

HIS HONOUR: All right, I will do that, thank you.

What do you want to do with this, Mr Zahra?

30

ZAHRA: Your Honour, this is a conversation that is recorded by an interception device, a conversation between Mr Folbigg and his wife. It is, in fact, a conversation where Craig Folbigg presents a sequence to his wife, where he will admit to killing the children. The point that is sought to be made is highlighted by the statement that appears on the first page, starting with, "Hold on a minute", at about point 6.

35

In the context, obviously, of what had been said before about her finding the children. He ultimately says in that passage, "I wake up. I admit that I wake up at 1 o'clock. I kill her in her sleep, while you're out of the room".

40

Now, this whole sequence is based on the premise or the foundation that the child was out of the room at 1 o'clock, and that is the significance of this passage. In other words, the scenario that he was in the bedroom at the time she was out of the bedroom.

45

HIS HONOUR: So, you are saying what he is putting to her is true.

50

ZAHRA: Not in the sense that he killed the child, but the foundation for the sequence is, she was out of the room at 1 o'clock and the child was in the room, and that he had the opportunity, in her absence, because the child was still in the room.

55

HIS HONOUR: But this is a fantasy, isn't it; this being put here?

5 ZAHRA: Your Honour, it is significant that it is on the foundation when the conversation was, in relation to her finding the children, that he doesn't say anything about her being out of the room, and I need to change that, or the child being out of the room.

10 It is clear that the whole foundation of his proposed sequence is what, we say, is the true foundation; that the child was in the bed prior to the mother coming upon her.

15 HIS HONOUR: Well, what it means, I suppose, is for the jury. What do you say about this, Mr Crown?

CROWN PROSECUTOR: Your Honour, what we say is this: That there is no serious suggestion that this is an actual confession of any involvement by Mr Folbigg. If your
20 Honour goes to the second page of the conversation, the first entry for Craig is, "It's not ridiculous. It is as feasible as what they're trying to say about you" and then about a third of the way down the page, he says, "So were you. All I'm trying to show to you is the futility of the
25 bullshit is going on". In other words, he is trying to portray to his wife that the allegations that they assume the police have in mind about Kathleen are as crazy as if they allege that he was responsible, because she loved the children as much as him.

30 HIS HONOUR: Insofar as you make that submission, you appeal to my understanding of the words, and I might say I am inclined to agree with you, subject to what else might be said.

35 CROWN PROSECUTOR: Your Honour, I don't perceive that my learned friend is seeking to suggest that this is any evidence at all other than credibility evidence. It is not going to be used in any way as suggesting that he may
40 have been the cause of the death of the children.

HIS HONOUR: But I don't understand that. Mr Zahra is going to say that it goes to the fact of whether the child was in the bed at the time.

45 CROWN PROSECUTOR: That is a different point, your Honour. What I am submitting is this: That my learned friend is not seeking to use this conversation as any evidence that Craig Folbigg was responsible for the deaths of any of his
50 children. So, therefore, it goes to credibility only; the credibility of his evidence.

HIS HONOUR: That is the leap I don't follow.

55 CROWN PROSECUTOR: The reason being that the use that my friend wishes to make of it, in effect, is this: That here is a statement inconsistent with his testimony in court about the whereabouts of Sarah. It is a prior

statement which is inconsistent with his present testimony; therefore, the jury ought not to believe his present testimony. So it goes entirely to whether or not it is credible; his evidence is credible.

5

HIS HONOUR: It doesn't go entirely to whether his evidence is credible; it certainly goes very much to whether his evidence is credible, but it goes to the fact whether the child was in the bed.

10

CROWN PROSECUTOR: Yes, I take your Honour's point. It does go to that fact.

15

HIS HONOUR: So, it is not caught by section 102, if that is what you had in mind to bring my attention to.

CROWN PROSECUTOR: It was, your Honour.

20

Your Honour, the real difficulty that I have is that, in my submission, the jury could well misuse this material; they might misinterpret it; they might think it is tantamount to an admission which even the defence would say it is not, and my concern is that, because of that potential misuse, under section 135, there is an issue as to whether it ought to be permitted to go into evidence because it is unfairly prejudicial to a party under paragraph (a) and it might be, "Might be" -; that is the wording of the section - "misleading or confusing", which is paragraph (b).

25

30

Your Honour, I understand the use that my friend wishes to make of it, but, in our submission, there ought to be a way that he can cross-examine Mr Folbigg on this material without getting into evidence the part about Craig Folbigg hypothesising that it may just as easily have been him that killed the children.

35

For instance, my learned friend could say to him, "Well, would you have a look at those sentences you see about two-thirds of the way down the first page?" "During your discussions with your wife, did you assume, in those discussions, when you were speaking to her, that Sarah was in the room?", or words to that effect.

40

45

So my learned friend may well be able to get out of this material what he wishes, without the misleading part, or the prejudicial part, that could be misunderstood by a jury.

50

HIS HONOUR: You don't seem to have an interest, Mr Zahra, in putting before the jury evidence suggesting that Mr Folbigg might have considered himself responsible for the death of the child?

55

ZAHRA: No, your Honour.

HIS HONOUR: Then, what the Crown says seems to have some substance. Can you just tell me precisely now which part

or parts of the passages you want in?

5 ZAHRA: Well, after the words, at the top, towards the top, "further conversation (inaudible)", starting from there, over the page, to where it ends, "(Conversation inaudible)"; in other words, "you wouldn't have known I was there".

10 HIS HONOUR: Can you ask your questions without verbatim reference to those passages in which, as I understand it, you agree Mr Folbigg is putting forward a preposterous story that he was responsible?

15 ZAHRA: Your Honour, the significance of this passage is dramatically reduced, in the sense that this is a conversation which the witness had no knowledge about, a conversation with the accused, where he makes a statement inconsistent with his present testimony, and it is made in this particular context. It is difficult to get the sense
20 of what, in fact, is happening here without that.

Your Honour, I can make it clear that it is not part of our case that he had anything to do with the deaths of the children. This is a matter that simply can be addressed
25 with suitable directions, but the difficulty is that, firstly, it would be difficult to follow in this oblique way.

30 CROWN PROSECUTOR: Would your Honour pardon me for a moment? I might be able to reach an agreement with my learned friend?

HIS HONOUR: Yes, your Honour.

35 CROWN PROSECUTOR: We have reached agreement.

IN THE PRESENCE OF THE JURY AND THE WITNESS

HIS HONOUR: That matter has been sorted out now, ladies and gentlemen, and we can continue.

5

I think you were asking for the Sheriff's Officer to confirm about next Friday's sitting. We shall be rising at 1 o'clock. At 1 o'clock I shall stand the case over until 10 o'clock on the following Monday.

10

ZAHRA: Q. Mr Folbigg, I was about to take you to a transcript, a recording by a listening device, of a conversation between you and your wife on 26 July 1999, at about 7.31 in the morning. Do you understand that?

15

A. Yes.

Q. Can I just generally set the scene? What you are doing in this conferring is suggesting to your wife how you regarded the police version that she had killed Sarah as being quite preposterous and that you were suggesting other versions equally as preposterous to the police version that she had killed Sarah. Do you understand what I'm saying?

20

A. Yes.

25

Q. Do you recall this conversation?

A. I do, actually.

Q. In relation to that preposterous version, you say, "Why can't they think that?" And your wife says, "The problem was I found them all" and then you say this:

30

"Hold on a minute, hold on a minute, hold on a minute, can you hear me out? All right, so I get up and I kill Caleb because the next person to find him would be you, all right. Sarah, you're out of the room, I wake up, I admit that I wake up at 1 o'clock, I kill her in her sleep while you're out of the room."

35

40

Have you been able to follow that?

A. Yes.

Q. You see, you are here putting up a preposterous version?

45

A. Yes.

Q. Is that right?

A. Yes.

50

Q. And you are trying to indicate to your wife that it is equally as preposterous as what the police are saying about her killing the child?

A. Yes.

55

Q. But at all times your version has the foundation that you kill the child when she was out of the room and Sarah was in her sleep, while you were out of the room, while

Kathy was out of the room. Do you understand what I'm putting to you?

A. I do.

5 Q. You see, I put it to you that you put it on that foundation because that's what happened? When Kathy was out of the room Sarah was still there?

10 OBJECTION. AMBIGUITY. QUESTION TO BE REPHRASED.

Q. You see, in that answer, when you were giving the sequence about who was in the room at 1 o'clock, you say that Kathy was out of the room, and the child was in the room at 1 o'clock. Do you see that?

15 A. I do see what you're saying, yes.

Q. Can I put it to you that you said there, or use as a foundation, that the child was in the room?

20 A. In that scenario.

Q. I put it to you the reason you put it as a foundation was because that is what happened; that Sarah was in the room at 1 o'clock?

25 A. No. That was a scenario. If you would read the whole lot of that the scenario would unfold right up until the culmination of the conversation.

Q. I am happy to do that in these circumstances now. I do not know if my friend wants to say anything about that.

30 CROWN PROSECUTOR: I think my friend is saying the first two sentences of the first entry for Craig on the second page and the third entry for Craig on the second page. I have no objection to them being read out.

35 HIS HONOUR: You may, if you wish.

ZAHRA: In the circumstances of the invitation by the witness, it is now important that it be raised in context for it to be thought that I might be misleading him.

CROWN PROSECUTOR: If I thought that my learned friend was misleading the witness, I would certainly say so.

45 ZAHRA: I press page two, the first entry of Craig, down to "conversation inaudible".

HIS HONOUR: That is not resisted by the Crown.

50 ZAHRA: : It is. I understand my friend only wants the first part.

CROWN PROSECUTOR: It is objected to. I would only agree to the first two sentences as being relevant to this issue.

55 HIS HONOUR: What about the second and third entries for Craig? Are you asking for them to be included?

CROWN PROSECUTOR: I have no objection to those. The second and third entries of Craig.

5 HIS HONOUR: I will ask the jury to leave again if you like. It seems to me that if the whole of the page down to and including the third entry of Craig, the third reference to Craig, is read, that sets the context.

10 CROWN PROSECUTOR: I would like to make a submission.

HIS HONOUR: We are speaking in shorthand, as you understand, in an effort to try to get things done quickly without the need for you to go out again. It was a
15 near-miss.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Firstly, I agreed to my learned friend
being permitted to embark upon this line on certain, very
strict parameters. He is now seeking to go past those
parameters.

ZAHRA: Might the witness go outside?

10 HIS HONOUR: Yes.

(The witness was asked to leave the courtroom
and did so.)

15 CROWN PROSECUTOR: I should not have been put in the
position where I had to object to anything in front of the
jury. My learned friend knew perfectly well what my
approach was, I made it clear. He understood clearly. It
20 is not appropriate for him to now rely upon an answer that
has been given by the witness to get some further material
out.

The main submission is that apart from the first two
sentences of that first entry on page two, the rest of
25 that segment of conversation is just an expression by Mr
Craig Folbigg of belief in his wife's innocence. So it is
an out of Court expression by him of belief in her
innocence. I wonder what would happen if the Crown tried
to elicit evidence from any witness of an out of Court
30 statement by a witness of belief in the accused's guilt,
what the reaction of the defence would be? It is not
admissible. It is not relevant. What he says there is
pure opinion. It is not expert opinion. It is clearly
inadmissible. I ought not have been put in the position
35 of having to object to it.

HIS HONOUR: What is the answer that Mr Folbigg gave by
way of invitation to look at the rest of the context?

40 CROWN PROSECUTOR: He said something about that it was all
explained later on in the interview. We will get the
actual wording of it.

The question was:

45 "Q. I put it to you that the reason you put it
as a foundation was because that is what
happened; that Sarah was in the room at 1
o'clock?

50 A. No. That was a scenario. If you would read
the whole lot of that, the scenario would
unfold right up until the culmination of the
conversation."

55 HIS HONOUR: I do not think that answer entitles you to do
anything that you would have been otherwise not entitled
to do, Mr Zahra, does it?

5 ZAHRA: Only that the witness is saying that there are other parts of this; that, in fact, I have been selective in the answer; that there are other parts of this, if I were to read on, which will, in fact, show that there was some doubt that he had expressed about that being a foundation. In other words, that I have chosen this piece out of context. If it were to be read in context, it would show that he did not believe that his daughter was in the room.

10 HIS HONOUR: I think the context is fairly shown if you have leave to go over the page and deal with the first two sentences of the first attribution to Craig and that is all that you may do.

15 ZAHRA: It is a matter for your Honour. I take it your Honour means, "This whole house the only person that was...".

20 HIS HONOUR: And "in this whole", et cetera, to the end of that passage is objected to and is rejected.

25 ZAHRA: So the first two sentences only: "It is not ridiculous. It is as feasible as what they are trying to say about you."

HIS HONOUR: That is correct.

30 CROWN PROSECUTOR: I have no objection to the third entry for Craig: "So were you. All I'm trying to show to you is the futility of the bullshit he's going on with".

35 HIS HONOUR: That, I think, is what really shows the context. That is a matter for you Mr Zahra.

ZAHRA: Yes.

(The witness returned to the Courtroom.)

40 HIS HONOUR: Mr Folbigg, may I ask you a second time to be careful just to give a sufficient answer to the question you are asked and not volunteer information.

IN THE PRESENCE OF THE JURY

5 ZAHRA: Q. Can I read to you two other comments that you
have made after that particular passage that I read. You
say this: "It's not ridiculous. It's as feasible as what
they're trying to say about you" and also, "So were you.
All's I'm trying to show to you is the futility of the
bullshit he's going on." Do you recall saying those
things?

10 A. I do.

Q. What do you say about the statement that your daughter
was in the room in that context?

15 A. In that context, saying Sarah was in the room was
incorrect.

Q. Why did you pick 1 o'clock? Why not just before you
came in the room?

20 A. I don't understand the question.

Q. Why is it that you just so happened to use the
critical time, 1 o'clock, to describe how your daughter
was in this scenario, still in the room?

25 A. Well, the time line was the time line. I couldn't
change the time line.

Q. It's not the case, is it, that the reason you pick out
1 o'clock was because you were on the solid foundation
that your daughter was in the room at that time?

30 A. She wasn't in the room.

Q. When you were awoken by your wife screaming, you
related a sequence of events that involved your attempts
to resuscitate the child and also then a number of other
people arriving, including the ambulance?

35 A. Yes.

Q. A number of people arrived?

40 A. Yes.

Q. Before your child had left the house?

A. Yes.

45 Q. In particular, ambulance officers came there and
attempted to resuscitate the child?

A. Yes.

Q. And there were a number of ambulance officers around?

50 A. Yes.

Q. Do you remember how many there were?

A. There was a girl who came there first and there were
two other fellows from the other unit.

55 Q. Do you recall telling anyone on that night, be it
ambulance or police or anyone, that you saw that your wife
was up with the child at about 1 or 1.10?

A. No, I don't.

Q. Are you saying you don't remember or you didn't?

A. I don't recall if I told anyone.

5 Q. What is your recollection? Did you tell anyone?

CROWN PROSECUTOR: He has just said he doesn't recall.

10 ZAHRA: Q. You have made no statement at any time, have you, that you told anyone on that night that you saw that your wife was out of the room with your child at about 1 or 1.10?

A. Sorry, I didn't understand that.

15 Q. I will ask it again. You have never in any statement that you have made ever suggested that on this night, at the house, when ambulance and police were arriving, that you told any of them that, at about 1 or 1.10, your wife was out of the room with your child?

20 A. I don't recall if I have made a statement in that fashion at all.

Q. Did detectives turn up on that night?

25 A. I don't recall if they were detectives. They were police officers.

Q. You don't recall telling any of them that your wife was up with the child out of the room at about 1 or 1.10?

30 A. I don't recall.

Q. You see, the ambulance officers attempted to resuscitate your daughter at that time?

A. Did I see them?

35 Q. Yes?

A. I saw them start to and they ushered us out of the room.

40 Q. But you are aware that they were attending to her health?

A. I was.

45 Q. Why didn't you say, "Hang on a moment, 20 minutes ago she was okay, she was with my wife outside the room." Why didn't you tell anyone that?

OBJECTION.

50 CROWN PROSECUTOR: I object to 20 minutes. By the time the ambulance officers came it would have been half an hour at least.

QUESTION TO BE REPHRASED.

55 ZAHRA: Q. Why didn't you tell anyone that when your wife screamed and you saw your child in this way that 20 minutes before she was okay or with your wife?

A. I can't answer that with a yes or no.

Q. Well, you are simply being asked why. Can you give an answer as to why? Just let me finish. Bearing in mind this scenario, your daughter is being treated by ambulance officers. Didn't you think that it was important to tell the history of what had just happened? In other words, your wife was up with the child and about 20 minutes after that the child was found in this way? Why didn't you tell them that?

5
10
15
20
A. Based on that question, Mr Zahra, I'm led to assume that you've never suffered a situation such as this yourself, because if you had of you would understand I wasn't going to tap one of those men on the shoulder whilst he was doing what he was doing for the baby and saying, "Excuse me, I just thought you need to know this." Then the night rolls on. It's even more traumatic when they come to tell you that they haven't been able to save her and then police officers want to ask you stuff about what's going on. All you want to do is be with this baby. So I'm sorry, I don't know why I didn't have the temerity or the presence of mind at that point in my life to say that to anybody.

Q. You see, you didn't tell anyone at all?

25
30
A. Some days later, when it came back to memory, and I asked Sarah's mother things about that night, she wouldn't speak about that night, I kept things to myself, met Dr Hilton further down the track, still couldn't bring it up. Didn't know what to do with it. Never suspected that - the possibilities or the probabilities of what you're suggesting.

Q. You see, you didn't tell anyone about this between August 1993, this night, and May 1999, about six years. That was the first time that you raised with the police that Sarah was out of the room at 1 o'clock - six years?

35
A. That's correct.

Q. Whilst the ambulance people were treating your daughter you didn't see it necessary that it might be important in their treatment of your daughter, "Hang on a moment, my wife saw her okay 20 minutes before we found her"?

40
A. I don't understand the question.

45
50
Q. It didn't enter your mind that it would be important information, so far as the treatment of your daughter is concerned, that they might want to know that your wife might have something to say about how she was 20 minutes before she was found?

A. No, it didn't enter my mind.

Q. You spoke with Professor Hilton who you knew had carried out the autopsy?

55
A. I learned that he had.

Q. Did you ever tell him in your discussions with him that it might be important that you ask Kathy how she was

20 minutes before she was found?

A. No. Basically I just sat there and listened to what Professor Hilton had to say to me.

5 Q. Correct me if I am wrong, isn't the impression you are giving us that you were quite unhappy with what you were being told? You wanted to know more. You wanted to know the answers. This was your state of mind at the time.

10 A. I do recall asking Professor Hilton what time Sarah had died. Professor Hilton told me he wasn't sure. He would have to look at his notes.

15 Q. Didn't you think it an important piece of information in them trying to find out what happened to Sarah, "Why don't you ask Kathy? 20 minutes before this she was up with the child"?

A. Nobody at the time said to me, "We think she was killed 20 minutes before they found her".

20 Q. You say that it never crossed your mind other than the fact that your recollection was certain that the child was all the time outside of the room at 1 o'clock? You have said that a number of times today. Your memory of this has not faltered. From the moment you made the
25 observation that your child was not in her bed at 1 o'clock until today your memory has not faltered?

30 A. My memory has never faltered on the fact that Sarah was not in her bed that night at 1.10. It never crossed my mind to bring up that information to anybody because I never had any suspicions as to Kathy's involvement in anything until after Laura died.

35 Q. I am not asking you about suspicions. I am asking you about the fact that when you were there with Professor Hilton, and there was a discussion about why this child died, at that time your memory, as you say, would have been clear that there was an important part of this that he may not have known; that is, 20 minutes before this, she was found, when your wife was screaming, that she was
40 up with Kathy?

A. The night--

45 Q. Let me finish. Presuming that, in fact, this was just a normal attending to her - that was your understanding - why didn't you tell Professor Hilton that?

50 A. The night Sarah died those police officers took Kathy into one room and took me into another. I didn't think to bring it up that night because I was so upset at the fact that Sarah had died. When we spoke with Dr Hilton I didn't know if Dr Hilton knew that or not.

55 Q. Putting your suspicions to one side, why wouldn't you say to Professor Hilton, "Hang on a moment, my daughter was okay 20 minutes before this"?

A. I didn't know that she was okay 20 minutes before that.

Q. You have given evidence that, at all times, you had

assumed that your wife was attending to the child, feeding the child?

A. Yes.

5 Q. Why wouldn't you say that to Professor Hilton, if that was the case that she was out of the room, "Hang on, Professor Hilton, it might be important in trying to explain or trying to investigate that, that 20 minutes before this everything must have been fine because I
10 assume, when I saw the child out of the room, that everything was okay at that time. 20 minutes later she's found this way." Why wouldn't you tell Professor Hilton that, who was, in fact, at that stage trying to work out what, in fact, had happened?

15 OBJECTION. TRIPLE QUESTION.

Q. Let me put it this way. Have I got the scenario right: That you go to see Professor Hilton because you
20 want answers?

A. No.

Q. Why did you go to see Professor Hilton?

25 A. Because Professor Hilton asked us to go to see him.

Q. Did you think it was important at that point in time to obviously find out what had happened?

A. Yes.

30 Q. Did you ask him for his opinion about what, in fact, had happened?

A. No, he told us.

Q. Sorry?

35 A. He told us.

Q. Did you ask him questions?

A. No.

40 Q. Did he ask you--

A. No.

Q. Did he ask you or your wife to give an account of what, in fact, had happened beforehand?

45 A. No.

Q. Do you recall how long you spoke to Professor Hilton for?

50 A. I think it was about a half an hour.

Q. Correct me if I am wrong, but when you gave evidence about how you left Professor Hilton, that you weren't happy at that time, were you?

55 A. No.

Q. Are you saying that you asked no questions; that you essentially took at face value what Professor Hilton said to you?

A. He was a coroner.

Q. You understand what I have said to you? You say you took at face value what he said to you. You didn't ask him any questions.

5 A. I was upset at what he said. I didn't ask him any questions.

Q. You at no time said to him that this was an important part?

10 A. No, I didn't know that it was an important part or could have been.

Q. What I am saying to you is that the ambulance officers people who were there on the night, no doubt trying to revive your daughter, that you at no stage sought to assist them in any way in saying, "Look, I've got this vital piece of information. 20 minutes ago my wife was outside of the room with this child"?

15 A. I didn't know that was vital to the fact that they were trying to revive her.

Q. You didn't think that it was important to say, "Hang on a moment, 20 minutes before this she was okay"?

25 A. But I didn't know that she was okay 20 minutes before that.

Q. The reason you didn't tell anyone that is because it didn't happen, did it?

30 A. That's not correct.

Q. She was, in fact, in the room?

A. She was not.

Q. You say in evidence that you are able now to indicate, with some degree of precision, that it was about 1.30 that your wife was screaming because at the time of screaming you swung around and saw the clock?

35 A. Not at the time of the screaming. When I grabbed Sarah from her bed and swung around to put her on my bed I saw the clock.

Q. Before you gave that evidence, you had previously indicated or used the words "about 1.30". You are now saying that you swung around and saw that it was exactly 1.30. Exactly 1.30?

45 A. Give or take a couple of minutes.

Q. You swung around and saw the clock. What time was it?

50 A. It was about 1.34 actually.

Q. 1.34?

A. About that.

Q. Why didn't you say that the other day?

55 A. You are splitting hairs on--

Q. A moment ago you were the one giving evidence at this

time talking about swinging around at 1.30. You are the one who was giving the evidence? Why didn't you say, "Well, I recall it was 1.34"?

A. I don't know.

5

Q. You see, you have also said at times, in relation to 1 o'clock, you said it was 1 o'clock or about 1 o'clock and at times you have said it is 1.10?

A. Well, it is about 4 o'clock now.

10

Q. Do you understand the question?

A. I do.

Q. Do you agree there are times you have said it was about 1 o'clock and other times it was 1.10?

15

A. Yes.

HIS HONOUR: It can be noted that it is 12 minutes to 4 by the Court clock.

20

ZAHRA: Q. This was a digital clock, is that right?

A. It was.

Q. You see, whilst you think it might be splitting hairs on a digital clock, if it is 1, or 1.10 or 11 o'clock, could you have been mistaken with the numbers you are reading?

25

A. No.

Q. Why haven't you been precise beforehand when you were making the statements and giving evidence as you are now?

30

A. It's just figures of speech.

Q. But you have got more and more precise as time has gone on?

35

CROWN PROSECUTOR: Is that a question?

ZAHRA: Q. Well, have you?

40

A. Only because you have driven me to the exactness of it all.

Q. You say you weren't driven to the exactness of it before, when you were giving evidence about 1.30, when you were swinging around. You weren't taken to the precision at that time?

45

A. No.

Q. Can I just read this question and answer in examination-in-chief at page 128, line 31:

50

"Q. Do you know what time it was?

A. I do. I woke up, it was ten past one."

55

Then later on, on the same page, line 49:

Q. And it was 1.10?

A. 1.10."

So, it was you that was adding the precision. Would you agree with that?

A. Yes.

5

Q. And you have added further precision between the time of your giving evidence about it being 1.30 and now 1.34?

A. Because you asked for a precise to the minute time.

10

Q. With respect, I was asking you actually about whether you are now saying it was exactly 1.30am and then you, in fact, offered, on reflection, it was 1.34?

A. Because you asked me if it was exact.

15

Q. You didn't think that it needed to be exact when you were answering the Crown's questions about swinging around and seeing the clock?

A. I don't think the question was asked that way.

20

Q. But needless to say you didn't think it was necessary to be precise?

A. I just felt I had to answer the question.

25

Q. So far as your wife's reaction on this night is concerned, you have given evidence that she was screaming, is that right?

A. Yes.

30

Q. And she was crying?

A. Yes.

Q. And that she had her knees to her chin?

A. Yes.

35

Q. In fact, when the ambulance officers arrived, you were both crying?

A. Yes.

40

Q. Did your wife appear to be devastated?

A. Yes.

Q. You gave evidence that after the death of Sarah your wife, to quote you, pretty much got back on with things?

A. Yes.

45

Q. You see, she had continued to be devastated after the death of Sarah, didn't she?

A. No.

50

Q. Have you got your statement there of 19 May: "Once again, Kathy and I were in the position where one of our children had just died. I was confused and overcome with grief." Are you following me?

A. Yes.

55

Q. Can you read the next sentence after 48?

A. "Kathy appeared devastated also, but she has always been stronger than me."

Q. Well, after some thinking, a moment ago you said, "No, she wasn't devastated"?

A. No. You said, "Kathy continued to be devastated".

5

Q. Well, can you see 48: "Once again, Kathy and I were in the position where one of our children had just died"?

A. This is me speaking about the time virtually directly after Sarah died.

10

Q. Well, you used the words "once again"--

A. Once again.

Q. --"I was confused and overcome with grief"--

15

A. I was.

Q. --"Kathy appeared devastated also"?

A. She did.

20

Q. "But she has always been stronger than me. I become consumed with grief and Kathy seems not to let grief control her, like it does with me. Eventually Kathy tired of having to prop me up and make me feel happier." What you were there talking about is, in fact, the times after, aren't you?

25

A. Yes.

Q. And you described Kathy being devastated in those times after the death of Sarah?

30

A. She was devastated after Sarah died.

Q. See, a moment ago you said, "No, she wasn't"?

A. She didn't continue to be devastated.

35

Q. And a moment ago you said she wasn't devastated, would you agree with that? Do you want me to read it back?

A. Yes, if you would.

Q.

40

"Q. You see, she had continued to be devastated after the death of Sarah, didn't she?"

Then you took some time and you answered "No"?

A. Sorry? I answered "no"?

45

Q. Yes.

A. She didn't continue to be devastated.

Q. That's quite different, isn't it, than what you have said in the statement?

50

A. No.

Q. You didn't use the words "she appeared devastated for a period of time and then not"?

55

A. No. I said "Kathy appeared devastated also but she has always been stronger than me. I become consumed with grief and Kathy seems to manage not to let grief control her, like it does with me." She ceased to be devastated,

but I didn't use that word.

Q. See, you didn't qualify it, did you?

A. No.

5

Q. That's because now you want to paint a picture of your wife of being cold and not grieving for the child, isn't it?

A. Now?

10

Q. Yes.

A. Now, I want to tell the truth.

15

Q. You see, in evidence you said "She hid herself away from the world. Didn't really want to do anything". This is at page 135.

Could I just read this to you, at page 135, line 1.

20

"Kathy at first hid herself away from the world. Didn't really want to do anything. When we moved to Singleton, we were only up there a short while, and that's when she got the job at BabyCo and that prompted us to move back to Newcastle. I think at that stage we had only been up in Singleton for two months and we moved back down and the people we had rented the house at Thornton to were relations."

25

30

A. Yes.

Q. You see, you talk about Kathy hiding herself from the world?

A. Yes.

35

Q. Didn't really want to do anything?

A. No.

40

Q. For what period of time did she do those things?

A. When we moved to Singleton.

Q. How long was that?

A. About two months.

45

Q. So, for two months she was hiding herself away from the world; didn't really want to do anything?

A. No.

50

Q. That's because she was devastated, wasn't she?

A. No, because it's, in her own words, as I recall, that she gave them to me, when we lived in Singleton she was fat and nobody liked her. She couldn't fit into the gym and she couldn't get a job. That's why she hid away from the world whilst we were at Singleton.

55

Q. That was part of the state of mind of your wife, wasn't it? That she was grieving. She felt devastated. She was concerned about her appearance and her weight, and

how her life had become. Wasn't that the case?

A. She didn't appear to be grieving. She was at loggerheads with herself about her appearance and--

5 Q. You contributed to that, didn't you?

CROWN PROSECUTOR: I don't think he had finished his answer.

10 WITNESS: A. At her appearance and the fact she didn't seem to be able to make friends or fit in anywhere.

ZAHRA: Q. But she was devastated during that time, wasn't she?

15 A. By the fact that she was fat and couldn't fit in anywhere.

Q. You surmise that, don't you, now, but she was devastated. She gave the appearance that she was devastated, as you said in your statement?

20 A. When we were in Singleton?

Q. For two months you didn't go to Singleton?

25 A. For the two months at home?

Q. Yes.

A. Before we moved to Singleton?

30 Q. Yes.

A. Was she devastated for the whole two months?

Q. Yes. That's what you are indicating, isn't it?

A. No.

35 Q. You are saying that she appeared to be devastated, but for another reason?

A. Well, I said she appeared to be devastated. That was in the context of when Sarah died.

40 Q. You see, you're just making that up, aren't you, to overcome the fact that you are stuck with the statement that you made originally, making an observation that your wife was devastated?

45 A. No.

Q. You are trying to water down the effect of that by saying she was devastated because of her weight, because that fits in with the picture that you want to portray that she didn't care about the child; she was only concerned about her weight?

50 A. No.

55 Q. You see, that's the picture, and you have taken the opportunity at this time to again try and present that picture of your wife. You say that she was devastated in your statement, no qualification, but now you want to say she was devastated because of her weight?

A. I didn't say she was devastated by her weight.

Q. No, you never did, did you? When you made the statement, you said, quite clearly, that she appeared devastated?

5 A. When Sarah died, and I didn't lie about that. She did appear devastated when Sarah died.

Q. Look, let me go back another question. You see, this question here, just going back, at page 134, line 51:

10

"Q. Did you both grieve in the same way or in different ways?

15 A. I pretty much did the same thing as I had always done, except this time I sunk myself into my job. You learn as you go. I pretty much hooked in my job big time, and Kathy"

- as I say, this is in the context of being asked a general question about grieving. You say this:

20

"Kathy at first hid herself away from the world. Didn't really want to do anything, and then, when we moved to Singleton"

25 - you go on. See, there was no qualification there. You were being asked questions in the context of you and your wife grieving. Do you understand that?

A. Yes.

30 Q. You didn't qualify at all at that time, saying, no, she was in fact hiding herself away from the world, didn't really want to do anything, because of her weight and not because of grieving for Sarah?

A. No, I didn't.

35

Q. That's because you have just made that up to try and extricate yourself from this statement by throwing in "Well, she was devastated. If I said she was devastated, I should have really said devastated because she was overweight", because when you were asked by the Crown to give evidence about grieving--

40

OBJECTION. DOUBLE QUESTION.

45 HIS HONOUR: Which question do you want answered?

ZAHRA: I should have noted that he had nodded.

50 CROWN PROSECUTOR: I dispute that he nodded to any part of that question.

ZAHRA: I will ask it again.

QUESTION DISALLOWED. ANY RESPONSE TO BE STRUCK OUT.

55

Q. You see, when you gave that answer about your wife hiding herself away from the world, didn't really want to do anything, it was in the context of just before you were

asked questions: "Did you both grieve in the same way or in different ways". Do you understand what I'm saying?
A. I think so.

5 Q. Well, what I'm putting to you is that you didn't qualify it then: "Look, she grieved but she grieved because of her weight". You answered this without qualification in relation to a question about grieving for Sarah. That's the way you answered it then?

10 A. Uh-huh.

Q. And, now, you are introducing a new reason: Well, if she was devastated, it was because of her weight, not because she was grieving?

15 A. You have used the words "devastated because of her weight".

Q. I have used the word "devastated" when I read to you this passage from the statement?

20 A. She was devastated when Sarah died. I don't know if she was devastated because she was overweight. She was terribly unhappy about it. And, you know, it costs thousands of dollars, through Jenny Craig, to change that sadness about herself and give her confidence back in herself, so it wasn't that it irritated me.

Q. What are you now saying when you used the word "devastated" in this statement? That was being devastated because she was grieving for Sarah?

30 A. When Sarah died.

HIS HONOUR: We will resume this tomorrow, ladies and gentlemen.

35 JURY EXCUSED

<WITNESS STOOD DOWN

40 ADJOURNED PART HEARD TO WEDNESDAY 9 APRIL 2003

45

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EE:FHI:RT:8

D6

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

SIXTH DAY: WEDNESDAY 9 APRIL 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE PRESENCE OF THE JURY

<CRAIG GIBSON FOLBIGG(10.06AM)
ON FORMER OATH, CROSS-EXAMINATION CONTINUED

20 ZAHRA: Q. You gave evidence and demonstrated how you saw
Sarah on the bed when your wife was screaming?
A. I did.

25 Q. I put it to you that Sarah was not in the position as
you have described?
A. That's not correct.

30 Q. I put it to you that her left arm was extended
outwards?
A. That's not correct.

35 Q. Yesterday afternoon I was asking you questions about
your wife's demeanour after the death of Sarah. Do you
recall those questions?
A. I do.

40 Q. You remained together for about five or six months
after Sarah's death?
A. I think it's a bit longer than that.

45 Q. How long do you think it was?
A. No, no, you're right sorry. It was five or six
months.

50 Q. During that time you were devastated?
A. I was.

55 Q. She hid herself away from the world and didn't really
want to do anything?
A. Yes.

60 Q. You see, she didn't go out during that time before you
separated?
A. Not on her own, no.

65 Q. She went out with you?
A. Yes, there were times we went out.

70 Q. But on her own she did not go to clubs, she did not go
.09/04/03 386 C G FOLBIGG XX

anywhere?

A. No.

Q. She wasn't even going to the gym?

5 A. Not at that stage.

Q. In fact, before that time she had never gone to the gym?

10 A. Not that I recall.

Q. See, the first time that she went to the gym was, in fact, after she went with your sister to Jenny Craig?

A. That's correct.

15 Q. She went to Jenny Craig with your sister after there was some argument or discussion about her weight?

A. She told me about her weight and told me she was going to do something about it, yes.

20 Q. You see, you said some things to her about her weight, didn't you?

A. Not that I recall.

Q. Well, you said some things about her being fat?

25 A. Not that I recall.

Q. Well, did you?

A. Maybe in response to her bringing the subject up.

30 Q. In an argument?

A. I don't recall an argument about it.

Q. I put it to you that you, at times, made reference to her as being fat and ugly at this time?

35 A. Not that I recall.

Q. Could you have?

A. It doesn't sound like something I think I would have said.

40

Q. Did you say you had three fat sisters and didn't want a fat wife?

A. Not that I recall.

45 Q. Well, did you?

A. Not that I recall.

Q. You do not dismiss it out of hand?

50 OBJECTION.

CROWN PROSECUTOR: He has given his answer.

55 HIS HONOUR: You are becoming argumentative again, Mr Zahra. Please move on.

ZAHRA: Q. I put it to you that it was in those circumstances where there was argument and you said those

things to her that she went with your sister to Jenny Craig?

A. Not that I recall.

5 Q. As a result of going to Jenny Craig, in fact, it was suggested that she went to the gym?

OBJECTION.

10 CROWN PROSECUTOR: He is asking what is in someone else's mind.

QUESTION WITHDRAWN.

15 ZAHRA: Q. Did she say something to you after going to Jenny Craig that she wanted to go to the gym?

A. Not that I recall.

20 Q. The fact that she went to the gym around this time met with your approval?

A. She was doing exceedingly well. I was proud for her and proud of her, so, yes, I guess it met with my approval.

25 Q. During the course of your separation, it was at this time that she was going out with your sister?

A. Yes.

30 Q. Did you express to her that you were proud of her standing on her own two feet?

A. I do remember saying that to her.

Q. And being independent?

A. I do remember that.

35

Q. And you remained in contact during the course of the separation?

A. We did.

40 Q. At all times you were working towards a reconciliation?

A. It appeared that way.

Q. She was going to the gym and looking after herself?

45 A. Sorry, was that a question?

Q. Yes.

A. Oh, yes.

50 Q. You, in fact, were going to counselling?

A. I was.

Q. That was part of the communication that you had with your wife during the course of this separation?

55 A. Yes.

Q. There was a concern, during the course of discussions, that you needed obviously to go to counselling because of

obviously that being a problem during the course of your marriage, resulting in lack of communication?

A. I kept my grief very much to myself and - yes.

5 Q. Because of that you--

A. Went to counselling.

10 Q. But during the course of the time you were together before the separation, you would have very little to do with your wife during that time. You would go to work, go into the garage, there would be no communication for long periods of time?

A. Hardly any.

15 Q. That was the background to your going to counselling?

A. Yes.

20 Q. At all times your wife was expressing a need to communicate?

A. No.

Q. She expressed that, didn't she?

A. Eventually.

25 Q. During the times that you were separated the question obviously of the need to communicate was part of the discussion that you had?

A. Yes.

30 Q. You then did, in fact, reconcile?

A. We did.

35 Q. Was it the case also that during the course of this separation, you yourself went out?

A. Yes, I did.

Q. You were living in Singleton at that time?

A. Yes.

40 Q. You had a close circle of friends there that you would go out with?

A. I formed a friendship with a fellow up there who introduced me to other people.

45 Q. Introduced you to other people at local clubs?

A. At the pub.

Q. You became a regular attendee at the pub also?

A. Well, regular?

50

Q. Tell us how often you were going there?

A. Every other week.

55 Q. And you were mixing in a pub with other persons and you formed other friendships?

A. I did.

Q. When your wife reconciled with you, you were then

living together at Singleton?

A. Kathy eventually moved up.

5 Q. You introduced her to those friendships that you had formed during the time of the separation?

A. I did.

Q. She became good friends with them also?

10 A. With those girls.

Q. It was from time to time in that circle of friends that she would have girls' nights out?

A. Not at the start, no.

15 Q. Sorry, over time?

A. Eventually.

Q. Quite infrequently?

20 A. At the start, yes.

Q. They were a couple of months apart?

A. At the start, yes.

Q. Organised well in advance?

25 A. At the start, yes.

Q. When you say start that was the case, wasn't it, up until the time of the birth of Laura, these times that your wife went out with this circle of friends, it was infrequently - once every couple of months?

30 A. That's the case.

Q. It was organised well in advance?

35 A. Yes.

Q. It was with those persons that you would form friendships at the pub?

A. It was with the girls from that group.

40 Q. You describe this time in your statement as being a good time?

A. We had fun.

45 Q. You say in paragraph 55 of your statement, "When we moved in everything was great. Kathy was going to a local gymnasium on a regular basis and was enjoying life."

A. That's - yes.

Q. During this time you met neighbours?

50 A. We met our neighbours.

Q. The persons Mel and Steve Smith who lived near you?

A. Yes.

55 Q. You got on well with them?

A. We did.

Q. Now, in evidence you say that it was your wife who

raised with you the prospect of having another child?

A. She did.

5 Q. Would it be the case that at one stage, before anything was said about having a child, you said to her something to the effect of, "Would you like to try again"?

A. No.

10 Q. I put it to you that there was, in fact, quite some discussion over this time about whether to have another child?

A. There was not.

15 Q. I put it to you that it was after quite some considered conversations between you that the decision was ultimately made to have the child Laura?

A. I'm sorry I didn't understand that question.

20 Q. I am sorry. I put it to you that the decision to have Laura ultimately, whilst you from time to time changed your mind, ultimately you worked towards - quite in a detailed and considered way - towards--

A. After Kathy brought the subject up.

25 Q. I am putting to you that you brought the subject up. What I am putting to you generally--

30 OBJECTION. DOUBLE QUESTION. TRIPLE QUESTION. QUESTION WITHDRAWN.

Q. Before the decision ultimately was made to have Laura there was quite some discussion, wasn't there, between you?

A. Yes.

35 Q. That proceeded in quite a considered way?

OBJECTION.

40 CROWN PROSECUTOR: I do not know what that means.

ZAHRA: Q. You at length discussed the benefits and the concerns?

A. Yes, we did.

45 Q. You gave evidence that when you say your wife raised this you were shocked?

A. I was.

50 Q. You said (page 151, line 25) that you expressed to Kathy that, at that stage in your lives, you thought we already talked about parenthood and how it wasn't going to be a factor for you?

A. That's correct.

55 Q. Hence the reason we bought the house that we bought, went into a huge amount of debt to get the house, relied on both our wages. There was quite some discussion there,

wasn't there?

A. Yes.

5 Q. You see, in the conversations that you have related so far, you do not raise any suggestion that you were saying to Kathy you can't handle being a mother, you growl every day, you growled every day with Sarah. You have not mentioned anything of that nature as being part of the reasoning about the position?

10

OBJECTION.

CROWN PROSECUTOR: He has not been asked. Implicit in the question is the sort of criticism--

15

QUESTION REJECTED.

20 ZAHRA: I object to my friend making a comment in the presence of the witness. I will take him to page 151, line 25 and following where he was asked what was your reaction to that. I thought he was, in fact, asked what his reaction was.

25 CROWN PROSECUTOR: I think that the previous question was--

HIS HONOUR: Let us not worry about a post-mortem. Let us go on with another question.

30 ZAHRA: Q. You see, I put it to you that when you were asked what your reaction was and you talked about the types of things that you discussed, you made no mention that this conversation included any statement by you, "Hang on a moment, you can't handle it. You growl every day. You growled every day with Sarah"?

35

OBJECTION.

40 CROWN PROSECUTOR: The question at page 151 was, "After you had moved into the new house later that year, still 1996, was there anything that Kathy said to you about having another child?" Then the next question was, "What was your reaction to that?"

45 HIS HONOUR: I do not think you can found your question on that question.

50 ZAHRA: The next question: "What did you say to Kathy when she suggested having another child?"

50

CROWN PROSECUTOR: The answer was no.

ZAHRA: That is what I am asking about. I am confirming.

55 CROWN PROSECUTOR: My objection is that implicit in Mr Zahra's question is the suggestion that he has been asked for the full conversations between he and his wife.

HIS HONOUR: I have upheld the objection and I do so again, Mr Zahra.

5 ZAHRA: Q. You were asked this question, "What did you say to Kathy when she suggested having another child?" You answered, "No". This is in evidence?
A. That's correct.

10 Q.
"Q. And what was her reaction to that?
A. She wasn't happy about that. I got basically a copy book repeat of the Sarah incident. What was the use of being married if we weren't going to be a family."

15 Do you recall that?
A. I do.

20 Q. "It was wonderful to see me as a dad. That was the best time of our life was when we were parents, that sort of thing.

Q. Was this just one conversation or many conversations?
A. It was many conversations.

25 Q. And during most of those conversations, what was your attitude?
A. No.

30 Q. And did you discuss it with Kathy?
A. I discussed with Kathy my reluctance to be a parent again.

35 Q. Did she discuss with you her desire to be a mother again?
A. Yes.

Q. And for a while was your attitude no?
A. It was a negative.

40 Q. Did you change that attitude?
A. Eventually, in an effort to throw up her own block toward what ended up being inevitable, I threw by Kathy that it couldn't be that easy, you know - you can't -
45 can't just have a baby, come home, play happy families, not with what we have been through and we need to find people to be there to help us and people who can assist us with that."

50 Do you recall that evidence?
A. I do.

55 Q. You see, you relate statements made by your wife pushing the right buttons, recalling that it was the best time of your life?
A. My wife recalling that.

Q. Well, you see, you didn't relate at any time during the course of those answers that you expressed anything to

the contrary?

A. It's a bit like when your wife asks you if she looks good in a dress or pair of shoes. There are pretty much some things you can't say to them.

5

Q. You are saying you were very negative. You made it very clear - no, you were making your thoughts known to her. Do you agree with that?

A. Yes.

10

Q. But nowhere in what you have related here today have you ever suggested that you told her she was a bad mother?

A. I've already told you previously, Mr Zahra, there were certain things you couldn't say to Kathy.

15

Q. See, isn't it the impression that you are giving in this question and answer is that you were vulnerable because she was reminding you of the best time of your life and that was when the children were with you?

20

A. I was vulnerable.

Q. And you were vulnerable to that because that's the way it was. It was the best time of your life and she was a good mother?

25

A. It was the best time of my life, being a Dad. Full of wonderful times.

Q. I will read again what you said:

30

"A. That was the best time of our life was when we were parents, that sort of (stuff)."

A. That's what Kathy said to me.

35

Q. And "come home, play happy families". These were the buttons that she was pushing. That's what you are saying here?

A. I said, "You can't just expect to have a bub and bring this baby home and play happy families."

40

Q. How could you be vulnerable to this suggestion when, from what you say, your memory was that this was a nightmare?

45

OBJECTION. QUESTION REJECTED.

Q. You gave evidence that every day when Sarah was alive your wife was growling. That's the case, isn't it?

A. Yes.

50

Q. Which I put to you is not the case?

A. That's incorrect.

55

Q. I put it to you that if it was, as you say, she wouldn't have been able to push the right buttons because this would have been a sham?

OBJECTION. QUESTION REJECTED.

Q. Suffice it to say that from your answers you never suggested to her that it wasn't the best time of your life?

5 A. No.

Q. And that's because it was?

A. No, being a father was wonderful.

10 Q. It was because you were able to play happy families every day when you came home?

A. I can remember coming home from work and having a lot of fun, getting little butterfly kisses, cuddles, it was fun.

15

Q. That's what made you vulnerable, because that's the way it was, wasn't it?

OBJECTION.

20

HIS HONOUR: I do not understand the question.

ZAHRA: Q. Could I take you to paragraph 56 of your statement? You see you say there, "In 1996, Kathy mentioned that she would like to have another baby and I was initially cautious." That's what you said in your statement. In evidence you said, "I was shocked". You see, you have elevated that, haven't you, over time?

25

A. How do you mean?

30

Q. You have made that sound worse for her. That's your intention, isn't it?

35

A. In 1996, when the question of becoming parents and eventually Sarah was born, when she asked me that, I was shocked because we had had those same conversations about parenthood not being a part of our lives anymore. We sold our house that we owned. We went into debt and bought a house in Portland. Kathy had a job, had purchased herself a new motor car, so I was shocked, because didn't we talk about this?

40

Q. You have described that in your statement in May 1999, your reaction was initially cautious?

45

HIS HONOUR: Are you referring to paragraph 56?

ZAHRA: 56.

50

HIS HONOUR: You said in May 1999.

ZAHRA: That is the May 1999 statement, the 19 May 1999 statement, signed on the 23rd.

55

HIS HONOUR: That is my mistake. I am sorry. The reference in the paragraph to which you were referring is 1996. I thought you had mistakenly said 1999.

ZAHRA: I can understand how that has occurred.

Q. It was during this time also that you both went to see Dr Seton?

A. I'm sorry?

5

Q. After the discussion about having another child?

A. Are we in 1999 now?

Q. Yes.

10 A. Okay. Yes, we did.

Q. 1996, after the decision was made to have another child?

A. Sorry, yes, in 1996.

15

Q. How many times did you see Dr Seton?

A. Before Laura was born we saw him on an initial consultation. After Laura was born, we saw him about two or three times.

20

Q. Was your wife working during the time before she was pregnant?

A. She was.

25

Q. Up until the time that she was pregnant, I think we have covered this this morning, you are going out with her with this group of persons that you met at Singleton?

A. No, the group fell apart and we didn't go out very much together any more.

30

Q. Nor did she. She didn't go out?

A. She stayed friends with the girls and went out with the girls.

35

Q. But very occasionally in an organised way?

A. Yes.

Q. You were not spending much. You were buying a house at that time?

40

A. We came to a decision, in the October of 1995, that we weren't really achieving much with our money, so we should look at - we were happy in - living at Singleton and we should look at stabilising our lives, so we made the decision to buy the house and that made up a considerable amount of funds.

45

Q. I put it to you that, during the course of her pregnancy, she went out only on one occasion on one of these nights, as I say, about when she was four months pregnant?

50

A. I don't recall if that's the case.

Q. But you don't recall her going out during this time?

A. I recall her going out, I just don't recall the frequency.

55

Q. Also that, during this time, she was continuing to go to the gym, however, she stopped after three months into

the pregnancy?

A. It was some months into the pregnancy.

Q. About three months?

5 A. I think she stopped when it was apparent she was pregnant.

Q. When Laura was born that was a happy time?

10 A. It was.

Q. And your wife was happy at that time?

A. She appeared to be.

Q. Now, you gave evidence about the Corometrics alarm?

15 A. Yes.

Q. Now, you were given a schedule to complete when the alarm went off?

20 A. It was a blank, ruled page.

Q. Sometimes you made entries?

A. If I responded to Laura.

Q. But by and large, the majority of the entries were completed by your wife?

25 A. That's correct.

Q. Again, is it your recollection that this particular alarm was firstly in the bassinet with Laura?

30 A. It's my recollection that the module part of it was on either a shelf or a bedside table.

Q. It wasn't the case that it was inside the bassinet?

35 A. It ended up being inside the cot.

Q. It was designed to stir the child?

A. No.

Q. That was the effect, however, when the alarm went off?

40 A. We were instructed, when given the Corometrics monitor, how to check on Laura's progress after an alarm more gently than we had shown the nurse that was teaching us. I'm not aware whether the Corometrics monitor was supposed to rouse the child.

45 Q. But that was the effect, wasn't it, when the alarm would go off. It would, in fact, wake her?

A. You would find that.

50 Q. And there were a number of entries in this schedule to that effect. In fact, some entries that you had entered to the effect "Bub sound asleep. Machine roused her"?

A. Yes.

55 Q. I am just referring you here, for example, to Christmas Day 1997: "Bub sound asleep. Machine roused her." Then on the next day you have written here: "Bub sound asleep. Machine roused her"?

A. Yes.

Q. Have you had a look at this at one time?

A. Yes.

5

Q. There are quite a lot of entries to that effect, aren't there, that the alarm goes off and rouses her?

A. Yes.

10

Q. The alarm was stressful for your wife?

A. Yes.

OBJECTION. OBJECTION WITHDRAWN.

15

Q. You had some sympathy for that stress that it was causing her?

A. Yes.

20

Q. She again was the primary carer of the child?

A. Yes.

Q. And you were working full-time?

A. Five and a half days a week.

25

Q. She was at home with Laura?

A. Yes.

30

Q. You thought at that point in time that it was sufficient to perform your duties as a provider and that you couldn't be expected to do more at home?

A. No.

35

Q. Is that what you thought or you didn't think that way?

A. I didn't think that way through Laura's life.

Q. Have you got your statement? Paragraph 62?

A. (Witness turned up paragraph 62.)

40

Q. I will read it to you.

CROWN PROSECUTOR: What has been put by Mr Zahra in the question is different to what is in his statement. If he had put it the same way as what is in the statement he might get a different answer.

45

ZAHRA: My friend should not make a commentary. If my friend wants to discuss the admissibility he should not do that with the witness present who might take up on it.

50

HIS HONOUR: What was the question? Would you now frame your question precisely, Mr Zahra?

55

ZAHRA: Q. During the time that Laura was alive, so far as the day-to-day care of Laura was concerned, you didn't do as much as you should have?

A. There were times I didn't feel that I had.

Q. And that you were working full-time and Kathy was home

with the baby?

A. That's correct.

5 Q. And you felt that you were performing your duties as provider and, therefore, couldn't be expected to do more at home?

A. Than what I was doing, no.

10 Q. You say in paragraph 62, "I now realise this was wrong and Kathy was doing everything at home". Do you see that?

A. I see what I've written or I've said, yes.

Q. Was that the truth?

15 A. No.

Q. You lied there?

A. I qualified it further from that.

20 Q. I will read the rest, "I used to feed Laura a bottle in the morning. Go to work. Sometimes bath and dress her of a night and play with her. Kathy appeared to get stressed occasionally with looking after Laura"?

A. Yes.

25 Q. Was that the truth?

A. Yes.

Q. You consciously used the word "occasionally"?

30 A. Yes.

Q. Was that the truth?

A. That's how it appeared.

35 Q. You go on to say, "I can understand that she was home with her all the time and would have been stressful. I used to get stressed sometimes when Laura demanded my attention constantly."

A. Yes.

40 Q. Was that the truth?

A. Yes.

Q. So, you had quite some understanding or empathy for your wife's situation at that time?

45 A. I did.

Q. You could see the stress that the false alarms of the monitor were causing her?

50 A. Yes.

Q. You were comforted by the alarms, but she was stressed?

55 A. I was comforted by the fact that a machine was alarming us to possible problems and when we found those problems weren't evident, I was comforted.

Q. But it was, by and large, her function to check on the alarm, firstly, during the night?

5 A. Over and over and over again, during this time of Corometrics monitoring of Laura, I would attempt to get out of bed and Kathy would say to me, "It's okay, I'll deal with it." I would say, "No, it's okay, I'll have a go" and she'd say, "No, it's fine, I'll do it."

Q. Primarily, by and large, she was the person who was attending the monitor?

10. OBJECTION.

CROWN PROSECUTOR: He has already answered that.

QUESTION WITHDRAWN.

15

ZAHRA: Q. It was during this time that you say that the relationship between yourself and your wife lacked communication and that you were going through a very stressful time?

20 A. That's correct.

Q. It was during this time that your wife handed you a letter, is that right?

25 A. Towards the end of Laura's life, so yes, during that time.

Q. In that letter your wife raises difficulty with communicating with you?

30 A. Yes.

Q. She says that over the years you have become--

OBJECTION. RELEVANCE.

35 CROWN PROSECUTOR: What she has written is only relevant at this stage insofar as he might agree with it or might have done something about it, but the actual statements themselves--

40 HIS HONOUR: I do not know. Perhaps there are questions coming along behind this.

Go on, Mr Zahra.

45 ZAHRA: Q. In that letter she says, "Over the years you have become an oppressive and depressing person. I only see sparks and tiny ones at that of the man that attracted me all those years ago." Do you recall statements to that effect?

50 A. I remember reading that letter.

Q. She makes a comment that--

OBJECTION.

55

CROWN PROSECUTOR: It is not his document and not admissible as to its contents at this stage. My friend is intending to read out select parts of it. That is not the

proper way to do it. He should tender it.

ZAHRA: I tender the letter.

5 CROWN PROSECUTOR: The tender can be dealt with.

ZAHRA: It is MFI 3.

10 CROWN PROSECUTOR: I have it here. I would need to address some submissions to your Honour.

HIS HONOUR: I shall have to deal with this in your absence, ladies and gentlemen.

15 JURY EXCUSED

IN THE ABSENCE OF THE JURY AND THE WITNESS

HIS HONOUR: Should I see the letter then, MFI 3?

5 CROWN PROSECUTOR: Yes. I hand up the original to your Honour.

(MFI 3 was handed to his Honour by the Crown Prosecutor.)

10

The tender is objected to. At this stage it is not admissible. It might later become admissible through the accused if she were to give evidence.

15 HIS HONOUR: I am reading it at the moment.

What is the relevance of this, Mr Zahra?

20 ZAHRA: Can I take your Honour to page 163 of the transcript?

HIS HONOUR: Yes, I have that.

25 ZAHRA: Your Honour can see from around line 9 that it was my friend who introduced evidence of this letter. In fact, he asked him directly about the contents at page 164, at the top. "Basically did Kathy tell you...". Then down the bottom, at line 45 - I am only referring to the major ones. Your Honour can see from the whole tenor of
30 that that my friend was enquiring about the contents of the letter. "Could you tell us what they were?" He answered, "In the letter she stated..." - it goes on.

35 It is my friend who raised evidence about this. It is relationship evidence. It is relevant because this is the state of the relationship in times not that far off the death of the child Laura. My friend has put one part of this letter. There are other parts. My friend has introduced this letter. This is relevant because it is
40 relationship evidence.

CROWN PROSECUTOR: The suggestion that their marriage came to an end in a letter is the equivalent of a verbal statement contained in a letter. It was not objected to
45 when it was given in evidence. I suppose my friend could have insisted that I tender the letter instead of going to the nub of it which is the part that I was relying on.

50 HIS HONOUR: If he had would you have been bound to tender it?

CROWN PROSECUTOR: I would have been bound to tender it.

55 HIS HONOUR: How are things any different now?

CROWN PROSECUTOR: What the Crown sought to rely upon in-chief was the fact that she was suggesting that their marriage break up. That was the only part that I was

5 seeking to rely on. I suppose my friend could have placed me in a situation where I would have been obliged to tender the letter which would have put in her reasons for wanting to break up the marriage, but, in effect, my friend is now seeking to put before the jury this letter to show what her reasons were in seeking to break up the marriage.

10 Her reasons for wanting to break up the marriage are not admissible at this stage. It might become admissible if she were to give evidence. In the absence of her giving evidence, the only thing that is admissible is the fact that she wanted to break up the marriage because that is what the Crown has led in-chief. Her reasons for it are
15 not admissible. What is admissible at this stage is what is in his mind in terms of his reactions, his reasons, his responses.

20 Her reactions, reasons and responses, at this stage, are not admissible and would only be admissible at the instigation of the Crown as admissions. The Crown does not rely upon these as being admissions.

25 It is a self-serving statement that my friend is seeking to get into evidence at a stage of the trial where it is not admissible.

30 HIS HONOUR: I propose to receive the letter into evidence.

IN THE PRESENCE OF THE JURY AND THE WITNESS

5 HIS HONOUR: I have heard argument about the letter. I have decided to receive it into evidence. It is exhibit 1.

EXHIBIT #1 LETTER (FORMERLY MFI 3), TENDERED ADMITTED WITHOUT OBJECTION

10 (A jury note was handed to his Honour.)

HIS HONOUR: The jury are having trouble hearing you, Mr Crown, sometimes and Mr Folbigg sometimes.

15 Mr Folbigg, the jury cannot always hear what you are saying. Would you please make a point of trying to stay close to the microphone, please?

20 MFI #10 JURY NOTE RE OCCASIONAL INAUDIBILITY OF CROWN AND WITNESS

ZAHRA: I do not require that to be read at this stage, but maybe it could be given to the jury to read over the short adjournment.

25 Q. Just before the break I was reading part of the letter to the effect that your wife makes this statement:

30 "Over the years you have become an oppressive and depressing person. I can only see sparks and tiny ones at that of the man that attracted me all those years ago."

35 Do you recall I read that to you a short time ago?
A. I do.

Q. Your wife makes mention in this letter clearly about the failure to communicate?
A. She does.

40 Q. You gave evidence that she handed this letter to you and asked you to read it?
A. Yes.

45 Q. And that you read it and then came back to your wife and said something to her?
A. Yes.

Q. Did she say, "Finally you talk to me"?
A. Yes.

Q. Did you say to her you knew that you had been untalkative and cranky?
A. Yes.

55 Q. Did you ask her, or did you say to her that you would do more if she stayed?
A. Yes.

- Q. That you would try to get home earlier?
A. Yes.
- 5 Q. Did you speak at length about supporting each other and being considerate of each other's needs and feelings?
A. Yes.
- 10 Q. Did you embrace and were you confident that you could work it out?
A. Yes.
- 15 Q. You then typed up a letter?
A. I did.
- 15 Q. But you did not give her that letter?
A. No.
- 20 Q. In that letter, when she spoke about leaving you, she made it clear that she was going to take Laura with her?
A. Yes.
- 25 Q. Now, you gave evidence in some detail of a number of incidents that had occurred three days before Laura died?
A. Yes.
- 30 Q. Now, is it the case that you made a statement about those matters on 30 December last year?
A. Yes.
- 30 Q. About three or four months ago?
A. Yes.
- 35 Q. This was the first time that you related these incidents?
A. Laura's last weekend?
- 40 Q. Yes?
A. Yes.
- 40 Q. I put it to you that in that statement concerning this weekend you are not telling the truth?
A. That's not the case.
- 45 Q. That you refer to some things that have occurred, but that you fabricate evidence in order to paint a very dark picture of your wife's mood on this weekend?
A. That's not the case.
- 50 Q. That you have taken what are otherwise normal domestic situations and have made them look sinister?
A. That's not the case.
- 55 Q. I put it to you that, when you relate that your wife went out on the Friday night, that did not occur?
A. That's not the case.
- Q. When you made this statement on 30 December 2002, this

was the first time that you had made mention of that fact?

A. That is the case.

5 Q. I put it to you that it wasn't the case that she was going out as frequently as you suggest at this time?

A. Part of the agreement between Kathy and I, after the letter, was that I not whinge and moan about her going out; that I just accept and live with the fact that she needed to blow off steam and get out and about.

10

Q. Now, you relate conversation about the Saturday, when you left to a show?

A. Yes.

15

Q. I put it to you that you exaggerated the tone of that conversation?

A. That's not correct.

20

Q. I put it to you that your wife was concerned that, in order to settle the child, it was important that she remain with her at that time?

A. That's what she told me.

25

Q. I put it to you that you again changed the tone of your conversation with her when you came home and wanted to kiss the child good night?

A. That's not correct.

30

Q. You introduced words there in an attempt to paint this in a sinister way?

A. That's not correct.

35

Q. The following day, again, you have attempted to paint a negative picture of your wife in the morning?

A. That's not correct.

40

Q. You have attempted wrongly to suggest that she wasn't properly caring for the child that morning?

A. That's not correct.

45

Q. I put it to you that when your friends attended that day it was a normal social event, where you stayed basically with the guests, but for a lot of the time your wife was inside the house, preparing meals and doing other things for the guests?

A. She did.

50

Q. That was the reason that, from time to time, she was not with them?

A. That's so.

55

Q. Again, when you gave evidence about the conversation about whether anything had happened between your wife and Laura, again you changed that to make it more sinister?

A. That's not correct.

Q. She did not say words to the effect of, "I've lost it with her" as you have suggested?

A. She did say those things.

Q. I put it to you that you mentioned that, in fact, she
5 had knocked over the child inadvertently and that that
distressed the child?

A. I beg your pardon sorry? I'm sorry, I didn't hear the
question.

Q. I put to you that she told you that she had
10 inadvertently knocked over the child and that the child
had become upset as a result of that?

A. Yes, that's true.

Q. That was the nature of the conversation, not as you
15 have put it?

A. I'm sorry, I don't understand.

Q. You see, you have added expressions from your wife to
20 the effect of, "I lost it with her"?

A. That's what she told me.

Q. I put it to you that she did not say those things?

A. She did say that.

Q. She did not say those things to you?

A. She did say those things to me.

Q. And you have added those things to make a normal
30 domestic incident into a sinister one?

A. That's not correct.

Q. The first time that you made a statement with this
35 detail was a little over three months ago?

A. That's correct.

Q. Could I take you to the morning that Laura died?
40 Again, I put to you that you have added and fabricated
evidence relating to the incident of this morning?

A. That's not correct.

Q. This was a very significant incident in the way you
45 related it?

A. It was.

Q. You didn't refer to this in your original statement in
50 May 1999?

A. No, I didn't.

Q. Did you have a conference with the Crown Prosecutor in
55 October?

A. I did.

Q. 25 October?

A. I did.

Q. You didn't mention this incident to him at that time?

A. Not that I recall.

Q. Can I just take you to your evidence about this particular morning? You were asked (page 172, line 12):

5 "Q. What sort of mood was Laura in that morning?

A. Laura was very clingy, very subdued, whinging, when I started to go about my normal daily things, which obviously to Laura it seemed obvious to me that Laura pick up that I was going to get ready for work and such.

10 Q. That you were what?

A. Going to get ready for work. Laura got really agitated and upset. She came into my room and she was jumping up and down on the bed and I got her off the bed and she ran up the hallway crying. I went out. Kathy was losing patience with her."

20 You go on to say you heard Kathy growl and then you walk down the hallway to see what was happening in the kitchen?

A. Yes.

25 Q. Is that what you say happened?

A. Yes.

Q. In the statement you made a little over three months ago--

A. I didn't mention Laura jumping up and down on the bed.

30 Q. Can I just read this:

35 "Kathy got up about 7am and Laura was in a very clinging whingey mood. I was walking around nursing her to keep her settled as every time I put her down she would cling. We were feeding the gold fish and the lid on the tank fell down and bumped Laura on the right shoulder, on the right side of the head. This made her cry and Kathy became angry with me and told me to put her down."

40 A. Yes.

45 Q. What is the right version?

A. That did happen and Laura did jump on the bed at a later stage of the morning.

50 Q. Will you agree that the way it is read there, this is part of the same scenes that you were relating in evidence?

A. And?

55 Q. There is no mention of the gold fish, the lid of the tank falling down, and that was the reason that she was crying?

A. That was one of the reasons she was crying.

Q. You didn't mention that in evidence?

A. Was I asked the question?

5 Q. Well, I will just go through it again with you.

OBJECTION.

10 CROWN PROSECUTOR: My friend did not ask a question. He made a statement.

HIS HONOUR: Why do we have to go through it again? I think you are at issue on this.

15 ZAHRA: Can I just indicate to the witness that what, in fact, I have read to him before, the question before that was:

"Q. What time did Kath get up?

20 A. Kath got up, it would have been probably quarter to 7.

Q. What sort of mood was Laura in that morning?"

25 That is what I have read before. I just wanted to put that further question to the witness.

HIS HONOUR: You have done that.

30 ZAHRA: Q. You see, it does not sit with the version you have given in this statement where you start, "Kathy got up about 7am", "very clingy" and then "the gold fish". Then:

35 "She got angry. This made her cry. Kathy got angry with me. Told me to put her down. I picked up Laura. Kathy became really angry, grabbed Laura from me and put her in the highchair to give her breakfast cereal."

40 You see--

CROWN PROSECUTOR: My friend has asked the question, "It does not sit with the version you have given?"

45 ZAHRA: Yes.

Q. It does not sit, does it?

A. No.

50 Q. You see, you have given these two versions within three and a half months of each other?

A. Of different moments of the same morning.

55 Q. See, the sequence that you have given in evidence was that Kathy got up. Laura was in a clingy mood. You were getting ready for work. Laura got really agitated and upset because you say it seemed obvious to you that Laura

picked up on that you were getting ready for work?

A. It did.

5 Q. But in the statement you say that she started to cry because of the gold fish lid?

A. She did.

10 Q. You then said in evidence that when you walked down the hallway you saw that Kathy had Laura in the highchair and that she had both Laura's hands pinned under her hands on the deck of the highchair and she was trying to feed her cereal?

A. That's correct.

15 Q. Is that what happened?

A. That is what happened.

20 Q. Can I read to you what you said in your statement in May 1999 about this? "Kathy got out of bed about 7am that morning." This is page 25. Paragraph 68:

25 "I was in the shower and Laura came into the bathroom talking to me. Laura became upset because she knew that I was going to work so Kathy came and got her to give her breakfast. Laura became upset and started to cry and chuck a tantrum. You walked out and said to Kathy, 'If she doesn't want breakfast why the hell make her have it?'"

30 You do not refer to anything about the gold fish incident at that time?

A. This is the statement that I have already admitted to making in a softer light.

35

Q. Sorry?

A. This is the statement that I have already admitted to lying to.

40 Q. A softer light did you say?

A. And making the statement in a softer light.

Q. It was a lie, was it?

A. Sorry?

45

Q. It was a lie.

OBJECTION.

50 CROWN PROSECUTOR: Was what a lie?

ZAHRA: Q. Your description?

A. On the 23rd.

55

Q. Yes.

A. This statement?

Q. Yes.

A. It was a softened detail.

Q. Can I take you to paragraph 82?

A. Yes.

5

Q. Can you see the last two sentences there, "I suppose"?

A. Yes, I can.

10

Q. "I suppose I told Detective Ryan those things".

OBJECTION.

CROWN PROSECUTOR: The whole paragraph should be read out rather than taken out of context.

15

ZAHRA: I was going to go to the paragraph. I will read the whole paragraph:

20

"Time just rolled on and my wife hasn't come back to me. I have seen her out in Singleton and she appears to be enjoying herself. I'm deeply hurt and I want her back. I believe, because of this, I contacted Detective Ryan and told him some things that were not true. I told him that, on the night Sarah died, Kathy and Sarah were not in the room when I woke up at 1am.

25

30

I also said that after Laura died I heard Kathy talking to herself using a different accent. I must admit that I was hurt at the time I said these things to Detective Ryan and also I was naturally suspicious about the deaths of my children. I love my wife and still do. I would never seriously think she has hurt my children, but of course everybody..." -

35

I will not read that sentence unless it is pressed.

40

CROWN PROSECUTOR: It is not pressed.

ZAHRA: Q.

45

"I suppose I told Detective Ryan those things out of spite and because I was hurt that Kathy would not come back to me. Even so, everything that is recorded in this statement is the truth, honest to God."

50

You said that?

A. No.

55

Q. Well, that's in your statement, "Even so, everything that is recorded in this statement is the truth, honest to God"?

A. Sorry, yes, I said that.

Q. Sorry, you said that?

A. Yes.

Q. So, when you said that you knew that you were telling lies in the statement?

5 A. Yes.

Q. So, despite you knowing at that time that this statement, from what you say, contains lies, that you said, "Even so, everything that is recorded in this statement is the truth, honest to God"?

10 A. Yes.

Q. You see, you made a distinction in cross-examination between what you said in this statement and taking an oath on the Bible?

15 A. I didn't have a Bible at the police station. I didn't actually put my hand on a Bible.

Q. So, it was okay to use the expression "honest to God" because that was not on a Bible?

20 A. That's correct.

Q. Now, just going back to the sequence that you related in your statement of the morning:

25 "Laura became upset because she knew that I was going to work, so Kathy came and got her to give her breakfast. Laura became upset and started to cry and chuck a tantrum. I walked out and said to Kathy, 'If she doesn't want breakfast, why the hell make her have it?' Kathy said, 'Just go and get ready for work and leave her be'."

35 Are you following this?

A. Yes.

Q. Do you see that you then go on to say:

40 "She said 'She knows that she can getaway with anything with you. You sook her up too much.'"

You said, "It beats having her crying"?

45 A. Yes.

Q. And that Kathy put Laura down from the highchair that she was in?

A. Yes.

50 Q. And she said, "Well, go to your bloody father then"?

A. Yes.

Q. And Laura walked down the hallway to you?

55 A. Yes.

Q. And started to jump on the bed?

A. No.

Q. Sorry, I will read it to you.

"Laura stood up on the bed and started to jump
up and down."

5

I am just reading from your statement. Can you see that?
Page 25?

A. Are we on the 1999 statement

10

Q. 1999 statement.

A. Oh, sorry. Page?

Q. Page 25?

A. Right.

15

Q. Do you see a little past halfway" Kathy put Laura down
from her highchair"?

A. Oh, yes, I've found it. Yes.

20

JURY EXCUSED

SHORT ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY AND THE WITNESS

5 CROWN PROSECUTOR: Your Honour, I understand from Mr Zahra that he has about 45 minutes left in his cross-examination.

10 We have three doctors who have come here from various places this afternoon to give evidence, who are not available to give evidence again for some considerable time. We would want to put them on at the earliest opportunity.

15 What we would propose to do, subject to your Honour agreeing, is to delay the re-examination of Mr Folbigg until tomorrow, to call two very quick ambulance officers to set the scene for Patrick's near-miss and death, and then to call the three doctors. We are hopeful of
20 concluding them this afternoon.

If it does become necessary to sit a little bit past four, we would seek your Honour's indulgence to try and have them finished.

25 HIS HONOUR: Thank you, Mr Crown. Are the doctors all concerning Patrick?

CROWN PROSECUTOR: Yes.

30 HIS HONOUR: Does that suit you, Mr Zahra?

35 ZAHRA: Yes, your Honour. I think the only question that I have is in relation to sitting after 4, I think there is a users' group meeting at 4.30.

HIS HONOUR: I have an engagement at 4.30 at Queen's Square.

40 ZAHRA: : It is the same users' group meeting that I have to attend.

HIS HONOUR: Well, we will just have to see how things look at 4 o'clock.

45 ZAHRA: I don't mind my friend's suggestion, your Honour.

IN THE PRESENCE OF THE JURY AND THE WITNESS

(A jury note was handed to his Honour.)

5 HIS HONOUR: Mr Crown, the jury has asked whether they may have copies of exhibit J, that's the diary of 6 June 1997; and of exhibit G.

10 CROWN PROSECUTOR: Your Honour, we actually have had them sitting here for a couple of days, and I have omitted to hand them out. We have copies of the original diaries, both of them, and copies of the typewritten extracts for both diaries.

15 HIS HONOUR: I think the bundle of papers each juror is going to finish up with warrants a binder of some kind.

20 CROWN PROSECUTOR: Yes, we have binders, your Honour. Perhaps the Sheriff's officer might make a hole puncher available to them.

HIS HONOUR: All right, that can be attended to in due course.

25 Thank you for your note, ladies and gentlemen. That is marked 11 for identification.

MFI #11 JURY NOTE RE EXHIBITS J AND G

30 CROWN PROSECUTOR: We will hand these out now, your Honour. We have a working copy for your Honour as well.

35 Your Honour, your Honour will see that the first things that are in the folder are the typed extracts, which are the ones that I have read during my opening address, and then there are the two diaries. The first one '96 to '97, which should be flagged with a yellow post-it note sticker, and then the '97/'98 diary, again flagged, and that is the complete diaries.

40 HIS HONOUR: Thank you, Mr Crown.

Yes, Mr Zahra?

45 ZAHRA: Can I indicate, for the assistance of Mr Folbigg and the jury, that I intend to complete my cross-examination before lunch.

HIS HONOUR: Thank you, Mr Zahra.

50 ZAHRA: Q. Mr Folbigg, just before moving on to the sequence of the morning of Laura's death, can I ask you some questions about your evidence concerning your wife leaving the child Laura with other persons and also your evidence generally about her going out before Laura died and after Laura died; you understand what I am about to do?

A. Yes.

5 Q. I put it to you that, as far as leaving the child to go to the gym, firstly, when your wife went to the gym during the day she took the child with her?

A. That's correct.

10 Q. The only times that she left the child Laura with any other person to go to the gym was in relation to a particular class; I think that's been called a night-time class, a step class?

A. Yes.

15 Q. And, in fact, started about 5.30 of an afternoon?

A. Around that time.

20 Q. And the usual arrangement was that you would try to get back from work by then, and you would look after Laura and she would go to the gym?

A. That was what we tried to do.

25 Q. But from time to time that presented a problem and she left the child Laura, firstly, with a neighbour, Melissa?

A. Originally.

Q. And then with the person Karen Hall?

A. Yes.

30 Q. But, overall, if the child was left in those circumstances, it would only be for a short time until you would get home from work; that was the arrangement?

A. It wasn't an arrangement. That was what I discovered.

35 Q. But they were the circumstances when the child was left with others; that it would be for a short period of time until you got home?

40 A. Karen Hall started to look after Laura after Kathy and I had discussions, after Kathy had gave me that letter, and so Karen Hall had Laura for a considerable amount of time and would bring Laura home around about the time Kathy got back from the gym, and that gave Karen Hall and her family time with Laura.

45 Q. That was for the purpose of, at times, the gym, and, after the gym, doing some shopping?

A. I'm not aware of the shopping part.

50 Q. But that was--

A. It was so that Kathy could go to the gym.

Q. And shopping?

A. I'm not aware of the shopping part.

55 Q. Do you dismiss that?

A. I do.

- Q. I put it to you that, even in those circumstances, it was relatively infrequent that the child would be left to go to the gym because of this step class?
- 5 A. Laura was left there and I think it was a Wednesday night, Laura was left there - or gave to Karen and her family's care every Wednesday night.
- Q. Did you go and pick Laura up from those--
- 10 A. From Karen's, no.
- Q. Yes.
- A. No, Karen brought Laura home.
- Q. What time was that?
- 15 A. It was always round the time Kathy would get back from the gym.
- Q. And what about the person Melissa? Would you go and pick up the child?
- 20 A. Laura was only a wee bubby when Melissa was given Laura, and I would have to find Laura at Melissa's, and - when I got home, Kathy and Laura weren't home and I would find Laura at Melissa's and take her home.
- Q. When you went home, and then you knew on a Wednesday night that that's where the child was likely to be?
- 25 A. Back then it wasn't Wednesday nights. It was not necessarily a Wednesday night.
- Q. You were able to infer where the child would be?
- 30 A. I was left to figure out where the child was.
- Q. Well, it wasn't rocket science, was it, Mr Folbigg?
- A. No, Melissa was over the road and Melissa was the most convenient access point from the house.
- 35 Q. Now, I have already asked you questions about the frequency of your wife going out whilst Laura was alive and I have put to you that you have grossly exaggerated the frequency that she was going out; you recall that?
- 40 A. I do.
- Q. So far as after Laura's death is concerned, you separated about a month or so after the death?
- 45 A. We did.
- Q. And during that time she didn't go out at all?
- A. After Laura died?
- 50 Q. Yes.
- A. Before she left me?
- Q. Yes.
- A. I don't recall.
- 55 Q. Now, you've indicated that there was a time when you then reconciled?
- A. We did.

Q. And you, at one stage, had told her that you had gone to the police and made a statement?

A. I did.

5

Q. On that particular night that you had quite a discussion about where your relationship was heading--

A. Yes.

10

Q. --you spent the whole night discussing the relationship?

A. We did.

15

Q. And you left quite amicably?

A. Yes.

Q. And, then, over the next month, as you had done before that, you attempted reconciliation?

A. That is so.

20

Q. And attempted reconciliation by quite some discussion during a period of about a month?

A. About that long.

25

Q. And you met and you discussed the relationship?

A. We got together for dinner a few times. Kathy would come up to the house, or I would go to her flat, and we would have dinner and spend time together.

30

Q. And it was about a month after you told her you made a statement that you again began living together?

A. About that long.

35

Q. Can I just return to the sequence of the morning? Sorry, there is one matter. You recall actually that you said after Laura's death that Kathy returned to the gym fairly soon after?

A. Yes.

40

Q. How long?

A. It was the Monday after Laura's funeral.

Q. You became quite emotional when you gave that evidence?

45

A. (Witness nodded.) Yes.

Q. Wasn't it the case that the reason she went to the gym on that day was because her friends came around and talked her into going?

50

A. I don't recall that part.

Q. Can I take you to your statement, paragraph 75? Paragraph 75:

55

"I found at first it hard to come to terms with Laura's death, but I was determined to get a handle on it, so I didn't drag Kathy down with me, like I did before. Kathy went back to the

gymnasium on the following Monday, being 8 March 1999. This was because her girlfriends from the gym came and got her and were supporting her."

5 You recall that in your statement?

A. I can see that.

Q. You see, you neglected to say that when you were giving your evidence?

10 A. I don't recall whether her girlfriends were the vehicle behind her returning to the gym.

Q. You see, Mr Folbigg, I put to you that this is the nature of the evidence that you've given about your wife going out and going to the gymnasium; that you have sought to colour it to make your wife look quite sinister. What do you say about that?

15 A. I'm sorry you think that.

Q. And, particularly, that this is an example of that; that you didn't give the full reason when you gave evidence as you did in your statement that it was others who came back who were supporting her and that she went to the gym because her girlfriends from the gym came and got her; you didn't say that, did you?

25

OBJECTION. TRIPLE QUESTION.

Q. You didn't say, did you, at that time that Kathy went back to the gymnasium on the following Monday, being 8 March 1999, that this was because her girlfriends from the gym came and got her and were supporting her? You didn't say that, did you?

30

A. I didn't say that in here.

35

Q. And you neglected to do that because you wanted to create an impression that, before and after each of the children's deaths, your wife was prone to leave the child, not interested in the child, preferred to go to the--

40

OBJECTION. MULTIPLE QUESTIONS.

Q. You are trying to create a very sinister picture of your wife, aren't you?

45

A. I don't think that I am.

Q. You see, I put to you before the morning adjournment that this incident on the morning of Laura's death was a relatively normal domestic situation in your household, where the child was whingey. There were times in the morning when the child became distracted because you were getting ready for work and there was a tension between you and your wife about her routine and your wanting to have an interaction with the child?

50

55

A. It wasn't a typical morning, no.

Q. I put it to you that that was the sequence; that, firstly, the child appeared to be unwell?

A. Not that I recall.

Q. Well, did you give the child medication?

A. Not that I recall.

5

Q. Was she taking medication?

A. Not that I recall.

10 Q. Can I just take you to the top of page 25 of your statement of May 1999. You see you say:

15 "Laura was still suffering from a runny nose and congestion in her chest. She had been taking medication which had been prescribed by Dr Innes of Singleton Heights Medical Centre. I gave her about 200 or 250ml of Enfalac and she drank all of it."

20 Is your memory assisted by that?

A. Enfalac is a baby milk formula. It's what bubbies drink.

Q. Well, you say she had been taking medication?

25 A. There was some time previous, some weeks before Laura died, when Laura had a cold.

Q. Was there any medication on the morning?

A. No.

30 Q. But she was suffering from a runny nose and congestion in her chest?

A. No.

Q. You lied?

35 A. Yes. I backed up what Kathy had told the police.

Q. You see, I put it to you that she made no suggestion - she did not tell you to lie?

A. I'm sorry that you think that.

40

Q. You see, you gave evidence that your wife was force-feeding the child on this morning?

A. I did.

45

Q. Would you agree with me that you didn't mention anything about force-feeding in your statement in May 1999?

A. As far as I recollect.

50

Q. Well, the Crown will tell me if I am wrong, but you make no--

CROWN PROSECUTOR: Well, that's not quite right.

55

ZAHRA: Let me go through the detail.

CROWN PROSECUTOR: About a third of the way down page 25.

ZAHRA: Q. Yes, I will read you this sequence:

5 "We sat and watched the news on television in
the lounge room. Kathy got out of bed about 7am
that morning and I started getting ready for
work."

Can you see that part?

10 A. Yes.

Q. You go on and you say:

15 "Laura became upset and started to cry and chuck
a tantrum."

You see:

20 "I walked out and said to Kathy, 'If she doesn't
want breakfast why the hell make her have it?'"

You see that?

A. Yes.

25 Q. "Kathy said 'Just go and just get ready for work and
leave her be'?"

A. Yes.

30 Q. "She only carries on like this when you're around".
You see, you make no mention there that she was
force-feeding the child?

OBJECTION.

35 CROWN PROSECUTOR: In the part that my friend has read--

ZAHRA: It is a matter that I can put to him.

40 Q. You see, you say, "She doesn't want breakfast. Why
the hell make her have it?" You say that is
force-feeding?

A. That's a softened description of what happened.

45 Q. She didn't use the word "force-feeding", did she?

A. Not in this softened version, no.

Q. Because this softened version creates an impression
that there was persistence, not force-feeding?

A. Creates an impression that Kathy wasn't as harsh as
she was.

50 Q. Because that is what was happening, was what I put to
you. It was persistence, not force-feeding?

A. It was force-feeding.

55 Q. You see, this time you didn't mention anything about
pinning the child down either; would you agree with that?

A. I do.

Q. Would you agree that also, when you stated to the Crown Prosecutor in conference in October last year, you made no mention of those things also at that time?

5

A. I don't recall.

Q. You see, it wasn't until 30 December--

A. When I was given an opportunity.

10 Q. You were never given an opportunity before then to talk in terms of the child being pinned down?

A. Not since May 1999, no.

Q. But it is clearly left out of this statement in 1999?

15

A. It was one of the things I left out.

Q. So, the first time that you mention anything about pinning down was in December, 30 December, the end of December last year?

20

A. Yes.

Q. A little over three months ago?

A. That's correct.

Q. Because that's a lie, isn't it?

25

A. No, it's not.

Q. And you've purposely lied to make it even more sinister?

30

A. It was sinister.

Q. See, similarly, so far as the sequence is concerned, you've given different evidence in your statement and your evidence in this trial regarding scooping the child up and then having an argument about "It looks like you're about to punch someone"?

35

A. It did.

Q. You see, in the statement this occurs in the kitchen and in evidence it occurs in the bedroom. Where did it happen?

40

CROWN PROSECUTOR: Your Honour, I object. My friend says in the statement it happened in the kitchen.

45

ZAHRA: Page 172. I am just trying to shorten it a little. Page 172, line 15, I can go to the detail there, if you want.

CROWN PROSECUTOR: In relation to the statement--

50

ZAHRA: The statement is "the kitchen", see, from the bottom of page 25, and in evidence, page 172, line 15, it occurs after being scooped up and taken into the bedroom.

55

CROWN PROSECUTOR: I don't think it is clear from the statement that it says where it happened, your Honour. Just reading the bottom part of page 25 and over on to page 26.

ZAHRA: Q. Well, can I just take you to paragraph 69 on page 26? Can you see it starts there, "When I took Laura up the hallway"? Can you see that?

5 A. Yes.

Q. So that, when we go back to this statement of punching someone in the face, that was before you went up the hallway?

10 A. Yes.

Q. So, in the statement you're saying it's in the kitchen; the "punch someone in the face" conversation?

15 A. The dining room.

Q. But not up the hallway in the bedroom?

A. No.

Q. That's what you said in evidence. You see, Mr Folbigg, you are lying about this and you make these mistakes because you are lying?

20

A. I don't agree.

Q. You see, you have done this also in relation to her calling you after this to apologise. Can I take you to paragraph 70:

25

30 "About 8.15 that morning I received a telephone call from Kathy and she said, 'I'm sorry I got angry, but she's only like this with you. If you could see her now, she's happily and quietly watching television.' I said, 'I'll try not to be only the good fun Dad and maybe it won't happen again. Do you want to come down here for morning tea?' And she said, 'Yeah, no worries.'"

35

Now, is that the truth?

A. It's not in its totality.

40

Q. Well, that's what's there, isn't it?

A. That's what's on the page.

Q. "Yeah, no worries"?

45

A. That's what's there.

Q. In evidence, however, you put a very sinister tone to this, suggesting that you wanted to see the child and that she was making it difficult. Can I just read what you said--

50

CROWN PROSECUTOR: Is that a question, your Honour?

ZAHRA: Q. I put that to you. That is what you are doing in evidence; you are trying to make this more sinister?

55

A. I don't agree.

Q. Can I read the passage to you? Page 174, line 44:

5 "I asked how Laura was. She said she was fine.
She was watching TV. They had gotten ready.
They were about to go to the gym. I asked her,
if Laura was fine, would she bring her in at
morning tea so I could see her, and Kathy said
she didn't know what she was going to be doing,
but she would see how she'd go. I said, 'No, if
10 you say Laura's fine and you're fine, come in
and have morning tea with me'."

That was the end of the phone call?

A. Yes.

15 Q. Firstly, would you agree that that is quite different
than simply, "Yeah, no worries"?

A. It is different to that.

20 Q. And it is different because this is an example of
what you've done in evidence, making everything more
sinister when you had any opportunity to do so?

OBJECTION. QUESTION ALLOWED.

25 WITNESS: A. I'm sorry, could you repeat it?

ZAHRA: Q. You see, I am putting to you that this is an
example of what you have done during the course of your
evidence; that you have got innocuous domestic situations
30 and made them more sinister over time?

A. I don't agree.

35 Q. This has gone from being, "Yeah, no worries" in 1999
to your evidence now of this confrontation, "Well, if
she's fine, bring her in". You see, that's what you've
done; you've made this more sinister?

A. No, I finally had a chance to tell the truth.

40 HIS HONOUR: Ladies and gentlemen, the Crown Prosecutor
objected to a question a couple of questions ago, the
substance of which was "This is an example of your making
things appear more sinister than they were". I let the
question go. Mr Folbigg disagreed with the proposition in
45 the question. Logically, the answer to the question
permits a conclusion that this is not an example of my
trying to make things more sinister. In other words, it
leaves open the possibility that "I am, on other
occasions, trying to make things appear more sinister".

50 I ought to have rejected the question. It would be quite
clear to you throughout that Mr Folbigg has rejected any
suggestion that he has, on any occasion, tried to make
things more sinister.

55 Yes, Mr Zahra?

ZAHRA: Q. Is this difference to be understood by your
evidence that, in 1999, you were making things softer?

A. Yes.

Q. So, you lied in your statement to make it softer?

A. Yes.

5

Q. And what you are telling the Court now is the truth?

A. Yes.

10 Q. You see, can I ask you this: When you made the statement on 30 December, a little over three months ago, were you trying to soften the blow there?

A. How do you mean?

15 Q. Well, were you trying to soften what happened?
A. No, I was trying to tell people about Laura's last weekend.

Q. That's right, and in quite some detail?

A. It was a horrible weekend.

20

Q. Can I just read what you said actually about this conversation in the statement of 30 December? This is at paragraph 29:

25 "I said, 'Well, how about bringing her in here, after the gym, for morning tea?' She said, 'No, I don't think so. I will probably be having morning tea with the girls.' I said, 'No, don't have morning tea with them, if you say Laura's
30 okay.'"

CROWN PROSECUTOR: That is half of a sentence.

35 ZAHRA: Q. "Then bring her in here and see me after the gym." She said, "Okay. Then I will see you later."

You recall that's what's in your statement?

A. Yes.

40 Q. You see, there you talk in terms of "She said, 'No, I don't think so. I will probably be having morning tea with the girls'?"

A. And?

45 Q. That's quite different from the evidence that you have given in evidence in this trial?

OBJECTION. STATEMENT. QUESTION WITHDRAWN.

50 Q. You see, in evidence you said "Kathy said she didn't know what she was going to be doing, but she would see how she'd go". Now, you see, I put to you that there's quite a difference between that and Kathy saying "No, I don't think so. I will probably be having morning tea with the
55 girls". What do you say about that?

A. It does sound different.

Q. It is different because you're lying and you can't

remember what you said in December?

A. I don't agree.

5 Q. You see, after Laura's death also, you've sought to minimise the grief of your wife by saying things such as "She cried on cue and she resumed a normal life"?

A. Do you want an example of "on cue"?

10 Q. Well, do you understand what I am saying to you?

A. Yes.

Q. That you have sought to minimise her grief, yes or no?

A. No.

15 Q. You see, in paragraph 74 of your statement, you talk about people around you

20 "trying to help and be there for us. I just didn't know what to do. Once again, I was overcome with grief. I don't know how to console Kathy and, once again, I put all my reliance on her. The night Laura died, Kathy spent the night just laying on our bed, crying and staring into space."

25

Can you see that?

A. Yes.

30 Q. Was it the case that she couldn't be consoled?

A. No.

Q. She couldn't, could she?

A. Not when her friends turned up.

35

CROWN PROSECUTOR: Your Honour, there is a double negative there and I think the answer is ambiguous.

ZAHRA: I withdraw the question.

40

Q. In the times after the death of Laura your wife was in grief and she couldn't be consoled?

CROWN PROSECUTOR: Is that a question?

45

ZAHRA: Yes.

WITNESS: A. I didn't understand it, I'm sorry.

50

ZAHRA: Q. I put to you that after Laura died, in the time before your separation, she was grieving and was unable to be consoled?

A. It didn't appear that way.

55

Q. You said in evidence (page 179, line 40) that she couldn't deal with her own grief? That was the case, wasn't it? That was the impression that you had?

A. That was the impression she gave me.

Q. You were of the view, as you expressed in your statement, that you didn't know how to console Kathy?

A. No, I didn't.

5

Q. Can I take you to, lastly, in relation to the morning that Laura died, you talk about her coming to your place of work?

A. Yes.

10

Q. And you then talk about when the child and your wife left on that day you were there when they drove off; is that right?

A. Yes.

15

Q. And you gave some evidence about persons waving at you?

A. Yes.

20

Q. You see, you've given evidence that your impression was that the child wouldn't go with your wife at that time?

A. That's how it seemed.

25

Q. At page 175, line 51, of the transcript, you've said this in evidence here:

30

"We walked out of the office. Kathy started to walk off. Laura wouldn't go with her, so Laura - you couldn't really tell whether she was mucking about or not, so Kathy was walking away, saying 'I'll go without you I'll go without you'."

35

And that you then picked up Laura and walked to the gate. You gave them both a kiss goodbye. They went across the road to the car.

40

"Kathy - the car was opposite the car yard, and Kathy went to the back left-hand door, which was where the baby seat was, and put Laura in."

Now, after that, did someone wave to you?

A. They both waved to me.

45

Q. See, that's what you said in evidence here:

50

"They waved, and she put Laura in the baby's seat and walked around the car to the driver's door, got in, drove off. That was the last time I saw Laura alive."

That's your recollection here now?

A. Yes.

55

Q. At paragraph 71 of your statement, you say this:

"About 11am that morning, Laura and Kathy came to my work. Laura was wearing a disposable

5 nappy, a pair of bike shorts, a singlet, a little T-shirt and her Teletubby sandals. She appeared well, considering her runny nose, and she played in my office for about half an hour. Kathy said, 'Come on, bub, we have to go home. It's your nap time.'

10 Laura and I walked to the front gate of Teasdale's car yard and I kissed them both goodbye, and I told them that I would see them both at lunchtime. I religiously went home for lunch every day. Kathy took Laura across the road to where our car had been parked. They both waved goodbye and drove off."

15 Have you been able to follow that?
A. Yes.

20 Q. Was that the truth or was that a lie?
A. Most of it's the truth.

25 Q. What about how your daughter was? You see, the picture you paint in your statement is that your child was well and your wife said "Come on, bub, we have to go home. It's your nap time"; that there was no problem; you agree with that?
A. This is in May '99?

30 Q. Yes?
A. That's what I've said there then.

35 Q. Well, is that a lie?
A. I added in that she appeared well, considering her runny nose.

Q. And that was a lie?
A. That was added in.

40 Q. It was a lie?
A. Yes.

Q. It was a lie to soften the blow?
A. Yes.

45 Q. However, you've told the truth in evidence that the child didn't appear to want to go?
A. And?

50 Q. There's quite a difference there, isn't there?
A. Between the softened version and the truth?

Q. Yes.
A. Yes.

55 Q. You see, why then in your statement of 30 December, a little over three months ago, did you give this version:

"At 11.30am, Kathy came to the door and said, 'I

5 better get buggerlugs home for a sleep. She is probably tired. Come, on Laura, time to go.' Laura would not go to her, so I picked Laura up and carried her out of the office and put her down outside.

10 Kathy began to walk toward the gate of the car yard and she was calling Laura to go with her. Laura would not walk out with her mother, so I picked her up and carried her to the gate, where I handed her over to Kathy. I said, 'See you at lunchtime then'. Kathy said to Laura, 'Say goodbye to your father.'

15 They walked across the road and Kathy stopped at the left rear door to put Laura into the car. I was watching from the car yard gate. Kathy got Laura to wave to me and she then put her into the car. Kathy walked around the car and got into the driver's seat, pulled out and drove away. She did not even look over towards me, nor wave goodbye. This was the last time I saw Laura alive."

25 Q. You could see that there is a difference there about your wife waving you goodbye; you agree with that?
A. I can.

30 Q. In the statement, in 1999, which you say was to soften the blow, you, in fact, had her waving then?
A. Yes.

35 Q. But in December, a little over three months ago, she wasn't waving. "She did not even look over towards me, nor wave goodbye". You agree the passage I have just read from that statement is very detailed?
A. The truth was very horrible.

40 Q. Well, you see there--
A. It was horrible to experience. It must be horrible to understand.

45 Q. Well, what about now? Why is she back waving again, if it's the truth?
A. Who's back waving?

50 Q. Well, in evidence you are now saying that they both waved goodbye?
A. Sorry, I was agreeing to a previous statement.

55 Q. Well, in evidence, and I could take you back again, at page 176:

"Kathy - the car was opposite the car yard. Kathy went to the back left door, which is where the baby seat was, and put Laura in. Oh, they waved, and she put Laura in the baby seat and walked around the car to the driver's door, got

in, drove off."

So, she is back waving again in evidence. Why?

A. I don't know.

5

Q. See, you can't explain that in terms of wanting to soften the blow because on 30 December, it is quite clear--

10 OBJECTION. COMMENT.

Q. Well, on 30 December, you clearly made a point of expressing this part of the incident in a dramatic way: "She did not even look over towards me, nor wave goodbye"?

15 A. She didn't.

Q. You see, you are lying, aren't you?

A. No.

20 Q. And you're lying because, at times, you want to paint a picture of your wife in a very sinister way before the death of Laura by, in December, saying that she didn't even wave goodbye?

25 A. Your word "sinister". I merely wanted everybody to understand Kathy's aggression; Kathy's gruff nature.

Q. Do you understand the question, Mr Folbigg?

30 CROWN PROSECUTOR: It is an answer to the question. He was asked "Why?"

ZAHRA: Q. You said in evidence today that she waved; you'd agree with that?

A. Fine.

35

Q. And that's your recollection right at this moment?

A. No. I can remember the day.

40 Q. Sorry, you can remember the day?

A. Yes.

Q. What is your memory here today, whether your wife waved or not?

A. She didn't wave.

45

Q. She didn't wave? Well, did you lie when you said, "Oh, they waved, and she put Laura" - did you lie in evidence here?

A. No, I probably didn't use the exact words.

50

Q. This is more than the exact words. You talk about two different situations, don't you? What do you mean "exact words"? You didn't use the exact words?

A. The exact words that she didn't wave to me.

55

Q. You clearly said in evidence "they waved", "they waved"?

A. Fine.

Q. Well, in evidence here, can I just read this to you.
Page 427, line 55:

5 "Q. Now, after that did someone wave to you?
A. They both waved to me."

That was a little while ago. Do you accept that?
A. In reference to what?

10

Q. About waving?
A. In the reference to the '99 or the 2000--

15 Q. Today. You were asked today about your evidence at
page 175, line 51, and I read to you your evidence, and
then after I read to you your evidence, I asked, "Now,
after that did someone wave to you?" and you said, "They
both waved to me". That was a little while ago today?

20 A. And was it clear to me to what statement you were
referring?

Q. Well, I read your evidence to the effect of reading
it at page 175, line 51. You have said this in evidence
here:

25

"We walked out of the office. Kathy started to
walk off. Laura wouldn't go with her, so Laura -
you couldn't really tell whether she was mucking
about or not, so Kathy was walking away saying
30 'I'll go without you, I'll go without you'."

And that you then picked up Laura and walked to the gate.
You gave them both a kiss goodbye.

35

"They went across the road to the car. Kathy -
the car was opposite the car yard and Kathy went
to the back left-hand door, which was where the
baby's seat was, and put Laura in."

40 And I asked, "Now, after that did someone wave to you?"
and you said, "They both waved to me"?

A. Fine.

45 Q. Well, when were you lying?

OBJECTION.

HIS HONOUR: That is rejected, Mr Zahra.

50 ZAHRA: Q. Well, the two propositions that she waved and
she didn't wave can't exist together, can they?

A. No.

55 Q. Now, you recall giving evidence that when your wife
wrote a letter to you, where she was wanting to leave with
Laura, and then you typed up a response to that--

A. Yes.

Q. --and you didn't give her that--

A. No.

5 Q. --and you've been shown that during the course of evidence?

A. Yes.

Q. I think it is MFI 4. I tender that letter.

10 CROWN PROSECUTOR: It is produced, and there is no objection.

ZAHRA: Might the witness have that letter?

15 HIS HONOUR: The letter marked 4 for identification is exhibit 2.

EXHIBIT #2 LETTER FORMERLY MFI 4 TENDERED, ADMITTED WITHOUT OBJECTION

20

ZAHRA: Q. You were asked this question by the Crown Prosecutor about this letter (page 164, line 7):

25 "Q. In the typewritten letter that you didn't give her, did you state what your views were at the time?"

And you said, "I did." Do you recall that?

A. Yes.

30

Q. So, you were telling the Crown Prosecutor that in that letter you were stating what your views were at the time?

A. Yes.

35

Q. Can I take you to the bottom of the first page of that:

40 "Through good times and bad, through richer or poorer, through sickness and in health, as long as we both shall live, these words I hold true as they were my oath to you. I love you and desire you with every fibre of my being and I am proud of your achievements, with your weight

45 loss and your efforts in those regards. I am immensely proud of the mother you are to Laura. It is something I have wished for a long time. I am also proud of the fact that Helen thought enough of you to want you back at work with

50 them."

You see that passage I have read?

A. Yes.

55 Q. You see, as you told the Crown Prosecutor, this expressed your views as of 17 February 1999?

A. That's correct.

Q. And your views were there:

5 "I am proud of your achievements, with your weight loss and your efforts in those regards. I am immensely proud of the mother you are to Laura. It is something I have wished for a long time."

A. And I couldn't bring myself to give it to her.

10 Q. That was the truth, wasn't it, Mr Folbigg? It was your views at the time?

A. I couldn't bring myself to give her the letter.

15 Q. You understand the question?

A. I do.

Q. That was your view at the time, wasn't it?

A. While I was sitting there, typing the letter.

20 Q. And that's the truth, isn't it? That describes in a nutshell that you were proud of your wife the way she looked after the child Laura?

25 OBJECTION AS TO TIME.

ZAHRA: Q. Two weeks before she died?

A. I couldn't give her the letter.

30 Q. But you understand the question? That was what you expressed and what you say was in your mind or your state of mind at the time you wrote the letter two weeks before she died?

35 A. I sat to write the letter and I typed it how I felt, the words I felt Kathy would like to hear. When I finished typing the letter and read back through it, I couldn't bring myself to give it to her.

40 Q. Mr Folbigg, you have accepted from the Crown that this was your views at the time?

A. Fine.

45 Q. Mr Folbigg, you well knew that throughout the course of your 16 years with your wife she was a regular writer in a diary?

A. Yes.

50 Q. She would have it at the bedside table?

A. Yes.

Q. Write at night?

A. Yes.

55 Q. It was always around?

A. Yes.

Q. So, it was never hidden?

A. Rarely.

Q. Do you recall being asked questions about whether Kathy saw a clairvoyant?

5 A. Yes.

Q. Were you asked by the Crown Prosecutor in his conference in October of last year about a clairvoyant?

10 A. Yes.

Q. You were asked this question:

"How often was Kathy seeing a clairvoyant?"

15

You answered:

"Only once. 20 June 2000. Could be after that, but only once before. Kathy thought it was hogwash. I was the spiritual one."

20

A. Yes.

Q. Was that the truth?

25 A. Yes.

Q. "Kathy thought it was hogwash"?

A. Yes.

30 ZAHRA: I have nothing further, your Honour.

HIS HONOUR: We will take the luncheon adjournment then, ladies and gentlemen.

35 <WITNESS STOOD DOWN

LUNCHEON ADJOURNMENT

40

RESUMPTION

5 CROWN PROSECUTOR: Normally what we would do now is have the re-examination of Mr Folbigg. We have three doctors here from various parts of the country, who are anxious to give their evidence this afternoon in relation to Patrick.

10 What we would wish to do now is to delay the re-examination of Mr Folbigg until tomorrow. We will call one ambulance officer, in relation to Patrick's alleged near-miss, one in relation to his death, and then my learned junior will be leading the three doctors who saw Patrick during his life.

15 HIS HONOUR: Is that all right with you, Mr Zahra?

ZAHRA: Yes.

20 <DAVID WILLIAM HOPKINS(2.04PM)
RECALLED, RESWORN AND EXAMINED

CROWN PROSECUTOR: Q. Could you please tell the Court your full name and your place of work?

25 A. Yes, my name is David William Hopkins. I currently work at Hamilton Ambulance Station.

Q. You previously gave evidence in this trial relating to the baby Caleb Folbigg?

30 A. I did.

Q. I would like to ask you questions now about 18 October 1990 in relation to Patrick Folbigg. On that day were you performing duties at the Hamilton Ambulance Station with Ambulance Officer Yorke?

35 A. I was.

Q. At 4.31am, did you and Ambulance Officer Yorke respond to a call to attend at 36 Rawson Street, Mayfield?

40 A. I did.

Q. Did you arrive at the house at 4.41 that day?

A. Yes.

45 Q. Were you met at that house by the same woman that you had seen at the house in 1989?

A. I was.

Q. Namely, the accused Kathleen Folbigg?

50 A. Yes.

Q. Was she at the time holding a small baby in her arms?

A. Yes, wrapped in a blanket.

55 Q. Did she say words to this effect. "My baby is having trouble breathing and won't wake up properly."

A. Yes.

Q. What did you notice about the baby?

A. I noticed the baby - upon taking the garments from the upper part of the baby's body, I conducted a physical examination and determined that the baby was in respiratory distress. The baby was pale around the face.
5 It was very listless and had a decreased level of consciousness.

Q. Did you notice anything about the baby's respiration?

A. Yeah, a tracheal tug and intercostal recession was
10 noted upon physical examination.

Q. What do they mean?

A. That means the baby was in respiratory distress and was attempting to breathe, but it was very laboured. It
15 was very difficult. All accessory muscles were being utilised in the effort of breathing.

Q. When you say "accessory muscles", what do you mean by that?

A. The muscles of the abdomen and the intercostal muscles
20 between the ribs.

Q. What is the normal way that people breathe?

A. It would be slow and rhythmic, without any deep
25 laboured breathing and without the use of accessory muscles.

Q. How did this baby's breathing differ from the normal?

A. It was tachypnoeic, meaning it was quite - of a high
30 rate. As I said before, it was laboured.

Q. With his Honour's permission, would you perhaps demonstrate to us, using your own breathing, how the
35 baby's breathing was when you first saw it?

A. Yes, I noticed a tracheal tug, which is upon
40 inspiration. The pressure of the inspiration pulls the skin at the neck. You notice the skin and soft tissue of the neck draw inwards upon deep inspiration and, upon inspiration, between the ribs, you see the ribs extend out further than they normally would.

Q. Did you and Officer Yorke decide to transfer the baby immediately to the Mater Hospital at Newcastle?

A. We did.
45

Q. Did you place the baby and the mother in the back of the ambulance?

A. We did. We sat the baby on the mother's lap and the
50 mother on the stretcher and administered oxygen therapy en route to the hospital.

Q. Did you notice anything about the condition of the baby during the time that you were going to the hospital?

A. Upon the use of oxygen therapy, its level of
55 consciousness did rise. Its respiratory effort did remain impaired.

Q. Did you arrive at the hospital at 4.52 that morning?

A. We did.

Q. Did you hand the baby over to the hospital staff?

A. We did.

5

Q. Would you have a look, please, at this document (shown)? Is that the ambulance report which is filled out by yourself and Officer Yorke relating to this call-out?

A. Yes.

10

Q. In that report you've written under the tile "History" that it was a four-month-old baby in respiratory difficulty?

A. That's correct.

15

Q. You have written "ie intercostal recession"?

A. That's correct.

20

Q. What does that mean, "ie"?

A. That is.

Q. "Hard to wake up. Has had cold for two days." Is that something that you were told?

A. Yes. That was elicited from the lady on scene.

25

Q. Then you have written "question mark". It looks like "VLOC"?

A. Decreased level of consciousness.

30

Q. So, it is "DLOC", is it?

A. It is an arrow pointing downwards, albeit difficult to interpret.

35

Q. Then you have written "OE", which stands for on examination?

A. That's correct.

40

Q. "PT" for patient?

A. Yes.

Q. "Was pale and very listless"?

A. Yes.

45

Q. "Baby is normally happy and dynamic"?

A. Yes.

Q. That last bit you were also told?

A. That's correct.

50

EXHIBIT #P AMBULANCE REPORT OF 18/10/90 IN RELATION TO PATRICK FOLBIGG TENDERED, ADMITTED WITHOUT OBJECTION

EXHIBIT P DISTRIBUTED TO JURY

55

<CROSS-EXAMINATION

COOK: Q. Mr Hopkins, when you got there you first saw the child being held by a woman you took to be the child's

mother, is that right?

A. That's correct.

Q. She was plainly upset, is that correct?

5 A. That's correct.

Q. She was crying?

A. Yes.

10 Q. She said something to the effect of, "My baby's having trouble breathing and won't wake up properly"?

A. Yes.

15 Q. Was it the woman you took to be the mother who gave you the information which you have recorded in the history of your ambulance report form?

A. It was.

20 Q. Including that the child was normally happy and dynamic?

A. Yes.

25 Q. Now, you recorded on the ambulance history form that, on examination, you noted that the skin temperature of the patient was hot?

A. Yes.

Q. That was an abnormal thing, wasn't it?

30 A. Yes, it would be regarded as so.

Q. Because you have three choices: the skin temperature can be normal, it can be cold, or it can be hot, is that right?

35 A. Yes.

Q. Now, you've also recorded on the second page of the report form some information about the posture of the patient. Do you see that?

40 A. Yes.

Q. You have put a circle around number 2 for "supine". Do you see that?

A. Yes.

45 Q. Meaning lying on the back?

A. That's correct.

Q. Was this information that you had been given; that the patient had been lying on his back?

50 A. No. That section on the ambulance report form pertains to treatment. I have made a note there that the supine position - it is difficult to interpret, but it does refer to the mother. We laid her down, not probably exactly supine, but we laid her back and put the baby -
55 rested the baby on the mother's body on the stretcher. It does not pertain to anything else.

Q. So, because you were transporting such a young baby

you needed the mother to play a role in getting the baby safely to the hospital in the ambulance?

A. That's correct, yes.

5 Q. So, she laid back in the ambulance and the child lay on her?

A. Yes.

<NO RE-EXAMINATION

10

<WITNESS RETIRED AND EXCUSED

<KATHLEEN COYLE (2.17PM)

AFFIRMED AND EXAMINED

15

CROWN PROSECUTOR: Q. Would you please tell the Court your full name and your place of work?

A. Kathleen Coyle.

20

Q. And your place of work?

A. Kurri Kurri Ambulance Station, Newcastle.

Q. You are an officer of the New South Wales Ambulance Service?

25

A. Yes.

Q. In February of 1991, were you attached to the Hamilton Ambulance Station?

30

A. Yes.

Q. You were a level 2 ambulance officer at the time?

A. Yes.

35 Q. I would like to take you to 13 February 1991. On that day were you rostered for duty, together with Ambulance Officer Mullins?

A. I was rostered on duty on that day, but I'm not sure who I was working with, but according to the records I was with Russ Mullins.

40

Q. At about 10.03am that day, did you and Ambulance Officer Mullins respond to a call of a baby not breathing at premises at 36 Rawson Street, Mayfield?

A. Yes.

45

Q. Did you arrive at the house at 10.10am that morning?

A. Approximately, yes.

50 Q. Was there another ambulance that also arrived at about the same time?

A. Yes, we approached the same time in opposite directions.

55 Q. That other ambulance was being driven by Ambulance Officer Hetherington?

A. Yes.

Q. Did you go to the front door of the house?

A. Yes.

Q. Were you carrying equipment with you?

5 A. I can't remember carrying equipment, but regulations required that we would have, yes.

Q. When you got to the front of the house, did you hear the sounds of a woman sobbing?

10 A. Sobbing, hysterical screaming, yes.

Q. Did you see the accused, Kathleen Folbigg, sitting on a lounge in an hysterical condition?

A. Yes.

15 Q. Did she have her hands up to her face and was she crying out and sobbing?

A. Yes.

Q. Did you go past her and into another room of the house?

20 A. To my memory, not exactly past her, but adjacent to her and I turned left into another room.

Q. In another room of the house, did you see a man that you now know as Craig Folbigg kneeling over a small baby in that room?

25 A. Yes.

Q. Did the man appear to be attempting to do CPR on the child?

30 A. I remember him kneeling and I assumed he was doing CPR, yes.

Q. Did you then go over to the baby, together with the other ambulance officers, and commence treatment of the baby?

35 A. Yes.

Q. Did one of the other officers perform ventilation on the baby?

40 A. I remember--

Q. Do you have a statement in this matter?

45 A. Yes, I do.

Q. Would you like to refer to your statement?

A. Yes, if you like.

Q. With his Honour's permission, it is paragraph 7 of your statement. Did one of the other officers perform ventilation on the baby?

50 A. Yes.

Q. Did you perform heart compression?

55 A. Yes.

Q. That being a standard way of doing CPR?

A. Yes.

Q. Did you check the baby's vital signs?

A. Yes.

5 Q. Did you note, when you were doing that, that the baby was warm to the touch?

A. Yes.

10 Q. And slightly blue around the lips?

A. Yes.

Q. Would you have a look at this document (shown)? Is that a standard ambulance report in relation to this call-out?

15 A. Yes.

Q. That was filled out and signed by you and Ambulance Officer Mullins?

A. Yes.

20

Q. On that report you have written in terms of the history "code 2, bub", is that right?

A. Yes.

25

Q. "Code 2" being an emergency?

A. Being a cardiac arrest emergency.

Q. "PT" for "patient" "is an eight-month-old male"?

A. Yes.

30

Q. Is that the sign for "male"?

A. Yes, "with"--

Q. "With PH", which is "past history"?

35

A. Yes.

Q. "Of apnoea episodes and epilepsy"?

A. Yes.

40

Q. Was that told to you by one of the parents?

A. Yes.

Q. Do you remember which one?

45

A. I don't remember at the time, but, later on, in the vehicle, when we were taking the child to hospital.

Q. Then "OT"?

A. On treatment.

50

Q. What does that mean? Does that mean "on treatment"?

A. On treatment, yes.

Q. "Bar code 2. Time. Question mark"?

A. Yes.

55

Q. Does that mean that the bub had been in cardiac arrest for an unknown time?

A. Yes.

Q. "OA". On arrival?

A. On arrival, yes.

5 Q. "Patient skin colour pink, peripherally cyanosed"?

A. Yes.

Q. Which means that he was blue around the peripheries?

10 A. Yes, I only noticed slight blueing of the lips.

Q. Then it says "skin temperature warm"?

A. Yes.

Q. "Nil vital signs"?

15 A. Yes.

Q. "Patient past history epilepsy"?

A. Yes, "NAB", no other abnormalities.

20 Q. "Code 2 on arrival at hospital, car 36 on scene"?

A. Yes.

Q. Are you able to say from your memory whether the patient was breathing at all?

25 A. I know I have written in my statement that I had seen him breathing, but I have written "nil" on the notes.

Q. Now, where's that on the notes?

30 A. Down at the bottom. If you see "blood pressure/pulse nil, capillary filling nil", yeah, okay, I can't explain that discrepancy in my statement.

Q. There is a column that says "respiration"?

35 A. Yes, "nil".

Q. Under "rate", at 10.10, it is written "nil" and at 10.15 "nil"?

A. Yes.

40 Q. But you claim to have some memory that the baby appeared to breathe once?

A. Yes.

Q. Just on one occasion?

45 A. Yes.

Q. Yet there's "nil" written on the ambulance report?

A. Yes.

50 Q. Are you able to resolve that discrepancy?

A. Sometimes it's called "chain stokes". It's the last one or two breaths a patient will take. I believed - my memory at the time - that I had seen that as I approached the baby, and he was very pink. I went down. He's warm. He's slightly blue. The only explanation I can tell you about this is: (1), in my memory, he may have been taking those last one or two breaths, or (2) it was the result of him expelling the air that, if the man had given CPR prior

55

to us attending, that was being expelled. Right?

Q. Either way, are you able to say whether or not it appeared the child had died recently?

5 A. Yes.

Q. At some stage the man who had been attempting CPR identified himself as the father?

10 A. Yes.

Q. Did he say to you words to this effect, "His mother just found him like this"?

A. Yes.

15 Q. Did he also tell you that this was their second child that they had lost?

A. Yes.

Q. Now, did one of the other ambulance officers then put the baby, Patrick, into one of the ambulances?

20 A. Yes, Murray picked him up. A small child you pick one up (witness indicated). Murray continued single officer CPR on the bub out to the ambulance.

Q. In the meantime, had you got into the back of the ambulance that the baby was put into and did you continue chest compressions in the back of the ambulance whilst one of the other officers ventilated the child?

25 A. Yes.
30

Q. The father of the child got into the front of the ambulance?

A. Yes.

35 Q. And you then proceeded to the Mater Hospital at Newcastle?

A. Yes.

Q. And during the time that the ambulance was going to the hospital, you continued to try and revive the child with CPR?

40 A. Yes.

Q. On the way, the father told you that the baby had epilepsy and was blind. He told you that?

45 A. Yes, we asked was there any history that the baby had had previously, and he said "He's blind, epileptic" and some other sorts of problems, and I asked the father the baby's name.

50 Q. Did you arrive at the Mater Hospital at about 10.18am?

A. Yes.

Q. Did you then hand over the baby to the hospital staff?

55 A. Yes.

EXHIBIT #Q FURTHER AMBULANCE REPORT OF 13/02/91 IN
RELATION TO PATRICK FOLBIGG TENDERED, ADMITTED WITHOUT

OBJECTION

EXHIBIT Q DISTRIBUTED TO JURY

5 <CROSS-EXAMINATION

COOK: Q. I just want to ask you a few questions about this breathing that you noticed?

A. Hmm.

10

Q. Is it correct to say that you said today that you thought you might have been observing the child's last one or two breaths?

A. Yes.

15

Q. Is that your memory now?

A. No, that's not my memory now. That's my reason of that explanation of why I may have thought I've seen that at the time. It was 12 years ago.

20

Q. Sure. In the ambulance report, exhibit Q, you've noted a respiratory rate of zero?

A. Yes.

25

Q. Indicating no breath at all?

A. Yes.

Q. You made a statement about this in September 1999, is that right?

30

A. Yes.

Q. In that statement did you record that the breathing you noted was present, shallow breathing?

A. Yes.

35

Q. Is that the same as taking your last one or two breaths?

A. Yes.

40

Q. Or is it something different?

A. No, that's the same.

Q. Is it the position that you are not really sure what type of breathing, if any, you observed? Is that the position?

45

A. Yes.

Q. Because we are talking about an event 14 years ago?

A. Yes.

50

Q. And you didn't make a statement about it until ten years later?

A. Yes.

55

Q. The ambulance report suggests that there was no breathing you observed?

A. That's right.

CROWN PROSECUTOR: 12 years ago.

COOK: I am sorry 12 years.

5 Q. Now, the woman that you took to be the child's mother
was hysterical, is that right?
A. Yes.

10 Q. You have had plenty of experience in seeing hysterical
people?
A. I have now, yes.

15 Q. Crying?
A. Crying, rocking, screaming.

15 Q. Did you say "rocking"?
A. Yes, rocking, screaming, "er, er, er".

20 Q. Completely distraught?
A. Distraught, yes.

Q. Were you able to speak with her?
A. No.

25 Q. She was too hysterical?
A. Yes.

30 Q. Too upset?
A. Yes, and we had no time.

30 Q. You just indicated then, I think, that you were
putting your hands up to your face?
A. Yes.

35 Q. That is what she was doing when you saw her?
A. Yes.

40 Q. Holding, sometimes, her face in her hands?
A. Yes.

40 Q. Apparently overcome with grief?
A. Yes.

45 <NO RE-EXAMINATION

<WITNESS RETIRED AND EXCUSED

<JOSEPH GEORGE DEZORDI (2.33PM)
SWORN AND EXAMINED

50 HIS HONOUR: If you need to refer to any notes you have to
answer any question, please feel free to do so.

55 CROWN PROSECUTOR CULVER: Q. Can you state your full name
for the Court, please?
A. Joseph George Dezordi.

Q. Where are you working currently?

A. At the Townsville General, the Townsville Hospital.

Q. In what position?

A. Neonatal fellow.

5

Q. Can you tell the Court your qualifications?

A. MBBS Melbourne University and--

Q. When you say that, that's a Bachelor of Medicine?

10 A. Bachelor of Medicine, Bachelor of Surgery, Diploma of Paediatrics at University of New South Wales, and I'm currently doing advance training in research projects in paediatrics, or specifically in neonatology, care of newborn babies.

15

Q. Is it the case that you have trained in paediatrics for over seven years?

A. That's correct.

20 Q. Also, you have worked in general practice for an additional three years or so?

A. That's correct. I also worked on a consultant roster at Latrobe General Hospital for three years.

25 Q. Where were you working on 18 October 1990?

A. I was working at the Mater Hospital.

Q. That's at Newcastle?

A. That's correct.

30

Q. At about 5am, were you working as the paediatrics night resident at that hospital?

A. That's true.

35 Q. Now, were you called to an emergency at that time in the casualty department?

A. I was called to emergency before sunrise, I remember quite clearly.

40 Q. Did you, as a result of that, attend the casualty department and examine Patrick Folbigg there?

A. That's correct.

45 Q. Now, can you describe Patrick's condition when you first saw him?

A. Patrick was brought in by ambulance, I recall, and he was classified as an emergency with problems of cyanosis; that is, he was blue, not pink; not active; lethargic. There was a history that he had been coughing beforehand at home. When I saw the baby, he was lethargic and not very active.

50

Q. Was he responsive to stimuli?

55 A. He specifically - I specifically examined him to see whether he responded to stimuli, in the sense of painful stimuli, and he was not responsive initially - not very responsive initially.

- Q. Did you maintain notes?
A. Yes.
- 5 Q. Did you keep a record of the temperature of Patrick at that time?
A. Doctors don't normally record temperatures, but he was afebrile.
- 10 Q. What do you mean by afebrile?
A. He wasn't febrile.
- Q. What does "febrile" mean?
A. He had no fever.
- 15 Q. Now, did you speak with Patrick's mother, the accused, on that occasion?
A. I spoke to Mrs Folbigg.
- 20 Q. Did she tell you what had happened to Patrick before coming into hospital?
A. The information I obtained was quite brief. It was in the context of a situation which was fairly urgent to me at the time, so what I did obtain was that she had heard Patrick coughing at about 3 o'clock in the morning, which
25 would have been about one and a half to two hours previously, and that she saw him at that time, but he went back to sleep, or she didn't see any pressing issue then. Then she was alerted again, at about 4.30, when she heard sounds to the effect of him gasping. She told me that he
30 was blue around the lips; that he was lifeless and floppy; that he was making minimal respiratory efforts; and she stated that he also made a high pitched cry.
- 35 Q. Did she tell you whether or not any cardiopulmonary resuscitation had been performed on Patrick?
A. I specifically asked about that, and that had not been performed.
- 40 Q. To your knowledge, did the paramedics administer oxygen to Patrick?
A. They did.
- 45 Q. Do you know how long it was after Mrs Folbigg said she noted that Patrick was gasping?
A. I believe that it was 20 minutes.
- 50 Q. To your understanding, did Patrick revive slightly when the paramedics administered the oxygen?
A. From the history that I obtained, yes, slightly.
- 55 Q. Did you then treat Patrick?
A. When he arrived in casualty, I treated Patrick.
- Q. What did you do?
A. The initial treatment involved administering oxygen and getting - obtaining intravenous access, taking blood for appropriate pathology and, once being stable, then organising other tests, such as a chest x-ray.

Q. Now, did Patrick appear to respond to the treatment?

5 A. He did appear to respond, although, whether he was getting better spontaneously, that may also be possible. However, I did note that, although oxygen was being administered under my supervision, my conclusion was that he was improving despite, or without, the actual need for oxygen at that stage.

10 Q. When you say "improving", was it the case that he remained pink?

A. Yes.

Q. And he became more alert?

15 A. Yes, and also, objectively, we were able to actually measure the oxygen content in the blood anyhow with saturation monitors, and essentially he maintained what we call saturation levels.

20 Q. That is saturation of oxygen in the blood?

A. That's correct.

Q. Did you draw any conclusion from Patrick's improvement?

25 A. Because of that rapid, fairly rapid, normalisation of his colour and oxygen saturation level, my conclusion at that stage was that this was not - I was not dealing, primarily, with pathology involving his lungs, his chest and possibly his airway.

30 Q. So, can you explain to the Court what you mean by pathology involving the lungs?

35 A. For example, any disease that may impair exchange of oxygen across the airways, across the small airways into the bloodstream. An example might be pneumonia, a viral condition such as bronchiolitis, even into the upper airway.

40 Q. So, when you say he rapidly appeared to improve, over what time period are you talking about?

A. Certainly 15, 20 minutes.

Q. Did you conduct a further detailed examination of Patrick at that stage?

45 A. I examined his neurological system in detail. I examined him in detail, all systems.

Q. When you say "neurological system", does that pertain to the brain and the nerves?

50 A. Yes, specifically looking for possible explanations for his condition focusing on such possibilities as meningitis, some other process involving the brain, brain tumour, things like that, septicemia.

55 Q. What did you observe about Patrick at that stage so far as his general development presented to you?

A. Well, the development - well, perhaps more to the point, his growth appeared to be appropriate for his age.

His head size was probably in the upper levels of average to above average but, neurologically, he appeared to be a normal child, apart from the fact that he - I believe I noted that he was arching his back at times, but that's a very non specific thing.

Q. Given the history that you had received from Mrs Folbigg about Patrick's behaviour, the gasping before coming into hospital, did you conduct a further search of Patrick's airway?

A. Yes. We looked inside the airway and looked for things such as - things that might obstruct the airways, such as, for example, a foreign body, as we call them, or enlarged tonsils. That's a routine thing that is always done, and I did do.

Q. Did you find anything?

A. No.

Another thing you would look for would be, for example, evidence of upper airways obstruction, such as croup. I certainly didn't have any evidence of that at that time. And looking for other matter that might obstruct an airway, such as food; milk. Therefore, also the x-ray to further elucidate that.

Q. What did the x-ray reveal, if anything?

A. The x-ray was essentially normal, although I believe the radiologist reported some minor abnormality. But from my experience of x-rays in babies, it was actually quite normal. Normal. Yeah.

Q. So, in other words, are you able to say there was no blockage of Patrick's airway?

A. On the basis of Patrick and the x-ray, there was no blockage of the airway.

Q. Are you able to say whether there were any signs of other serious illness?

A. I think, in the sense of a long-term, general, acute illness, that might be lasting several hours, for example, ie, we think of meningitis, septicemia, that type of thing, meningococcal infection, there wasn't any of that. Of interest, an unexpected find, was the high level of glucose in his urine.

Q. When you say that was of interest, why is it of interest?

A. It's of interest because babies, nor adults for that matter, do not have glucose in their urine normally, unless they are diabetics, and obviously this baby was not diabetic, as we do know. So, the existence of a large amount of glucose in the urine tends to me so suggest a fairly catastrophic event, such as an asphyxiating event, or a prolonged seizure.

Q. When you say an asphyxiating event, can you explain what you mean by that?

A. Anything, any event, that leads to obstruction of air into the lungs and impairment of oxygen levels in the blood and to the brain.

5 Q. Now, was there any evidence of trauma or injury to Patrick?

A. On this occasion I found no evidence at all of trauma.

Q. Did he have any symptoms suggesting meningitis?

10 A. The only soft, I guess is the word we would use, symptom would be the history given of a high-pitched cry, but that's non specific. That can be caused by any number of pathologies affecting the brain, ie infection, lack of oxygen, or bleed, bleeding to the brain, or trauma. So,
15 specifically, no, there were no signs of meningitis to answer your question.

Q. Did Patrick's blood test come back with normal results?

20 A. Patrick's blood test, the full blood count, which is a fairly basic test but still of great use to us, suggested that there was no evidence of meningitis or a severe infection such as septicemia or meningococcal septicemia or a bacterial infection, which is what we are normally
25 concerned about.

Q. Did the neurological examination reveal any abnormality of the brain which might account for possible seizures?

30 A. On this actual night, and in the subsequent 24 hours, no. I mean, his neurological examination was essentially normal.

Q. What form did the neurological--

35 A. I was about to finish. Although you could argue, one could technically argue, that the examination was not complete because his pupils were not dilated and examined by an ophthalmologist, within the parameters of what we normally do, it was a normal examination.
40

Q. When you say the pupils were not dilated, is that consistent with lack of oxygen to the brain?

A. By "dilated" I mean--

45 COURT REPORTER: I'm sorry?

WITNESS: A. By "dilated" I mean medically dilated with medication that dilates pupils to look for retinal haemorrhages.
50

HIS HONOUR: We do not want you to give more evidence. We want you to repeat what you said before, please.

Q. Dilated to?

55 A. To investigate for retinal haemorrhages.

CROWN PROSECUTOR CULVER: Q. That's a further test that could have been done?

5 A. Well, I only mention that because in our medical student training we are taught you have not examined a child properly, or neurologically examined them properly, until you have dilated the pupils. I'm giving you orthodox practice of what should be done.

Q. On the neurological tests which were performed on that occasion, no abnormality of the brain was revealed?

10 A. No.

Q. Do you agree with the question I have just put to you: No, there was no abnormality revealed?

A. There was no abnormality revealed.

15 Q. Was there any sign that Patrick had vomited whilst at the hospital?

A. There was no sign that night, but I noticed that in the subsequent 24 hours he had vomited twice. Twice, I believe.

20 Q. Do you know whether or not Patrick experienced any respiratory difficulty with the process of vomiting?

A. I do know categorically that he did not.

25 Q. I just ask you to keep your voice up, if you can?

A. Sure.

Q. You said that an x-ray was taken and that it did not reveal any blockage of the airway. Are you able to say whether or not it demonstrated signs of aspiration or pneumonia?

30 A. A good question. A chest x-ray is not taken to look for blockage of the upper airway. It is taken to look for the latter things you mentioned. There was no evidence of aspiration or pneumonia.

35 Q. Were virological tests conducted?

A. I did do virological tests, and they were negative.

40 Q. By "negative", do you mean nothing was revealed?

A. Yes. Looking specifically for bronchiolitis as a possible cause of the whole picture, the clinical judgment, there was no evidence of that.

45 Q. So, at that time, with the tests that you had performed, what were your conclusions as regards Patrick's condition?

50 A. My conclusions were somewhat I think - I don't think I made any specific, absolute conclusion, because there was not enough evidence to make a specific diagnosis, so I made a list of differential diagnoses and, essentially, that was along the line of an acute asphyxiating event, such as: Did he aspirate, even though there was no evidence of that, admittedly, or did he have a prolonged seizure?

55 Q. When you talk about "aspirate", what does that mean?

A. Aspiration is the process whereby particular matter

enters the airway, upper or lower airway, and impairs oxygen exchange. So, for example, if an adult or even a child were to vomit and then inhale that vomitus, that would amount to aspiration and may cause varying degrees of respiratory difficulty, ranging from virtually no difficulty to death.

Q. Are you able to say whether or not you formed a conclusion about hypoxia?

10 A. Well, objectively, there is no doubt that Patrick was hypoxic when he came in, because the blood saturation tests proved that. There was no question that he was hypoxic.

15 Q. By "hypoxic", do you mean he lacked oxygen?

A. Yes.

Q. Is that lack of oxygen and the condition of Patrick that you observed consistent with Patrick having been smothered?

20 A. Could it be consistent? Possibly, yes, but it wasn't my priority thought.

Q. Did you take notes of your examination of Patrick on that night?

25 A. I did.

Q. I just ask you to have a look at this document (shown)?

30 A. Okay, yes.

Q. Is that a copy of the notes you made on that night?

35 A. This is actually a photocopy of the discharge summary. So - that page, anyhow, and the second page is my actual entry of that very night, which happened about 6am, when I made the entry.

Q. I am sorry. Saying "night", I do mean morning?

40 A. Sorry, morning, that's correct, yes. These are my notes from that morning.

Q. Could I ask you to have a look at those notes, in particular page 2 of the notes?

45 A. (Witness complied).

Q. Do you see at the bottom of the page there's an entry headed "Development"?

A. Yes.

50 Q. Are you able to comment on your observations of Patrick's development?

55 A. Right. Now, technically speaking, these are not observations, because development at this age we obtain by history. In other words, we ask the parent and we assume what they tell us is true. So, that's the format in which that information is gained. So, when we ask about smiling, smiling doesn't occur around six weeks, that's by report. What this indicates here is a normal level of

development. That's what that means. That's what that indicates.

5 Q. For his age?

A. Yes.

MFI #12 HOSPITAL NOTES REFERRED TO BY DR DEZORDI

10 Q. I might just show you another document, if I may (shown)? Do you recognise that document?

A. It's an EEG report.

15 Q. Can you indicate the date of the EEG?

A. 18 October 1990.

Q. Was that taken in respect of Patrick?

A. Oh, yes.

20 Q. What does that report indicate?

A. Before I actually comment on that, I think I should indicate that in the hospital environment it's not regarded as being expected of us, of myself, to actually comment on an EEG, because it is actually the prerogative of a specialised person, a neurologist. So, I just need to indicate that.

Q. Are you able to draw any conclusions from that report?

A. Well, I can look at the report and give you an opinion on it, but it won't be--

30

OBJECTION (COOK). GIVEN THE RESERVATIONS OF THE WITNESS, IT WOULD SEEM TO HAVE NO UTILITY.

35 Q. Can you explain the terminology used in that report? Perhaps, if you could read it out and explain the terminology?

A. I will start at the top, where it says "History". There is the word "apnoea". Then "query seizure". So, "apnoea" is cessation of respiration for 20 seconds or more. "Seizure" is basically what people call epilepsy but, technically speaking, one seizure does not constitute epilepsy, but it is a discharge of electrical activity in the brain, with a whole range of manifestations, such as eye movements to convulsive movements.

45

The persons who asked for this test have indicated, in the history, that there was apnoea. In other words, a period of no respiration or query a seizure.

50 The EEG report, summary of it, is a normal EEG. The summary of the report is that this is a normal EEG for this state and the state of sleep, or states of sleep. So, what you infer from this is that it is a normal EEG.

55 Now, an EEG is a fairly crude test which measures brain electrical activity and typically in seizure activity there may be no abnormalities in an EEG.

One of the reasons for doing the EEG - I think I'm quite qualified to comment on this - the major reason for doing the EEG was to look for evidence of encephalitis.

5 HIS HONOUR: You are going terribly fast, and you are using, of course, medical and technical terms. It is very difficult for the reporters to record what you are saying. Would you make a conscious effort to slow down please.

10 COOK: Just before that happens, would your Honour hear me on a matter. It is a question of some reservations the witness has expressed. "I think I'm qualified." It is also a matter of notice. What this material goes to. We have not had notice of this.

15 HIS HONOUR: It is best to deal with that now.

COOK: Yes, please.

20 HIS HONOUR: Ladies and gentlemen, I have to hear what Mr Cook has to say. I do not know whether it will take long. If it is going to be more than a couple of minutes, I will send a message to you.

25 JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Is it all right if Dr Dezordi remains?

5 COOK: I have no objection to that.

I understand the witness is going to - I glean this from
the question and the beginning of the witness' answer -
interpret this EEG report as being something which is
10 inconsistent with a diagnosis of encephalitis. I think
that's where he was going.

If I'm right about that, that's a relevant issue, because
there is, in the evidence, indications of such an opinion.
15 However, we have not been informed that this witness was
going to look at this document and give this
interpretation. On the face of the document, it is not
apparent that that is its meaning. That is a question of
notice.

20 The other point is that it has not been properly
established that the witness is qualified to give an
opinion based on this document about encephalitis.

25 They are the two points.

HIS HONOUR: First of all, Madam Crown, is Mr Cook's
apprehension correct: That that is the substance of the
evidence you want to get from Dr Dezordi?

30 CROWN PROSECUTOR CULVER: It is. I was going to approach
it in a more broad brush way and ask the doctor whether
his interpretation is that the child Patrick essentially
had no pathology of the brain revealed by that EEG.

35 HIS HONOUR: It may need to be established. At least from
a preliminary indication given by Dr Dezordi, he would not
feel confident in expressing an opinion of that kind.

40 CROWN PROSECUTOR CULVER: Certainly.

HIS HONOUR: There is no reason why that cannot be dealt
with here and now.

45 WITNESS: Can I clarify?

HIS HONOUR: We may need to ask you a question in a
moment. Would you mind just waiting to see whether we do
ask you a question.

50 CROWN PROSECUTOR CULVER: Might I also just address my
friend's issue of notice. This is a document which has
been made available to the defence for some time. Indeed
my learned senior opened on the fact that an EEG was taken
55 from Patrick on that day with normal results.

HIS HONOUR: Have you served any statement based on this
EEG report, whether or not it is consistent with the

presence or absence of myocarditis?

5 CROWN PROSECUTOR CULVER: There is another expert.
Encephalitis your Honour means.

HIS HONOUR: Encephalitis, yes.

10 CROWN PROSECUTOR CULVER: There is another expert by the
name of Dr Ouvrier, who is to be called in the Crown case.
He will also, as I understand it, be able to comment on
and interpret the EEG.

15 HIS HONOUR: Am I to assume from what you have just said
that Dr Ouvrier's report has been served and gives the
substance of what I have just asked about?

20 CROWN PROSECUTOR CULVER: Yes. If I could just clarify,
in answer to your Honour's question, the report of Dr
Ouvrier has been served and Dr Ouvrier did consider the
neurological function of Patrick; the history of seizure,
and so forth.

HIS HONOUR: Does he comment on this EEG

25 CROWN PROSECUTOR CULVER: I do not believe he commented on
this particular one. He did have access to the medical
history of Patrick, and that included this EEG, your
Honour.

30 If I could further clarify, Dr Dezordi has provided a
statement which has been served on the defence, indicating
that various tests were performed in respect of Patrick,
and those tests did not reveal abnormality. This is part
of that process. This was one of the tests performed, and
35 one of the tests, more broadly commented on, in Dr
Dezordi's statement.

40 HIS HONOUR: I do not know. Mr Cook says there is no
notice. I may have to look at the documents which you say
constitute notice. Do you have them there?

COOK: I am content with that. I am content that your
Honour looks at the document we are talking about.

45 CROWN PROSECUTOR CULVER: I hand to your Honour the EEG
report. Does your Honour have a copy of Dr Dezordi's
statement?

50 HIS HONOUR: Yes. This is 17 March 2000?

CROWN PROSECUTOR CULVER: Yes, it is.

HIS HONOUR: Does Dr Dezordi say anything in it about the
EEG?

55 CROWN PROSECUTOR CULVER: Dr Dezordi comments specifically
on subsequent EEGs. That is referred to on page 4.

Sorry, they are CT scans. Dr Dezordi refers to neurological tests. I will just check.

5 HIS HONOUR: I take it from what you say he does not say anything in his report about this EEG report.

CROWN PROSECUTOR CULVER: That is correct.

10 HIS HONOUR: Dated 18 October 1990.

CROWN PROSECUTOR CULVER: That is correct. He does not comment specifically on that report, but Dr Dezordi does say on page--

15 HIS HONOUR: Take things one at a time. The EEG report dated 18/10/90 is marked 13 for identification.

MFI #13 EEG REPORT OF 18/10/90

20 I am going to ask Mr Dezordi about whether he is prepared to make a comment on this EEG report.

COOK: Yes.

25 HIS HONOUR: You can stop me if you object to any question. You will have an opportunity to ask a question if you want to.

COOK: Yes.

30 HIS HONOUR: Q. Dr Dezordi you have been listening to the debate between counsel and myself. I want you to assume, as I do, that what counsel is going to try to come to is the question whether one can use this EEG report as a
35 basis for concluding the probable presence or absence of encephalitis?

A. Are you asking about whether I'm qualified to make that opinion?

40 Q. That is what I am really asking you, yes?

A. I just want to clarify - perhaps I confused people - but when you give me this document, this is not an EEG. This is a report of an EEG, which is 100 pages long. So, I need to - that's what I'm trying to say. It is possible
45 for some minor discrepancies to be in an EEG, and two people to report on it and not notice it.

If I am given this report of an EEG, then I'm assuming that the person who read it has read it correctly. That
50 is an assumption. I believe I can make that assumption because Dr Wilkinson, who is the consultant in charge of this patient, to some degree is an expert on EEGs as well.

Q. With that qualification, that you assume that it correctly summarizes the reader's reading of the long EEG test results, can you use this report to come to a
55 conclusion about the question you are going to be asked?

A. The report is useful, in the sense that one of the

major differential diagnoses for this infant was encephalitis or herpes encephalitis. Herpes encephalitis typically and reliably gives significant EEG abnormalities, results in EEG abnormalities, which would be detected by most - I'm sure by any expert examining the actual EEG itself. In other words, they are fairly definite features. That would ultimately end up in the report.

10 Q. Would you feel qualified to answer the ultimate question?

A. Which is?

15 Q. Does this report indicate at least the probability of the presence or absence of encephalitis?

A. I would say that with this report it is most unlikely that the infant had encephalitis. Most unlikely, as in I would not entertain the possibility.

20 Q. You regard yourself as fully qualified to answer that question?

A. On the information given to me, yes.

25 Q. Yes, with the qualification that you make. I follow.

A. See, I'm trying to compare an EEG to an x-ray. I can look at an x-ray and make a comment that I think is superior even to a radiologist because of my experience with babies, but with an EEG it is a specialised matter. All paediatricians rely on reports invariably of the EEG.

30

HIS HONOUR: Madam Crown, are you intending to ask Dr Dezordi to take into account any other information before you ask him the question you want to ask him?

35 CROWN PROSECUTOR CULVER: No. Essentially, if I could clarify what I'm seeking to gain from Dr Dezordi in respect of that EEG, it is, firstly, an interpretation of the terms used and, secondly, an indication that in his experience that is a normal EEG; that there was nothing abnormally revealed about Patrick's brain function at that time.

40

HIS HONOUR: But a normal function would mean the absence of encephalitis, would it?

45

CROWN PROSECUTOR CULVER: Yes, by extension, yes.

HIS HONOUR: Mr Cook, do you want to ask Dr Dezordi any questions to begin with?

50

COOK: Just a couple. I do not want the fact that I am asking questions at this stage to prejudice an application which I am going to make, which is that this evidence not be given before the jury at this time.

55

HIS HONOUR: I follow that. I am simply trying to establish the size of the problem.

COOK: The EEG report that you have looked at is dated 18 October 1990, is that right?

A. That's correct.

5 Q. Have you had regard to an EEG report conducted later, whilst Patrick was at the hospital; a second one or a third one?

A. I believe other EEGs have shown abnormalities.

Q. And you are aware, are you, that an EEG report was done on 5 November 1990?

A. I'm not aware of the exact date, but I know that at least two EEGs were done.

5

Q. And they disclose some abnormalities; is that right?

A. I believe that - I don't have the other EEG reports with me. I think it would be helpful to actually have them with me.

10

Q. Have a look at this one which I will show you, which is dated 5/11/1990 in the same layout and format as the one dated 18 October. Have you seen that before?

A. Yes.

15

Q. It discloses certain abnormalities, does it?

A. Yes.

20

Q. Could you tell us what, if any, significance those abnormalities have in terms of confirming or excluding a diagnosis of encephalitis?

A. This EEG finding would not be necessarily pathognomic of encephalitis. It could just be a process of epilepsy that is untreated or unresolved, but it could - it could be due to encephalitis. It is a possibility.

25

Q. You have said that the first report you have looked at in this case, in this evidence, dated 18 October, suggests that it is most unlikely that the child had encephalitis, correct?

30

A. Specifically, I did say herpes encephalitis.

Q. The second report leaves open a possibility that the child had encephalitis; is that right?

35

A. Not necessarily, because an encephalopathic process is much broader, much broader than herpes encephalitis itself, and it could be, for example, an encephalopathic process could be anything from an ongoing infection, or could be due to a metabolic disease causing chemical toxins in the brain, or it could be due to brain damage due to hypoxia, for example.

40

Q. It could be an indicator of encephalitis?

45

A. I am not prepared to say, on the basis of this, that it is - it may suggest herpes encephalitis, which is the main condition that we can reliably exclude as an infective form of encephalitis.

50

Q. Is it fair to say that the second report is less inconsistent with the finding of herpes encephalitis than the first?

A. I think, put in those terms, that that statement is valid.

55

Q. Assuming that a diagnosis could be made of herpes encephalitis as at 5 November, are you able to say how long such a condition would have pertained in the infant?

A. Sorry?

Q. Are you able to say how long such a condition would have been present in the infant, assuming it was detected by that EEG on 5 November?

5 A. Right. If you came in - given that he'd had lumbar punctures in the interim, which were unequivocally normal, I would say that a diagnosis of herpes encephalitis would be somewhat tenuous, although, I mean - yeah, that's what I'd have to say. It was a working diagnosis, but it was
10 not founded on the most important test, which is a lumbar puncture, which is a far more powerful test than an EEG.

HIS HONOUR: Mr Cook, I think I should stop you there. I simply invited you to ask any question you wanted to, having observed that I am trying to find out what the
15 problem is. It seems to me that you have raised two questions here. One is expertise. Now, Dr Dezordi has said that, provided the state of affairs is correctly set forth in the EEG report dated 18 October 1990, he
20 considers himself qualified to answer the question the Crown proposes to ask him. And that deals with your objection, it seems to me, unless you want to try to talk me out of that.

25 COOK: No, it is the other matter I now rely on, the notice.

HIS HONOUR: Well, what do the questions you are now asking have to do with notice?

30 COOK: I cannot justify them in terms of--

HIS HONOUR: Very well. Do you mind if I stop you then?

35 COOK: No, I don't, your Honour.

HIS HONOUR: What about this question of notice? The Crown says you have a report of Dr Ouvrier.

40 COOK: We do, but what the Crown says about it is not correct.

HIS HONOUR: Madam Crown, which report did you refer me to before?

45 CROWN PROSECUTOR CULVER: I referred your Honour to a report of Dr Ouvrier. It is dated 4 November 2002.

HIS HONOUR: First of all, do you have that report, Mr Cook, of Dr Ouvrier of 4 November 2002?

COOK: No, I have got a report dated 28 October.

55 CROWN PROSECUTOR CULVER: Your Honour, the signature has a date next to it of 4 November 2002, but the front of the report has a typed date of 28 October 2002.

COOK: Yes, I have got that, your Honour, and, with

respect, it doesn't bear out what the Crown says.

5 HIS HONOUR: You want to get some medical opinion in order to cross-examine Dr Dezordi, do you, upon the opinion he is likely to express?

10 COOK: Precisely. It is a relevant matter with some potential complication; that is, it is not an easy matter we can take in our stride, in our submission.

15 HIS HONOUR: I haven't seen Dr Ouvrier's report. I am not asking to see it. Mr Cook says that this does not forewarn the defence of the use you are now trying to make of the EEG report through the evidence of Dr Dezordi, Madam Crown.

20 CROWN PROSECUTOR CULVER: Yes, your Honour. I didn't suggest that Dr Ouvrier's report refers specifically to this EEG in question, but Dr Ouvrier is a paediatric neurologist who has reviewed the medical records of Patrick Folbigg and does come to some conclusions as to his condition.

25 Your Honour, can I just indicate, in respect of my learned friend's argument about lack of notice, indeed, Dr Dezordi's statement on page 3 refers to there being no signs to suggest any other serious illness; in particular, there were no signs to suggest meningitis, and then, further, on page 4, Dr Dezordi refers to examining the
30 medical reports from the Mater Hospital.

35 I submit to your Honour that, in both those references in Dr Dezordi's statement, there is a clear understanding that Dr Dezordi has reviewed the notes and has been able to reach certain conclusions about the condition of Patrick, such as "nothing to suggest meningitis".

40 This is one of the records from the hospital and one of the tests which Dr Dezordi refers to at numerous points in his statement by which he was able to say there were no signs to suggest meningitis or abnormality of the brain and so forth.

45 HIS HONOUR: Mr Cook, what do you need to do in order to deal with the proposed evidence?

50 COOK: Arm ourselves with information to cross-examine this witness on the subject which, with respect, is quite different from what he said in his statement of whether this EEG, dated 18 October 1990, or the report of it, is a sound basis for excluding encephalitis in the infant Patrick.

55 Now, with respect, it is quite wrong to say that somehow, because this doctor has referred to looking at the medical records of the Mater Hospital, we are somehow given notice of this particular opinion that is now being tendered.

HIS HONOUR: That is all right. You needn't say any more.

5 CROWN PROSECUTOR CULVER: Your Honour, can I just add a further point? We are prepared at this stage to tender the document in the interests of time, without asking any further questions of Dr Dezordi regarding this document.

10 HIS HONOUR: That is another matter. Is there going to be any argument about the tender of the document?

COOK: No, that is on the basis that the Crown outlined. That is not objected to.

15 HIS HONOUR: You say, in the interests of time, Madam Crown. I understood, before 1 o'clock, that the Crown was hoping to deal with a number of witnesses this afternoon, and I understand why you say what you say, but it does give rise to a question. I have some difficulties sitting
20 after 4 o'clock today. What is left? I have to give the Court reporters some relief. What is left of the evidence you hope to get this afternoon?

25 CROWN PROSECUTOR CULVER: Your Honour, I propose to finish Dr Dezordi's evidence and then call two further doctors, Dr Wilkinson and Dr Walker. I anticipate that the evidence of both of those doctors will be shorter in duration than the evidence of Dr Dezordi.

30 HIS HONOUR: We will do the best we can, but I can't give you any guarantee that you will finish this evidence this afternoon.

(The witness left the courtroom.)

35

SHORT ADJOURNMENT

COOK: Your Honour, could I raise an additional matter? It is this: At the end of this witness's
40 evidence-in-chief there will be an application that he be stood down for cross-examination at some later date.

The reason for that is this: That, according to--

45 HIS HONOUR: Is this consented to?

CROWN PROSECUTOR CULVER: Sorry, your Honour?

50 HIS HONOUR: When you have finished in chief with Dr Dezordi, Mr Cook is going to ask for me to defer his cross-examination. Does the Crown consent to that?

55 CROWN PROSECUTOR CULVER: I will need to find out when Dr Dezordi is next available, because I understand that he is an interstate witness, but, otherwise, yes, the Crown would consent to that course.

HIS HONOUR: Officer, will you ask Dr Dezordi to come in,

please?

5 COOK: Your Honour, there is one other matter of objection in his evidence.

Does your Honour have his statement?

HIS HONOUR: Yes.

10 COOK: Can I take your Honour to page 5? He is there recording a conversation with Professor DeSilva and - sorry, I am behind the developments. My objection is obsolete. That is not being led.

15 (The witness returned to the courtroom.)

HIS HONOUR: Dr Dezordi, the Crown wants to ask you something. I will stay here.

20 CROWN PROSECUTOR CULVER: I might just approach, your Honour.

HIS HONOUR: Yes.

25 CROWN PROSECUTOR CULVER: Your Honour, the Crown would agree to Dr Dezordi's cross-examination being deferred until tomorrow. Dr Dezordi has kindly indicated that he would be available tomorrow, but I understand that may be a matter for my learned friend.

30 COOK: Your Honour, we will need more time than until tomorrow morning.

HIS HONOUR: Why?

35 COOK: Because we want to convey the evidence of this witness to Professor Byard in South Australia. We want his opinion about what this witness says.

40 HIS HONOUR: Nothing that Dr Dezordi has said today is likely to be a surprise for you. Why aren't you ready for it?

COOK: Ready for it now?

45 HIS HONOUR: Yes.

COOK: For the reasons I have already outlined. This is evidence capable of being able to exclude encephalitis.

50 HIS HONOUR: He is not going to give that evidence.

COOK: Sorry, your Honour. I had prepared to cross-examine him on the basis of his notes as disclosed to us. His notes indicate a diagnosis of encephalitis.

55 HIS HONOUR: This is becoming ridiculous, Mr Cook.

COOK: No, with respect.

5 HIS HONOUR: Just a moment. We are now arguing about when Dr Dezordi has to come back. You say you aren't ready tomorrow. What, are we to have an auction here? How long will it take you to get ready?

COOK: I would--

10 HIS HONOUR: Dr Dezordi, when are you available to come back?

15 WITNESS: It is very disruptive to my hospital. I have come down from Queensland and next week I have booked a flight to Melbourne on Thursday.

20 CROWN PROSECUTOR: I opened on this. I opened on the fact that there was a normal EEG when he was first admitted and some time later there was an abnormal EEG. This doctor is not being asked to give any expert evidence, apart from what he has already given. There is nothing new.

25 HIS HONOUR: The examination-in-chief, as far as I understand, is not going to go outside the four corners of Dr Dezordi's report, and I expect you to be ready, Mr Cook. You can have the indulgence of an adjournment until tomorrow, if that is what you would like. You can inform yourselves overnight.

30 COOK: Yes, I am grateful for that. Your Honour has heard my application.

35 HIS HONOUR: Thank you, Dr Dezordi, for being prepared to come back tomorrow.

WITNESS: Can you clarify whether that is tomorrow morning or tomorrow afternoon?

40 HIS HONOUR: It will be tomorrow morning, yes.

Will there be any other examination-in-chief, other than the tender of the report?

45 CROWN PROSECUTOR CULVER: There will be, your Honour. I hope it will be brief.

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR CULVER: Your Honour, might that EEG, which was shown to Dr Dezordi before the break, be marked for identification?

HIS HONOUR: It has been marked 13 for identification.

10 CROWN PROSECUTOR CULVER: Your Honour, I believe, in fact, it was tendered rather than marked previously.

HIS HONOUR: No, you indicated in the absence of the jury that you proposed to tender it.

15 CROWN PROSECUTOR CULVER: I do propose to tender it.

COOK: No objection, your Honour.

20 HIS HONOUR: The EEG report marked 13 for identification is exhibit R.

EXHIBIT #R EEG REPORT (FORMERLY MFI 13) TENDERED, ADMITTED WITHOUT OBJECTION

25 CROWN PROSECUTOR CULVER: Q. Dr Dezordi, on that date, 18 October, were lumbar puncture tests conducted in respect of Patrick?

30 A. On that particular day - well, I finished my shift at about 8.30 and--

Q. Is that 8.30 in the morning?

35 A. Yes, yes, so I didn't perform a lumbar puncture at that stage. I didn't think it was necessary. A lumbar puncture was done subsequently though, the next - I think several days, but I did not do it.

Q. Is that recorded in the hospital notes which have been marked for identification today?

40 A. Yes, definitely.

Q. Now, is it the case, doctor, that you again saw Patrick Folbigg on 20 October 1990 at the Mater Hospital?

A. Yes, yes, I did.

45 Q. What was Patrick's condition at that stage?

50 A. In the following two days, Patrick had been having seizures and since I was the night resident I was handed over this information that Patrick was having recurrent seizures and, in the context of him having seizures, he was given treatment for the seizures, which is phenobarbitone, which is a barbiturate and it is usually effective in causing cessation of seizures, so the handover that I received was that Patrick had been having the seizures and to look out for this overnight and, 55 subsequently, when I saw him, he was having further seizures. So I proceeded to treat him for that.

Q. Did you organise tests in respect of Patrick?

A. I felt, because at this stage he was having a large number of seizures and they were probably focal seizures, that he should have had a CAT scan.

5

Q. What do you mean by "focal seizures"?

A. A focal seizure, as opposed to generalised seizure, refers to the seizure activity being localised or starting in a locality of the area controlled by the brain. For example, a generalised seizure is what you probably - popularly consider to be a fit, like in the popular mind, where the whole body convulses; whereas a focal seizure indicates activity in a part of the body, for example, it might be just an arm convulsing and it's got a different significance usually.

10
15

Q. You said that you obtained a CT scan?

A. That's correct.

20

Q. Is that a scan of the brain?

A. It is a computerised tomographic scan, whereby multiple - many x-rays are taken of the brain, or the part of the body in question, and these are studied with computers, and a composite picture is formed, which is very detailed.

25

Q. Did you obtain that scan on 24 October 1990?

A. I - I don't remember if I actual - I didn't obtain it. I may well have organised it, or suggested someone else organise it. I don't remember exactly whether I actually filled in the specific document to effect the CAT scan, but I believe I consented, I consented.

30

Q. Did you receive results of the CAT scan or a CT scan taken at around that date?

35

A. Yes.

Q. And did that result reveal anything?

A. It indicated some abnormalities of the brain, but I would like to be reminded by seeing an actual report, if I could. It was a long time ago.

40

Q. Do you have your notes there?

A. Yes, if I might have time to look at it.

45

Q. You might, with his Honour's leave, refer to your notes.

HIS HONOUR: Yes, I have already given leave to the doctor to refer to his notes.

50

WITNESS: A. I have here a report of a CAT scan of 23 October 1990 which indicates some abnormalities.

55 CROWN PROSECUTOR CULVER: Q. And when you say "abnormalities", what abnormalities?

A. There is - the thing that's unusual about this report is that - is that the abnormalities are in occipital lobes

and the temporal lobes, and I thought it was odd, in the sense that the conclusion was made that this could be encephalitis, whereas my understanding is that herpes encephalitis, which is the main cause of encephalitis, typically affects the temporal lobes rather than the occipital lobes.

Q. Which are the occipital lobes and which are the temporal lobes of the brain?

A. The temporal lobes are the lobes that are on the side of the head. For example, if you can relate it to the position of the head, externally, it is just above, say, the ear region, and the occipital lobes are at the back of the brain, and I was a bit perplexed by that report and, given it's a report, we always take - we don't accept it as absolute truth. We always weigh the evidence and, however, the conclusion was herpes encephalitis was possible and, subsequently, Patrick was treated for encephalitis.

Q. Do you know definitely what caused the pathological process or the abnormality that was reported?

A. I don't know what definitely caused it, but I had doubts that it was encephalitis, strong doubts, and that was based, not just on the CAT scan, but also on the lumbar puncture.

Q. What was the result of the lumbar puncture, Dr Dezordi?

A. It was normal.

Q. Now, can you explain to the Court what a lumbar puncture is?

A. A lumbar puncture is a test whereby a needle is inserted into the spine and it is similar in procedure to an Epidural, for example, or a spinal anaesthetic, which is done for women in labour, for example. The difference is that, in a lumbar puncture or a spinal tap, we put the needle in a bit further, to actually obtain brain fluid; the fluid that comes from the brain itself. It's a test that gives information that's very useful, and usually very absolutely definite in its meaning, in that the normal brain fluid is crystal clear. It's like plain water and in various diseases, such as meningitis or encephalitis, we can find that there may be some abnormality in that fluid. For example, there may be cells - by cells I mean, for example, white cells or blood, or protein, and any of these things would be abnormal and may indicate various kinds of pathologies.

Q. So, by obtaining a normal result from the lumbar puncture, were you able to exclude herpes as a cause of the seizure?

A. It's a good question. A formal lumbar puncture will make it most unlikely that herpes was causing the seizure, but it is not invariably absolutely true that you cannot have herpes and normal CSF. In other words, there have been rare cases in history, very rare cases. I actually

had a patient in another hospital who had normal CSF and had herpes.

Q. What is CSF?

5 A. The CSF is the cerebral spinal fluid. CSF - it is a common abbreviation we use and it is a fluid produced by the brain, which we try and retrieve from the spine.

10 Q. Now, does the lumbar puncture having a normal result also allow you to exclude any other infection as a cause of the seizures of Patrick?

15 A. Oh, definitely. The main thing we want to exclude is actually meningitis, which potentially is much more serious than encephalitis, potentially, because it is always fatal. So that's the two reasons we do the lumbar puncture: is to look for, mainly meningitis; also encephalitis; and possibly even brain haemorrhages, and other conditions as well, which there are too many for me to mention.

20 Q. So, after you obtained the normal lumbar puncture results--

A. That's correct, yes.

25 Q. --were you able to then and, having excluded infection as the origin of the seizures, are you able to say whether or not there was any known cause of the seizures?

30 A. Well, given that the EEG initially was normal, given that the lumbar puncture revealed normal CSF, it would have been very hard to be convinced and make a diagnosis of encephalitis, and given that there were no viruses detected by other means, because I did do other tests for other viruses as well--

35 Q. So, you were left with unknown causes or cause for the seizures of Patrick?

A. Yes.

40 Q. Is that right?

A. Yes.

Q. Now, doctor, is it the case that the tests continued in respect of Patrick?

45 A. Yes, many tests.

Q. And, in fact, another CT scan was conducted again on 5 November 1990?

A. Yes.

50 Q. And, once again, is it the case, doctor, that that demonstrated the same sort of abnormality demonstrated by the first CT scan, the earlier one on 23 October 1990?

55 A. Well, there appeared to be a deterioration, or an increase in the abnormality, if you like, and--

Q. Is that increase in abnormality explicable by the seizures that Patrick was experiencing?

A. Oh, the seizures themselves I don't believe would have caused the abnormality. It's the other way around; the abnormality causing the seizures.

5 Q. And, once again, were you able to find any specific cause of that abnormality?

A. No, not specific cause because I, myself - my own opinion, as a medical doctor, was that this was not caused by herpes encephalitis.

10

Q. Now, did you--

A. Because that was the diagnosis I was trying to disprove, or prove, whichever way you want to look at it.

15

Q. And did you discuss Patrick's case with other doctors such as Dr Ian Wilkinson?

A. Many times, yeah.

Q. And also with Dr DeSilva from Campbelltown?

20

A. Well, Professor DeSilva was - I only discussed with him on one occasion because I actually was asked to seek a second opinion on the CAT scans.

25

Q. All right. And is it the case that Professor DeSilva did not feel that coning was a likely cause of Patrick's CT results?

A. Yes.

Q. Can you explain coning for the Court?

30

A. Okay. Coning - coning is a process whereby the part of the brain called the brain stem, which is a very critically important part of the brain which controls breathing and vital functions, coning is a process whereby that part of the brain is actually forced through the base of the skull, through the hole, called the foramen magnum, and it squeezes that part of the brain and causes death - or may cause death.

35

Q. And coning was excluded here as being a likely cause?

40

A. Yes, yes. We were just looking for possibilities where we were, I guess, rather desperate to find some explanation.

Q. So, with all the tests you did in that desperation to find an explanation for Patrick's seizures, were you able to find any specific explanation?

45

A. No, not - not an obvious medical one, no, or even a rare medical one, because we looked for rare medical diseases as well.

50

Q. Doctor, can I show you these notes? (Shown.) Do you recognise the notes I have just shown you, if you could have a look at them?

55

A. I recognise the front sheet, the hospital front sheet.

Q. Does that appear to be a folder containing a copy of the records from the Mater Hospital at Newcastle regarding

Patrick Folbigg's treatment there?

A. Yes, it does, and prompts me to remember that he had had - yes, yes.

5 Q. Doctor, can you say whether that EEG report, which I showed you earlier, formed part of those notes from the hospital?

A. Yes.

10 CROWN PROSECUTOR CULVER: If that could be marked for identification?

MFI #14 FOLDER OF DOCUMENTS FROM THE MATER HOSPITAL, NEWCASTLE

15 CROWN PROSECUTOR CULVER: Thank you.

HIS HONOUR: Ladies and gentlemen, Mr Cook has asked me if I will defer the cross-examination of Dr Dezordi until tomorrow, and Dr Dezordi has kindly agreed to come back tomorrow, so we shall finish his evidence there for today and see him tomorrow.

20 Thank you, Dr Dezordi. You are free to leave the Court, and we look forward to seeing you tomorrow.

<WITNESS STOOD DOWN

30 CROWN PROSECUTOR CULVER: Your Honour, I call Dr Christopher Walker.

<CHRISTOPHER WALKER(3.53PM)
SWORN AND EXAMINED

35 HIS HONOUR: Dr Walker, if you have notes with you and you would like to refer to them in order to answer any question, you are free to do so.

40 CROWN PROSECUTOR CULVER: Q. Doctor, is your full name Christopher Walker?

A. Yes, it is.

45 Q. And do you hold a Bachelor of Science Degree from Sydney University?

A. Yes, I do.

50 Q. And Bachelor of Medicine and Bachelor of Science Degrees from Sydney University, again in 1978?

A. A Bachelor of Medicine; Bachelor of Surgery.

55 Q. Surgery, thank you. Are you a Fellow of the Australasian College of Emergency Medicine?

A. Yes, I am.

60 Q. And were you employed as a specialist emergency physician at the John Hunter Hospital?

A. Yes.

Q. On 13 February 1991, were you employed as the director of the Emergency Department at the Newcastle Mater Hospital?

A. Yes, I was.

5

Q. And were you practising emergency medicine at that hospital?

A. Yes, I was.

10

Q. Now, on that date, were you on duty when an eight-month-old male infant was brought into the hospital by the name of Patrick Folbigg?

A. Yes.

15

Q. Now, from the pre-hospital ambulance report and also from speaking with a parent of Patrick, did you obtain a history?

A. Yes.

20

Q. Do you know from which parent you obtained a history of Patrick?

A. I cannot remember at this stage. I think Mr Folbigg accompanied the ambulance and I think it was Mr Folbigg that I spoke to initially.

25

Q. Now, is it the case that the history you received indicated that Patrick had been found by his mother some time prior to the ambulance being called on that particular morning?

30

A. Yes.

Q. And were you told that Mrs Folbigg, the mother, had then called her husband at his work in Kotara and had also called a consultant paediatric neurologist by the name of Dr Ian Wilkinson?

35

A. Yes.

Q. Were you told that Mr Folbigg had driven from his workplace in Kotara and had commenced bystander CPR?

40

A. Yes.

Q. Is it also the case, doctor, that you were told that this had occurred prior to the arrival of the ambulance at Patrick's home at 10.10am?

45

A. Yes.

Q. Did the ambulance officers report to you that, on arrival at that home, they found Patrick to be pulseless and not breathing?

50

A. Yes.

Q. Did they also report that Patrick was peripherally cyanosed?

55

A. Yes.

Q. And what does that mean, "peripherally cyanosed"?

A. Blue. Discolouration around the limbs.

- Q. And also the lips; is that correct?
A. That's usually referred to as central cyanosis.
- 5 Q. Certainly. Patrick was also reported to have a warm skin temperature; is that correct?
A. That was what was reported to me.
- 10 Q. Was that reported by the ambulance officers?
A. By one of the ambulance officers.
- 15 Q. Now was basic life support continued by the ambulance officers in respect of Patrick?
A. Yes.
- 20 Q. And did you understand that there had been bag mask ventilation with oxygen and external cardiac compression performed until Patrick arrived at the hospital later on at about 10.18am?
A. Yes.
- 25 Q. Did you examine Patrick upon his arrival at the hospital?
A. Yes.
- 30 Q. And what did you see when you examined him?
A. On arrival, he was in cardiac arrest, or he was pulseless and apnoeic, but being supported by bag mask ventilation and external cardiac compression.
- 35 Q. Were resuscitation attempts continued at the hospital upon his arrival?
A. Yes. He was - his airway was controlled by endotracheal ventilation. Intravenous access was obtained and continued ventilatory support and circulatory support by external cardiac massage.
- 40 Q. Did Patrick respond to any of these resuscitation attempts?
A. He had no response.
- 45 Q. Is it the case that resuscitation was discontinued after about 20 minutes of his arrival at the hospital?
A. Yes.
- 50 Q. Is it the case also, doctor, that Patrick's death was pronounced by you?
A. Yes.
- 55 Q. And was that at 10.40am on 13 February 1991?
A. Yes.
- Q. Did you then, later, speak with Patrick's parents in the presence of medical and nursing staff at the hospital?
A. Yes.
- Q. And did you make notes concerning Patrick's medical condition?
A. Yes.

Q. Can I just show you this document, doctor? (Shown.)
Do you recognise that as a copy of the notes you made in
respect of Patrick on that date?

5 A. Yes.

Q. And do you note there that the baby's colour was good
and still warm? This is on page 1 of the notes.

10 A. Page 1 of the notes that you've given me?

Q. Down towards the bottom, about six lines down, is
there a note?

15 A. Oh, that's a note of the history, that the baby's
colour was good and he was still warm on arrival by the
ambulance officers at his home.

MFI #15 DR WALKER'S NOTES.

20 Q. Doctor, did you form an opinion as to what brought
Patrick to hospital?

A. Patrick was brought to hospital following an out of
hospital cardiac arrest.

25 Q. And did you find any cause for that cardiac arrest?

A. No.

Q. In your medical experience, are you able to say
whether or not asphyxiation can cause cardiac arrest in a
child?

30 A. Yes, it can.

<CROSS-EXAMINATION

35 COOK: Q. Have you still got your notes in front of
you, Dr Walker?

A. Yes.

40 Q. On the page the Crown Prosecutor referred you to, the
first page, you note the background; do you see that?

A. Can I just point out that my notes start on the
second page and you'll see my name "Walker" in the
left-hand column and they are the notes of the paediatric
registrar, who was part of the resuscitation team.

45 Q. And part of the background for this infant was and,
you can see it is on the first page, "Subsequently: ?
encephalitis / ? encephalopathic"; is that right?

A. Yes.

50 Q. They were matters to be looked at to see whether they
were causing the baby's problems - or rather had
contributed to the baby's death, I should say?

55 A. As I understand it, the baby had been admitted to the
Mater Hospital at six months of age following an apparent
life threatening event.

Q. So this background is a reference to that--

A. Yes.

Q. --admission?

A. Yes.

5 Q. Now, would you go a little further down on this first page? There is an entry that starts, "Last night"; do you see that?

A. Yes.

10 Q. Is that a history that came from one of the parents?

A. That is a history that I didn't obtain.

Q. And it says, " ? seizure"; do you see that?

A. Yes.

15

OBJECTION.

20 COOK: I am just going to ask him to explain some of the entries from a medical perspective in his notes as the Crown had asked him to explain, "The baby's colour, good", you see on the same page.

HIS HONOUR: You can ask the doctor what he thinks somebody else might have meant when they said "seizure".

25

COOK: Q. There is a notation "temp" t-e-m-p; you see that?

A. Yes.

30 Q. And there is an arrow which points upwards next to "temp"?

A. Mm, yes.

Q. Does that indicate something to a doctor?

35

A. Yes.

Q. What does that indicate?

40 A. That, on the previous evening, the child was mildly pyrexia, in other words, had a slightly elevated temperature.

Q. Would you turn over in the notes, please, doctor?

A. Yes.

45 Q. Was it your understanding that the parents were keen to know why this had happened to the child?

A. Yes.

50 Q. And was there discussion, which both parents were privy to, about whether there should be an autopsy of the child?

55 A. I commenced an interview with the parents after the child was declared deceased and after the resuscitation ceased and, during that interview, the paediatric team that had previously been responsible for the care of the infant led by a neurologist, Dr Wilkinson, arrived and said that they would prefer to continue the interview of the parents and arrange a further follow-up, which was the

standard protocol for children - or infants who had sudden unexpected death in infancy at the Mater Hospital. So that happened, Dr Wilkinson's team allowed me to leave and go back to work in the Emergency Department and took over the further care and interview of the parents.

Q. Do you understand that the parents consented or agreed to an autopsy; is that your understanding?

A. Yes.

OBJECTION.

COOK: I don't think it is in dispute.

CROWN PROSECUTOR CULVER: It doesn't say "the parents", your Honour. It refers to paternal".

COOK: Q. What is your understanding?

A. I understood that permission was obtained during a further interview with Dr Wilkinson's team for an autopsy to be performed.

Q. And was that an interview at which both parents were present?

A. Certainly, when I was speaking to the parents, both were present. After I left, I - I cannot comment.

Q. Now, the history that you understood had been taken, and I am going back to when you were first on duty and the eight-month old male was brought in and you saw him, you obtained the history from the mother; is that right?

A. I cannot recall which parent was initially present for the history-taking. However, I continued with the resuscitation of the baby and having got some preliminary history would have delegated the further taking of the history to another medical officer, probably the paediatric registrar, whose notes you'll see above mine. So I didn't actually leave the sight of the infant whilst that resuscitation attempt was ongoing.

HIS HONOUR: Ladies and gentlemen, I should explain why we are sitting after 4 o'clock. I agreed to sit a little after 4 o'clock today so that the evidence of certain witnesses could be concluded today. I didn't ask your permission about this, but I should tell you that I have agreed to sit for a little time, but it won't be much past 10 past 4 - certainly not as late as quarter past 4 - so please don't be concerned about that.

COOK: Q. Can I just read something to you from your statement to see if that refreshes your memory of who you spoke to?

A. Yes.

Q. In paragraph 4 it says:

"From the pre-hospital ambulance report and speaking with a parent of the child (probably

the mother), I obtained the following history."

5 A. That's why I wrote that in the statement because I wasn't certain in 19 - or the year 2000, when I was asked to make that statement, who I had actually interviewed.

Q. To the best of your recollection then, it was probably the mother?

10 A. Yes, but I wasn't certain.

<RE-EXAMINATION

15 CROWN PROSECUTOR CULVER: Q. Doctor, just referring to the notes, my learned friend asked you a question regarding the note concerning temperature. Could you read the next line immediately under that note?

A. "Otherwise no problems".

20 Q. And, doctor, furthermore, my learned friend asked you a question regarding the parental permission for a post-mortem. Could you turn to the notes and read, in fact, what the permission was?

25 A. In the second page, just above my first entry, it's written "post-mortem desired, parental permission tick".

Q. Is it "parental" or could you have a look at that word?

A. Sorry. It is "paternal".

30 Q. "Paternal"?

A. Yes.

Q. So by that you understand that the permission came from the father?

35 A. From the father, yes.

40 Q. And finally, doctor, if you could turn back to the first page of the notes, my learned friend asked you questions regarding the entries concerning encephalitis. Do you see, doctor, that there are question marks there?

A. Yes.

45 Q. As a doctor from that hospital referring to those notes, do you understand that to be a diagnosis?

50 A. No, the child had been admitted with an apparent life threatening event previously and had abnormalities noted on a CT scan and was found, on clinical examination, to be accordingly blind. So I think that there was no definitive diagnosis at that stage for that previous event.

<WITNESS RETIRED AND EXCUSED

55 HIS HONOUR: Ladies and gentlemen, we shall adjourn now until 10 o'clock tomorrow.

ADJOURNED PART-HEARD TO THURSDAY 10 APRIL 2003

FHI:EE:RT:8

D7

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

SEVENTH DAY: THURSDAY 10 APRIL 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: I am told that one of the jurors is running late, but I gather that counsel wish to make an application anyway; is that so?

20 ZAHRA: Yes, your Honour.

Your Honour may recall yesterday the difficulties that we had with Dr Dezordi's evidence. Overnight we were, in fact, able to speak with our expert from South Australia, and we have come to court in a position to finish the cross-examination of Dr Dezordi.

25 Regrettably, we received another statement from the Crown in relation to Dr Wilkinson, who is about to be called. It is the same situation that we were faced with Dr Dezordi; that there are quite a number of matters that we can't address in cross-examination.

30 I understand my friend does wish to proceed with calling Dr Wilkinson shortly.

Can I just hand to your Honour a copy of the further statement that we have received?

40 HIS HONOUR: Are you foreshadowing that you are asking for the cross-examination to be deferred or would you rather the examination-in-chief not start?

45 ZAHRA: It appears that the Crown is likely to be able to lead this evidence but we want to check whether there is an appropriate basis; in other words, does the expert evidence pass the bases test?

50 Your Honour, we were quite concerned, during the course of the trial, at the possibility that we would have to meet fairly complex medical evidence. We have had many discussions with my friend. Those discussions, at times, have involved my concern that, at the last moment, we would be met with medical evidence that we would not be able to understand.

55 We confirmed that, in as little as the week before the trial, if there was any further material could they let us

know in advance because we would need to consult with our experts. This also was a matter where a complex trial order was issued.

5 Regrettably, the way the trial has proceeded so far is
that the Crown appears to be having conferences with these
experts once they get to the Court. Either the experts
are then told to walk down the corridor to have a word
10 with us, or handwritten statements like this are given to
us, which we don't have the expertise to be able to
understand.

15 HIS HONOUR: Mr Zahra, are you asking that the evidence
not start, or that the cross-examination be deferred?

ZAHRA: Your Honour, our preference is that your Honour
allows us some time, even if Dr Wilkinson were told to
hold on whilst my instructing solicitor tries to make some
20 contact with our experts in South Australia. That is our
preferable situation.

25 We can't address the cross-examination. I can take your
Honour to some of the issues. Your Honour can see from
that that there are really quite complex issues.

The last matter raises an estimate of a percentage. I
understand, from just speaking to my friend, that they
don't intend now to lead the percentage. We have been
able to make some headway in agreement with that, but your
30 Honour can see that the majority of these points involve
very technical and complex issues of neurology.

35 HIS HONOUR: May I just ask you, Mr Crown, what is Dr
Wilkinson's position? What would be involved if he were
to be asked to come back on another day, either to start
or to continue?

40 CROWN PROSECUTOR: Your Honour, it would be possible for
that to be done. Certainly the cross-examination could be
done at a later stage. I understand that my friend wishes
to consult with his expert before cross-examining. We
would have no objection to the cross-examination being
delayed.

45 We would suggest that it would be appropriate to have the
examination-in-chief today.

50 Your Honour, Dr Wilkinson made three statements, which
included a medical certificate as to the cause of death.
The medical certificate refers to the cause of death being
asphyxia due to epileptic fit, the epileptic fit being
cause by encephalopathic disorder, the underlying cause of
encephalitis--

55 HIS HONOUR: Mr Crown, I don't want you to go into the
detail of it for the moment, if you don't mind. I was
only asking you what Dr Wilkinson's position was.

5 CROWN PROSECUTOR: His position was he made himself available yesterday and today. He would obviously prefer to have it dealt with to finality today, but I have asked him, if the defence wants to have the cross-examination on another day, would he make himself available. He has said that he would. He is not available on Friday, but he would make himself available on another day.

10 HIS HONOUR: I gather from something you said that you do not resist the proposition that the defence ought to have some time to consider these matters.

CROWN PROSECUTOR: That's correct.

15 HIS HONOUR: Well, then, I don't think I need to go into the detail of it. I think if the defence wants the time and you don't--

20 CROWN PROSECUTOR: For cross-examination.

HIS HONOUR: Yes, but the question still arises whether we should start with Dr Wilkinson's evidence.

25 CROWN PROSECUTOR: Your Honour, my desire to start with his evidence is for the reason that I explained to the jury in my opening address that I would try and keep the evidence of each child intact. Once we start delaying that and getting on to another child, it then becomes rather confusing for the jury.

30 HIS HONOUR: It may be impossible to avoid anyway, Mr Crown, if Dr Wilkinson is going to come back on a later day, when you might well be into the evidence concerning one of the other children.

35 CROWN PROSECUTOR: But at least they would have had the evidence-in-chief in relation to Patrick during the course of the evidence about Patrick.

40 HIS HONOUR: Well, at any rate you don't mind the evidence being given in chief, Mr Zahra, as long as you have the time to--

45 ZAHRA: Yes, I don't have a fixed view. I have a residual concern, but, obviously, I can understand that your Honour might want to have the examination-in-chief at this stage.

50 HIS HONOUR: I don't have a strong view about it. I think there is a lot to be said for having the whole of the evidence of the witness at the one time. That is the ordinary and proper thing to do. If we are faced with this position, however, we have to make the best of it and if we can deal with it in a manner which will not
55 disadvantage your client--

ZAHRA: Would your Honour excuse me one moment? On reflection, I have no objection to the

examination-in-chief being called today, and that is only because it may be that there are further issues that are going to be raised by the witness expanding from this--

5 HIS HONOUR: If this thing is developing, that seems like a very good idea, Mr Zahra.

10 ZAHRA: My mind has waivered between the two. It is a difficult call but, on balance, it may be at least we would know the parameters of the evidence.

15 HIS HONOUR: Let us take the evidence-in-chief of Dr Wilkinson, let us then defer it, the cross-examination, until some time later in the trial.

20 CROWN PROSECUTOR: I was going to suggest, your Honour, that we start off with the cross-examination of Dr Dezordi, then we have the examination-in-chief of Dr Wilkinson, then we have ambulance officer Hetherington in relation to Patrick, then we have the re-examination of Craig Folbigg.

25 HIS HONOUR: Very well, then. My learned junior will be doing the first two witnesses.

ZAHRA: Mr Cook will be doing Dr Dezordi.

30 HIS HONOUR: I don't know whether it is apparent to you but Mr Folbigg is seated in the Court.

CROWN PROSECUTOR: I have just asked my friend and he has no objection.

35 HIS HONOUR: Mr Cook, I owe you an apology. I was unnecessarily brisk with you yesterday afternoon.

COOK: It wasn't the first time I have been called ridiculous.

40 HIS HONOUR: I think it was this (indicated document), not you, that was ridiculous, and it was an expression I regret having made, and I apologise to you.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Good morning, ladies and gentlemen. Yes,
Madam Crown?

5

CROWN PROSECUTOR: Might Dr Dezordi be recalled, please?

<JOSEPH GEORGE DEZORDI(10.20AM)

10 HIS HONOUR: Dr Dezordi, as before, you may refer to your
notes, if you wish, in order to answer any question.

You understand you are still bound by your promise to
still tell the truth.

15

CROWN PROSECUTOR CULVER: Thank you, your Honour. The
examination-in-chief of Dr Dezordi has been completed.

20 HIS HONOUR: If you would just get the doctor's name for
the record, Madam Crown.

CROWN PROSECUTOR CULVER: Q. Doctor, you are Dr Joseph
Dezordi?

25

A. That's correct.

Q. And you are currently working as a paediatric
consultant; is that correct?

A. I'm a fellow in neonatology at the Townsville
Hospital.

30

CROWN PROSECUTOR CULVER: Thank you, doctor. That
completes the examination-in-chief.

<CROSS-EXAMINATION

35

COOK: Q. Doctor, you first met this young child or
encountered him on 18 October 1990; is that right?

A. That's true.

40

Q. And he presented as a complex medical problem?

A. Well, it unfolded that way, yes. I'd say it was more
a mysterious problem.

45 Q. You reached some early conclusions as to the
possibilities as to what could be behind his presentation,
and they included that he was possibly having a seizure?

A. Possibly.

50 Q. And you noticed that he was arching his back; is that
right?

A. Yes.

Q. And that suggests that he may be cerebrally
irritable?

55

A. Cerebrally irritated, that's correct.

Q. Which is an indication, cerebral irritation--

A. Yes.

Q. --of inflammation of the brain; is that right?

A. Yes, due to any cause.

5

Q. And to further your inquiries you had some CT scans done?

A. That's correct.

10

Q. Is this right: The first one was done on 23 October?

A. I believe so.

15

Q. And the opinion you got back, arising from the CT scan, was that the picture of the child's brain was compatible with encephalitis; is that right?

A. I think that's - I'd like to see the report before I comment again. Can I--

20

Q. It is a report dated 23 October 1990, and if you can't turn it up I will show you a copy?

A. I appreciate that.

25

Q. (Witness shown copy.) Now, is that a report of the results of a CT scan, and it is dated 23 October 1990?

A. That's correct.

30

Q. And the indications from that report were that the observed condition of the child's brain was compatible with encephalitis?

A. That's what the report concludes, but it doesn't mean I agree with that entirely, because I think it is open to question.

35

Q. Now, could you explain, in terms we understand, what a CT scan is?

40

A. I can explain that again. A CAT scan is a computerised process involving multiple x-ray cuts through a part of the body and that information is processed through computers and assembled to produce cross-sectional pictures. So, for example, it is like if you were to take slices of the part of the body concerned, but it's a reconstruction through a computer.

45

Q. All right. And what you noted on the CT scan formed part of the basis for the tentative conclusions you were coming to at that time; is that correct?

50

A. I think it is more complicated than that because, when I first saw Patrick, I was doing night shifts and then the weekend came up and then there would have been a whole process whereby the doctors at the hospital talked to each other, exchanged information, came to conclusions, and that's just part of the jigsaw. It is not as if this piece of paper forms the whole basis of what we think about - it's not like that.

55

Q. I think I said part of the information on which you were forming conclusions?

A. Very much a part. Only a part.

Q. And you came, in your capacity as a doctor on duty there, to fill out a discharge summary on 29 October 1990; is that right?

A. Most likely I did this - I prepared a discharge summary, yes.

Q. On 29 October 1990?

A. If I can just have it before me it would be useful. I probably have it here, but I need a while to find it. It might be quicker if you gave it to me.

Q. I'll show you this, doctor, which is a five-page document. Part of it is marked in highlighter, but don't worry about that. (Shown.) Is that the discharge summary that you prepared on 29 October 1990?

A. That's correct.

Q. And then did you put in what your then final diagnosis was?

A. Not at all because it's tentative. The word "probably", we don't use that word very frequently in discharge summaries. That is quite an unprecedented phrasing there, and it would suggest that I was very - that the whole thing was in question, so it's more of a working possibility, rather than a diagnosis.

Q. So, a working possibility then--

A. In other words, there was doubt.

Q. But the range of answers to this young man's condition, young child's condition, included encephalitis; is that right?

A. Well--

Q. As a possibility?

A. Well, I'd say as a possibility, in view of the fact that we found nothing else that we could explain it with, organically, medically.

Q. Could you just read out what you've put in there as being your opinion as 29 October?

A. Well, before I say it's my opinion, it's also a summary of everybody else's opinion, okay.

Q. Would you mind reading it out?

A. Sure. The following "diagnosis" line says "intractable seizures, probably viral encephalitis", and two other diagnoses, "bronchiolitis", "(brother died aged 19 days in sleep)".

Q. So, your opinion then included a belief, and I understand that you say this was provisional, that it was probable that encephalitis was the cause; is that a fair way of putting it?

A. Not entirely, because I was never convinced he had encephalitis, to put it bluntly.

Q. But you said on 29 October that you thought he probably had encephalitis; isn't that right - is that what it says?

5 A. Yes, it says - that's a summary of the consensus of thinking of the doctors and the process of investigation. It doesn't mean - well, I wasn't convinced at all.

Q. But you wrote, didn't you, sir--

10 A. I am trying to explain the process of how this document is and how it is constructed.

HIS HONOUR: Dr Dezordi, we can't have you both speaking at the same time. Please wait until Mr Cook has finished asking you a question before you give your answer.

15

COOK: Q. Doctor, did you write in that section next to the printed words "final diagnosis" an account of this young man's - the possible causes for his condition as including "probably encephalitis"? Didn't you write that?

20

A. The words "probably encephalitis" have been written by me.

Q. And can we take it that if you had strongly disagreed with that proposition at that time you wouldn't have written those words? Can we take that?

25

A. Not necessarily, given the process, excuse me, given the process of how we operate, or how I operate at that capacity, at that level, as a junior resident.

30

Q. Could I have that document back, please, the discharge summary dated 29 October?

(The discharge summary was returned to Mr Cook.)

35

Now, the child came back into hospital later, that is, after the first day he had another admission to hospital later on; is that right?

A. That's right, sir.

40

Q. And he again came into your care, or you were one of the doctors caring for him?

A. Yes, I saw him on occasions.

45

Q. And, during that admission, was a further CT scan done in relation to the child's brain?

A. I believe a second CT scan was done a short time after the first one, probably no more than about a week, thereabouts. I don't have the exact dates, sorry. I mean - but I--

50

Q. Are you aware that a CT scan was done on 5 November 1990?

A. Yes, I'm aware it was done. As I said, a second CT scan was thought to be warranted within a short period of time, which is a bit unusual.

55

Q. Do you have available to you there, in the documents

to hand, the report of the CT scan dated 5 November 1990?
A. It's probably better if you present it to me, please.

Q. Would you have a look at this, please?

5 A. Sure.

Q. (Witness shown document.) Now, is that something
which came to your attention shortly after it was made?

10 A. Yes.

Q. And that included reference to encephalopathic
process; is that right?

A. Let me just check that.

15 Q. Sure.

A. Sorry, are you saying the words "encephalopathic
process" appears in this statement?

Q. Yes, in the one of 5 November.

20 A. I'm trying to find that phrase "encephalopathic
process" here.

Q. You've got the document I have?

25 A. Yes.

Q. Does it refer to--

A. It doesn't say that, sorry.

Q. What word does it use?

30 A. In the summary it says:

35 "There is generalised loss in brain substance.
The patchy enhancement seen in both occipital
lobes could be related to the post inflammatory
changes. The high density seen in the pre
contrast scan may be due to dystrophic
calcification."

40 But the words "encephalopathic process" do not appear.

Q. Does that CT scan play any role in your forming an
opinion as to the possibility of encephalitis?

45 OBJECTION.

CROWN PROSECUTOR: The CT scan is dated November, your
Honour. The opinion he has been asked about is dated
October.

50 COOK: Q. Your opinion was changing and progressing; is
that right?

A. I think that's a fair statement. It was evolving.

55 Q. And can you tell us whether that CT scan dated 5
November had any effect on your evolving opinion?

A. Yep. Okay.

Q. On the question of the possibility of encephalitis?

A. Sure. Well, it's not just a CAT scan that affected my opinion, but you want me to comment specifically on this report; is that correct?

5 Q. Yes, please.

A. Given that I don't have the CAT scans with me, which is fairly unfortunate, with this CAT scan report, it tended to make me drift away from a conviction about encephalitis, herpes encephalitis, because the CAT scan -
10 the abnormalities on this CAT scan really emphasise some kind of damage to the back of the brain, which is more consistent with some other diagnosis rather than straightforward herpes encephalitis. Actually, it just doesn't look like herpes encephalitis, to put it bluntly,
15 in my opinion.

Q. So, the material you had, as at 5 November, was not, I suggest, of a progressive encephalopathic process?

A. Well, that's - the problem in saying progressive encephalopathic process is "progressive" means over a period of time and given the time frame of - between about four weeks, it's not possible to probably conclude finally that it would be a progressive encephalopathic process. You would probably need, I would think, several months to
20 finally conclude that, but you might begin to suspect the possibility.
25

So, there's no way - I guess what I'm saying is that when we're using terms such as "encephalopathic process", that's a fairly ambiguous term. It's not like saying someone's got a broken leg. It's not something definite and absolute. It is something that is evolving. It's something that involves lots of observation and thinking, and you'll go through periods and days where you have doubts and that's the way it is, because we're dealing with the most complicated structure in the universe, the human brain. But this CAT scan certainly does not - maybe, it would have been - it made me doubt that it was very much herpes encephalitis, for sure.
30
35
40

Q. Herpes encephalitis is something which causes encephalopathic process; is that right?

A. Herpes encephalitis is one of the many hundreds and hundreds of causes of an encephalopathic process.
45

Q. Can you tell us what your opinion was, as at 9 November 1990, in relation to what the cause of this child's presentation was?

A. At that particular time, my thoughts were along the lines of a progressive encephalopathic process, but I then changed my thinking soon after that.
50

Q. And a possible explanation for that progressive encephalopathic process was encephalitis; is that right?

A. Sorry, a possible--
55

Q. A possible explanation for the progressive encephalopathic process was encephalitis; is that right?

A. At that level, being a second-year doctor, yes, with limited knowledge.

Q. You see, this child--

5 A. But if I look at it from today's point of view, from my ten years further experience, and having looked after quite a few babies with herpes encephalitis, in other words, I actually cared for them myself and managed them in great detail, I'd have to say that this child's
10 clinical picture and scenarios were not in keeping with herpes encephalitis at all.

Q. But it is possible, isn't it?

15 A. Well--

Q. It's a possible explanation, isn't it?

A. Well, I'd say it's almost not possible to be honest, given the results of the more important tests, which you haven't referred to. I said "given the results of the
20 more important tests which you have not referred to".

Q. When did you first reach a view that encephalitis was either not possible or almost not possible as an explanation?

25 A. I think that my heart sunk with the encephalitis diagnosis when I actually--

Q. Sorry, tell us when in time approximately that you first reached the view?

30 A. Oh, okay. I'd say it was a process really, because I was - I saw two lumbar punctures being done. The first lumbar puncture was done within about two days of him coming in and I expected it would show some abnormality, but it did not, so I began to have doubts. And then, with
35 the second lumbar puncture also being normal, it basically sunk the encephalitis theory altogether really. That's why the words "herpes encephalitis" never really appear in my diagnosis with any--

40 Q. Were those lumbar punctures done before 9 November 1990?

A. Look, I'd have to look for the notes to find the exact date, but I know that one was done probably about the 20th or 21st.

45

Q. Of what?

A. October.

Q. So, there was one done before 9 November?

50 A. Yes.

Q. Can you tell us whether there were any others performed before 9 November 1990?

55 A. I'd say it was very close to that date, but I cannot - I'd have to look at the notes carefully.

Q. So, as at 9 November 1990, were you aware of the results of at least one lumbar puncture procedure?

A. Sure.

5 Q. And, on 9 November 1990, you expressed this opinion in a discharge - in a document entitled "History examination and progress notes": "Repeat EEG, multiple epileptic foci in both hemispheres. Marked serial deterioration in three EEGs".

10 CROWN PROSECUTOR: Before it is read, perhaps he might identify whether it is his note. My friend has asserted that it is this doctor's note. Perhaps it might be confirmed that it is his note, just for his benefit.

15 HIS HONOUR: It is being put "you wrote", and the doctor should assume that he did.

COOK: Q. "Marked serial deterioration in three EEGs"--
A. Mmm-hmm.

20 Q. --"suggests progressive encephalopathic process. Awaiting today's phenobarb level still"?
A. Yes.

25 Q. You wrote that, didn't you?
A. Yes.

30 Q. You signed it, didn't you?
A. Sure, sure, but encephalopathic process does not equal encephalitis. I'm sorry, but it's not the same thing.

35 Q. But it can be a manifestation of encephalitis, can't it?
A. It can be. But the fact that I'm using the words "encephalopathic process" shows that I'm not thinking - I don't really believe it is herpes encephalitis, because herpes encephalitis, that is such a definite diagnosis, such an important one, that I would write that down if I was convinced.

40 See, the fact is, we're using a very ambiguous term there because we don't know what's going on. We just know that there is a process that has happened where this child has lost - well, has had some brain damage, but the fact -
45 that's highly significant that you point that out because I haven't used the term "herpes encephalitis", so I agree with that point.

50 Q. You made a statement to police about this matter, didn't you?
A. Yes.

55 Q. And you made that years after you saw this young man?
A. That's correct.

Q. Was it your opinion, when you wrote that statement, that encephalitis was not a realistic possibility as an explanation?

A. I think as an all-embracing explanation, certainly not.

5 Q. Sorry, did you express that opinion in that statement?

A. I don't have - I'd have to open the statement up and read it. Are you referring to a particular page of that statement?

10 Q. Well, in the whole statement, would you agree with this?

A. Yes.

15 Q. You do not reach a conclusion which excludes encephalitis as a possibility; do you agree with that? You don't express that conclusion, I should say?

20 A. Well, the fact - as I'm trying to emphasise, the diagnosis of encephalitis is such an absolute and important diagnosis that, that if I really believed the diagnosis, that that's the diagnosis, I would state that, because it's important - the treatment is very particular and the implications are very important.

25 Q. What I am asking you, doctor, is whether you express an opinion in this statement which says it is not a possibility or something like that, or you excluded it; something to that effect?

A. Not, not so absolutely. I mean, I think--

30 Q. Absolutely or at all, sir?

35 A. I'm just trying to find whether - did I mention the CSF here, because I really want to - because that's the most important piece of evidence, I think; the CSF; the CSF being cerebral spinal fluid. I'm just trying to find--

Q. Is that what you refer to as a lumbar puncture?

40 A. Well, it's the fluid you obtain in the lumbar puncture. I'm just trying to find any reference to that. I would say that, as a document, this summary - this statement of mine - does not form a strong basis for concluding the child had herpes encephalitis.

45 Q. But the question I am asking you, doctor, is whether you express an opinion in this statement that you had excluded it? That's what I'm asking you, and you agree with that, don't you?

50 A. Well, it's - I don't know how far you can draw that logic. If I say someone has a fever and, therefore, you say to me they might have encephalitis, I suppose by that kind of logic you can make a statement, because we're talking about disease processes. I mean, we're talking about causes of disease, possible disease processes, here. So, I'm not really - I don't really - I was not thinking, when I made the statement, that Patrick had encephalitis, and I don't think he had encephalitis.

55 Q. I'm going to ask you a question about some evidence

you gave yesterday; do you understand - about some evidence that you gave here yesterday?

A. Sure.

5 Q. You were asked this question - first of all, you were shown the CT scan of 5 November 1990; you recall that?

A. Oh, the report of a CAT scan? It's quite different.

10 Q. You were shown that?

A. Yes.

Q. And you were asked this question, and this is page 460 yesterday:

15 "It discloses certain abnormalities, does it?"

You said, "Yes". You were then asked this question:

20 "Could you tell us what, if any, significance those abnormalities have in terms of confirming or excluding a diagnosis of encephalitis?"

You said:

25 "This EEG finding would not be necessarily pathognomonic of encephalitis. It could just be a process of epilepsy that is untreated or unresolved, but it could - it could be due to encephalitis. It is a possibility."

30

Now, do you agree that you said that yesterday?

A. I'm a bit confused because you actually started your statement by saying it is a CAT scan report you were using. You are talking about an EEG report.

35

Q. I'm reading your answer to the question; you understand that?

A. Are we referring this to a CAT scan report or an EEG?

40

Q. Yes. I showed you a CAT scan report, and I asked you a question?

A. Well, I was shown an EEG report as well.

45

Q. I will read it to you. Whatever you thought you were referring to--

A. Well, I think I have the right to know what I was referring to, what documents I was shown.

50

Q. Well, you were shown a CAT scan report dated 5/11/1990, okay? You were asked whether it discloses certain abnormalities and you said "Yes".

CROWN PROSECUTOR CULVER: I object, your Honour.

55

HIS HONOUR: I am not sure whether the transcript does reveal that it was a CAT scan report. Why do you object to it anyway, Madam Crown?

CROWN PROSECUTOR CULVER: It was an EEG report that was shown to the witness.

HIS HONOUR: That is the recollection I have.

5

WITNESS: My impression was an EEG report as well.

HIS HONOUR: Just a moment, doctor.

10

COOK: My learned friend is correct and I am grateful for that.

15

Q. What you have said is right, doctor. You had regard to an EEG report dated 5 November 1990, and I apologise for the confusion.

A. Thank you for apologising.

20

Q. You were asked this, "It discloses certain abnormalities, does it?" And you said, "Yes"?

A. Sorry, the first EEG or the second EEG?

25

Q. It is dated 5 November 1990?

A. In all fairness, can I have that presented to me, again, please? I just want to confirm the date because, from what I recall, the first EEG was done on the 18th of the 10th.

30

HIS HONOUR: Don't worry, doctor, it is going to be turned up now and you will have it in your hand in a moment.

35

COOK: Q. What I am focussing on is your response, which included the words, "It could be due to encephalitis. It is a possibility". You understand that? That's what you said yesterday?

A. Sure.

40

HIS HONOUR: The report of 18 October was marked 13. The one of 5 November was never marked, I don't think. Does anybody have a copy of it?

CROWN PROSECUTOR CULVER: I believe MFI 13 is now exhibit R, your Honour.

45

HIS HONOUR: Yes, that is so, but that doesn't help us with the report of 5 November.

50

CROWN PROSECUTOR CULVER: I have a copy of the report of 5 November.

HIS HONOUR: Just show it to Mr Cook, please. We better have it marked for identification. That will be marked 16.

55

MFI #16 REPORT OF 5 NOVEMBER 1990

WITNESS: A. This here is an EEG report, not a CAT scan report. Are we clarified on that?

COOK: Q. We have clarified that, I think.

A. Good.

5 Q. That is the document you were shown in the witness box yesterday, remember?

A. Yes, I was shown two EEG reports. This is a second one.

10 Q. And in relation to that one you have got in front of you, you were asked this question: "It discloses certain abnormalities, does it?" And you said, "Yes". You agree with that?

A. Yes.

15 Q. You were then asked this question, "Could you tell us what, if any, significance those abnormalities have, in terms of confirming or excluding a diagnosis of encephalitis?" You said:

20 "This EEG finding would not be necessarily pathognomonic of encephalitis. It could just be a process of epilepsy that is untreated or unresolved, but it could - it could be due to encephalitis. It is a possibility."

25

Now, you said that, didn't you?

A. Well, I believe I said that.

30 Q. And was that correct?

A. Well, it's correct and I think - when it's a possibility, it's - it is a possibility. When I say - but I did say - did I not say it was not pathognomonic of herpes encephalitis, effectively? Did I not say it was not pathognomonic of herpes encephalitis, because herpes encephalitis, you get a fairly, a fairly definite pattern in an EEG and this does not show - this EEG does not show that pattern of herpes encephalitis and, therefore, that's why we tend to veer towards the concept of an encephalopathic process because that's non-committal and it's not - it's not specifying herpes encephalitis. The evidence points away, quite strongly, from herpes encephalitis.

40

45 Q. What I asked you, doctor, was whether the answer you had given in evidence was correct?

A. Yes, it's correct in--

50 Q. And it is true, is it, that the abnormality that you observed, reflected in the second EEG, the one of 5 November, could be due to encephalitis? It is a possibility?

A. It is a remote possibility.

55 Q. Well, you didn't say that yesterday, did you?

A. Well, I can say it today. I can qualify my terminology. I did not know how exactly you wanted me to specify it.

Q. Well, you were asked what the significance was; do you understand that?

5 A. Well, I'm telling you now that when you say possibility, that's an open statement and I can tell you today, factually, as a medical doctor who is experienced in this, it is a remote possibility, because an EEG - by such an imprecise test, I mean, we don't draw our final conclusions from the EEG.

10

Q. Does that mean that you would not definitely exclude or include a diagnosis of encephalitis based on an EEG?

15 A. Oh, well, an EEG alone, if that is the only piece of evidence you have, is not going to clinch your diagnosis because it depends, more importantly, on the state of the child itself, and on the lumbar puncture findings, and on, if any, is available, any brain tissue findings, if any is available.

20

Q. The lumbar puncture findings, is this correct, are principally designed to pick up meningitis; is that right?

25 A. I think that's simplistic. I think that the urgency is - the meningitis kills within hours, as it can kill within one hour, and encephalitis can kill within a few more hours or days, so the way the test is processed, it's only by virtue of the fact that bacteria can grow within six to 12 hours on a culture plate, and it takes longer, at least in those days it took longer, to detect virus infections. So, as a matter of urgency, and practicality, the lumbar puncture's done to exclude meningitis and also
30 the possibility of encephalitis, for sure. I think - I think both are equally important.

35

Q. Sure, but do you agree with this proposition: That in the early stages of the progress of encephalitis the lumbar puncture may not detect it? Do you agree with that?

40 A. Not necessarily, because in the early - in the very early stages and this is a well-known medical fact - it is not open to any question - the appearance of the CSF, cerebral spinal fluid, in meningitis and encephalitis can be identical. In other words, in both there can be white cells and red cells. So, in fact, in the first few hours there may be no difference whatsoever and that, again, is
45 one reason why sometimes when we are in doubt we choose to treat the patient with both anti-meningitis medications and anti-encephalitis medications. That's evolved and current practice, and probably in the years following this case, more so.

50

Q. What I have asked you is, in the early stages of the progress of encephalitis, it is possible that a lumbar puncture or a CSF will not detect it; is that possible?

55

A. Sure, definitely, and true of meningitis.

Q. It is more likely to detect that if the progress of the encephalitis is further down the track?

A. Yes, that's - that would be true of many disease

processes, yes. The more time you have, the more time you have with destruction of brain cells and the more time you have for inflammation and, therefore, white cells to accumulate in the spinal fluid.

5

Q. Now, you expressed some reservations before, when I was asking you questions about the state of your knowledge and expertise back in 1990; is that a fair way of putting it?

10 A. Well, I - I do concede that. I've learnt a lot since then.

Q. In 1990, what was your function in the hospital?

15 A. I was a paediatric resident. I'd been a doctor for two years.

COOK: Thank you.

Q. You had some virological testing done; is that right?

20 A. There was some virological testing done, that's correct. On what tissues are you referring to?

Q. Was that looking for viruses or a virus?

25 A. Yes, we were looking for a herpes virus.

Q. Anything else?

A. We did other tests to look for other viruses. We did some tests on stools eventually, but I don't think that's very relevant.

30

Q. Assist us with this, if you can. Herpes encephalitis isn't the only form of encephalitis; is that right?

35 A. As I alluded to before, there's probably thousands of causes of encephalopathy and encephalitis, plural, are a group of causes and there are probably dozens of causes of encephalitis, but by far - we are talking about diseases here. For example, I read in the US, just to give you an idea of the population base, that there were two cases of herpes encephalitis per million per annum, but we are
40 talking here about the commonest cause of encephalitis by far. So, if we are talking here about a disease that might occur, you know, say in six patients per year, in Australia, that's by far the commonest cause, and any other cause of encephalitis would be so horrendously rare that I don't - I don't know if we really need to entertain
45 it really. I mean, it would have to be extraordinarily rare. We did think about other causes, such as lead poisoning and other poisons, but we found no evidence of that.

50

Q. Doctor, you entertained this very possibility yesterday, when you said that it could be due to encephalitis; it is a possibility, didn't you?

A. Well, there is a reason for that.

55

Q. But do you agree you were entertaining that possibility yesterday?

A. Sure, and I should entertain it--

CROWN PROSECUTOR CULVER: Objection, your Honour.

HIS HONOUR: To what are you objecting?

5

CROWN PROSECUTOR CULVER: The question by my friend, your Honour. The question is not specific enough. If my friend is referring to the evidence given by the doctor regarding the CT scan, then he was asked, particularly, to
10 look at a CT scan. Equally, to consider--

HIS HONOUR: No, the question may be asked and answered.

COOK: Q. You entertained the possibility yesterday
15 that this could be due to encephalitis; isn't that right?
A. That's correct. And can I explain that?

Q. Well, you agree that you said that?

20

A. Yes, and--

Q. And you agree that was your opinion at the time you
said it?

A. No, it's a possibility. It's a working diagnosis
25 which you have to have because you must - if you suspect
encephalitis in any degree whatsoever, you must treat it,
because if you don't treat it early, you cannot wait a
week for the diagnosis to come back, otherwise you'll have
even more brain damage, so it is standard practice to
30 think about the diagnosis, even if - even if you just
vaguely suspect it. It is a matter of methodology, it is
a matter of practice, it is a matter of proper medical
practice. It does not mean that it is the prime diagnosis
in your mind.

Q. We are not talking about a primary diagnosis. We are
35 talking about leaving a possibility?

A. Remote possibility.

Q. You didn't qualify it in that way yesterday as being
40 remote or fanciful, did you? You agree with that?

A. Sure, I didn't qualify it, but I am now filling in
the Court about the knowledge; the relevant facts.

COOK: Thank you. Those are the matters.
45

<RE-EXAMINATION

CROWN PROSECUTOR CULVER: Q. Doctor, you were asked
50 questions regarding your evidence that the CT scan was
compatible with encephalitis?

A. The first CAT scan?

Q. Yes, that's correct?

55

A. Mmm-hmm.

Q. You gave evidence that you think that's open to
question. Can you explain that answer?

A. Sure. Well, there are several ways in which this

information is open to question or several reasons, the main reason being, actually, that we don't have the actual physical CAT scan in front of us. I'd say that's a very important point, but we can't do anything about that
5 apparently. So we have a report here. Now the report - the report emphasises the back of the brain, and certainly the second report even more so, and the back of the brain, being this part of the brain (witness indicated), the occipital lobes, is not the kind of - is not the part of
10 the brain which is mainly involved in herpes encephalitis at all. It is just out of - it is not the pattern of herpes encephalitis, so it is partly for this reason, partly for - because of these CAT scan reports that there was a sense of ambiguity, and I realise there is ambiguity
15 in what I write because I am not committing myself to - I never have committed myself to - the diagnosis of herpes encephalitis, because even though I was only a doctor for two years I'd actually - I'd had - I knew enough, even then, to know about this fairly important condition.

20

Q. So, at that stage--?

A. And now I know more so.

25 Q. So, at that stage, when you were considering that CT scan, when you say, in your evidence that any compatibility within encephalitis is open to question, are you saying that that's because there were many possibilities open at that stage?

30 A. I'd say that there would be other possibilities. I don't know if there are many, but we have to investigate the many, but the reason we have to - even the slightest - even the most minute possibility of herpes encephalitis, you must act upon it because just from a medical, ethical point of view, you must treat the patient. So it is, I
35 guess, a way of reminding ourselves that it's a serious condition. You must be aware of it.

40 Q. But the way you say it is open to question is that because you are saying the CT scan was not typical--

A. No, not at all.

Q. --of encephalitis?

A. No, it's not typical at all of herpes encephalitis.

45 Q. You were asked questions by my learned friend regarding the discharge summary written on 29 October 1990 in respect of Patrick. Do you recall those questions?

50 A. About the use of the terminology of "probable" - sorry, possible or probable? You can quote it for me. I don't mind.

Q. I believe you were asked questions about the phrase "probable encephalitis"?

A. Yes.

55

Q. Probable. You begin to answer about the process of writing that discharge summary. Can you expand upon what you mean by the process of writing that summary?

5 A. Well, the discharge summary has to reflect, not just what I think, but what everybody else - what the people senior to me think, and also it has to fit a category that's not too vague, so that, dare I say, medical record keeping and the hospital auditing system can keep account of it, so we tend to use, we often tend to temper or modify what we think for the discharge summary diagnosis, and you'll find that's common practice.

10 Q. Is that discharge summary a proforma form?

A. Yes, it is actually.

Q. Something that is standardly used when a patient is discharged from hospital?

15 A. Yes, and I find it very constraining. I've always found them difficult to use, but that is what was used at that time.

20 Q. Does it include, as part of the standard form, a section where you write a diagnosis?

A. Yes, at the start, I think, there's - it only gives you an option of two diagnoses, but you can add more, I suppose.

25 Q. But, in the absence of any finding of Patrick's condition at that time, is it the case that you wrote down at that stage possible diagnoses?

A. Well, that's why the word "probably" appears there, quite clearly, I believe.

30 Q. If you knew the cause of Patrick's condition at that stage, would you have written down a definite diagnosis?

35 A. If the diagnosis was herpes encephalitis, it would be at the very start. There would be no other words in front of it.

Q. Is that at the front of that document?

40 A. Not at all. Because the fact is that this document starts with the words "intractable seizures" and that's not actually a diagnosis, but a seizure itself is not really a disease; it is a manifestation of a disease. We like to normally put the cause of a disease first. So, in this case, what I have done here is, quite clearly, I have put the differ symptoms first and then a comma and then
45 the word "probably", and then a possible diagnosis, a possible pathology, but, admittedly, the document itself provides no evidence, no convincing evidence, that that possible - possible diagnosis is actually substantiated.

50 Q. And, in fact, at that stage, when you wrote that discharge summary, did you know what was causing Patrick's seizures?

55 A. Well, if you read - if you actually read the body of the text, it says that "most of the test results were quite" - they were fairly complicated tests. I actually sent them to Adelaide, to a laboratory in Adelaide, and most of them were not even back, so it's ambiguous, because we don't have the information, but some of the

important information we did have, but, for example, for example, the culture - the CSF test for herpes culture - was negative--

5 COOK: Your Honour, I object to this.

HIS HONOUR: It is not responsive.

10 CROWN PROSECUTOR CULVER: Q. If I could ask you, doctor, at that stage, when you wrote that discharge summary, did you know what had caused Patrick's seizures?

A. No.

15 Q. And is it the case you were waiting for various test results to come back, which you hadn't yet received at the stage of writing that report?

A. Many tests.

20 Q. Now, you referred, during the course of your evidence on several occasions, to encephalopathic process?

A. Yes.

Q. What is encephalopathic process?

25 A. The word "encephalos" in Greek, where it's from, means brain, from a medical point of view, and "pathos" means disease, so it just means a brain disease. It is a very vague and ambiguous term, which we can use to embrace a whole number of conditions. So, an encephalopathic process, for example, could be someone being intoxicated by drugs, and they become delirious, and that could be an
30 encephalopathic process. It could be somebody who has encephalitis, and they have seizures and become delirious as well. Any number of things can cause an
35 encephalopathic process, but it is usually characterised by what we call fluctuating conscious state, and often seizures as well.

Q. Now, is it necessarily the case that there has to be an infection?

40 A. No.

Q. As the cause of encephalopathic process?

45 A. No. The very reason for using the term "encephalopathic process" is when we don't know that there is an infection, or we don't think there - we don't think there is an infection and, therefore, we are trying to embrace the concept rather than the actual causes, we are at least aware of the concept of diseases that cause this particular picture, if you like, but we are not committing
50 ourselves to an infection because of the other possibilities.

Q. Is herpes encephalitis an infectious condition; something that is caused by infection?

55 A. Very much so. Caused by the herpes virus.

Q. Does encephalopathic process include damage to the brain which can be caused from a hypoxic event, an event

where the brain has been starved of oxygen?

A. That would be a very important major cause, probably more common than herpes.

5 Q. And can asphyxiation--

A. Sure.

Q. --cause an hypoxic event?

10 A. It's probably the commonest cause in babies.

Q. So, encephalopathic process would include asphyxiation?

A. Sure.

15 Q. So, the damage to Patrick's brain, as revealed in the CT scans about which you have been asked, and the EEG reports about which you have been asked, could have been caused by asphyxiation of Patrick?

20 A. I'd say that, definitely.

Q. Now, you were asked further questions about the CT scan taken on 5 November 1990 in respect of Patrick, and you indicated in your evidence that it tended to make you drift away from encephalitis as having caused the damage to the back of Patrick's brain, and you looked at other processes.

25 HIS HONOUR: You said, madam Crown, the CT scan of 5 November. There was an EEG scan of 5 November.

30 CROWN PROSECUTOR CULVER: I believe also, your Honour, there was a CT scan on 5 November and that was the question put to the doctor in cross-examination.

35 HIS HONOUR: Thank you. Then I apologise for interrupting.

WITNESS: A. Yes, I have a CT scan dated 5 November report here.

40 CROWN PROSECUTOR CULVER: Q. And you recall being asked questions about that by my learned friend?

A. Yes, I recall the questions by your learned friend.

45 Q. Do you recall your answer that, looking at that scan made you drift away from the possibility of encephalitis as having caused the damage to Patrick's brain?

A. Yes, that's true.

50 Q. And do you recall your answer also that you said that looking at that CT scan made you look at other processes which could have caused that encephalopathic disorder?

A. Sure, that's correctly put.

55 Q. Now, what other processes did you consider?

A. Well, I myself considered other, what we call, metabolic diseases, which are rare diseases, involving, for example, the pathways of, or how the body handles,

glucose and the - and energy production in the body, and so that's why the Adelaide tests were so important, and so we're still waiting for those. But by that stage a lot of them had come back, so that left me even more confused.

5

Q. So, at that stage you were still waiting on the Adelaide tests, were you?

A. Well, some of them had come back, but by 5 November, there should be a page in the notes about the Adelaide tests, but I'd rung anyhow, but they come back in bits and pieces.

10

Q. From the tests that you conducted, when you looked at other processes, were you able to rule out the other processes?

15

A. The other encephalopathic processes?

Q. Yes.

20

A. Well, they seemed to be unlikely because of - for a number of reasons. They were - Patrick's behaviour was not like that of a metabolic, encephalopathic process, for example. If you look at the notes, it will say, quite often, that he was alert and responsive and that another day he had a seizure, and it's not really the pattern of behaviour.

25

Furthermore, he was able to feed, so he was not generally a drowsy, obtunded, encephalopathic child. So - but there was some kind of encephalopathic process probably, I thought, because of the seizures, but it wasn't one that jelled with a severe metabolic disease or encephalitis.

30

Q. So when you got all the test results back, did that assist you in assessing the cause of Patrick's seizures?

35

A. Well, it just made it more mysterious because we didn't have an explanation, but probably the most problematic thing was the second opinion on the CAT scans from an expert, but anyhow.

40

Q. Now, doctor, you were also asked questions during cross-examination about the progressive encephalopathic process and you said that you changed your thinking. What did you change your thinking to?

45

A. Well, I think I - I entertained, after talking - after I sent the CAT scans to Sydney, I entertained the possibility of--

COOK: Objection, your Honour.

50

HIS HONOUR: Yes, ask another question, please, Madam Crown.

CROWN PROSECUTOR CULVER: Q. Can I put it this way, doctor? You were asked questions regarding this progressive encephalopathic process and your thinking about it and you said that the child Patrick's clinical picture was not in keeping with herpes encephalitis?

55

A. That's true.

Q. What was it about his clinical picture which was not in keeping with that?

5 A. Well, there were a few things. As I said yesterday, he was not - he did not have a fever when he came in. The other thing is that he did not actually present with a seizure as often a child does with herpes encephalitis. The third thing is that - importantly - is that the spinal fluid was normal.

10

Q. And that was determined by the lumbar puncture tests?

15 A. Yes, we obtained the spinal fluid off the lumbar puncture. The fourth thing that was odd was that the behaviour generally was not like that of a child with herpes encephalitis because normally they're very sick and just what we call - they can even be in a state of what we call "in shock". "In shock" in medicine - we don't mean what you mean by "shock" in the media. What we mean by "shock" in medicine is that a child can look like they're about to die, they - like they're mottled and unstable in blood pressure and so forth. That was not a problem for him in hospital.

20

25 So, furthermore, other evidence or other things that would make you think about herpes encephalitis would be, for example, there were no cold sores on his face and there was no history of the mother having had a cold sore or herpes. Now that's not strong evidence either for or against, but sometimes - I had a patient recently where they had herpes blisters, for example. So none of these things were present. Other things are the blood tests which negated herpes infection.

30

Q. Did the blood tests actually negate any infection?

35 A. Initially, pretty much, yeah, I mean, in the first presentation there was no blood test that suggested any infection at all.

Q. Now when you conducted--

40 A. That's the first admission, sure. The important one.

Q. And when you say "important one", why is that?

45 A. Because that's how he presented in that state where he was cyanosed blue. And because I was involved with that admission I did a lot of work, like assessment, like I physically handled the child.

Q. So with all those clinical symptoms about which you have just spoken, you were able to rule out infection as having caused Patrick's condition?

50

A. Yes, I did a multitude of tests that ruled out infection.

Q. Now you referred in your evidence under cross-examination to two lumbar puncture tests and you said that when you received the second lumbar puncture test results it sunk herpes encephalitis as a possible cause of the seizures. Can you just explain for the Court

55

why that sank that theory?

5 A. Well, the reason is that if you have an
encephalopathic process, that is, something causing brain
malfunction, and if that process actually causes brain
10 damage - for example, herpes virus definitely causes brain
damage - if that were occurring, then you'd have to expect
that the fluid around the brain itself would show
evidence, because there's destruction of brain cells. So
you'd expect to see evidence of pus, for example, and
15 white cells and blood in the spinal fluid. It's fairly
suggestive of especially herpes encephalitis or meningitis
and if you missed it on the first lumbar puncture you'd
pretty much expect to pick it up on the second one if
there was any process of herpes encephalitis because it's
such a devastating illness. It causes extensive brain
20 damage.

So, given that the second spinal fluid result was clear,
that is, it was crystal clear to look at, and under a
25 microscope you could see no white cells, no pus cells and
no red blood cells and given that the immunological tests
for herpes were negative the second time round, then it
made it almost implausible really.

30 Q. So, doctor, is it the case then, by virtue of these
tests, you were able to exclude infection as being present
in Patrick by a combination of your results, that he had
no fever, the blood test results, the lumbar puncture
results, the CT scans, and the way he presented
physically, his demeanour?

A. Yes, infection would not have been the cause in my
mind.

35 Q. Now, you were asked questions by my learned friend
about the making of your statement and whether or not you
excluded specifically herpes encephalitis within that
statement. When you made your statement, did you see the
need to exclude herpes encephalitis?

40 A. Well, yes, as I said, because it's important to
exclude herpes encephalitis if you can, but if you can't
exclude it definitely, you must treat the child, you must
give them medications for it which is what happened.

45 Q. When you were making your statement at that point in
time, and this is your statement dated 17 March 2000, was
it in your thinking that Patrick suffered from herpes
encephalitis?

A. No.

50 Q. My friend also asked you questions regarding your
evidence about an EEG report of 5 November where you said
it was not pathognomonic of herpes encephalitis. Can you
explain pathognomonic again?

55 A. The word "pathognomonic" just means diagnostic. For
example, again just going back to a simple analogy, if you
take a bone and break it and you see a crack on an x-ray,
that is pathognomonic of a fracture. It is not going to
be anything else. So we are talking about absolutely

definitive evidence. So it is not like you can say, oh this is it.

5 HIS HONOUR: Q. I think a gnomon is a pointer, points to?

A. It's diagnostic virtually, yeah. So it's - in herpes encephalitis, you sometimes get a fairly definite pattern of brain waves which will be, I think, beyond - I think would be hard to explain without pictures what they look like to be honest, but we get periodic bursts of activity. 10 And the predilection of herpes encephalitis or the part of the brain it most affects is the temporal lobes. So the EEG, that EEG would not be really - well, it certainly is not proof of herpes encephalitis at all and, in fact, it 15 is more just a pointer that something serious is happening in the brain. That's all. I think that's all you can really conclude.

20 CROWN PROSECUTOR CULVER: Q. But when you move beyond the EEG tests to all the other tests you had available, were you then able to exclude herpes encephalitis?

A. I think I did. And--

25 Q. My friend also asked you questions about whether or not, with the first lumbar puncture test upon Patrick's first admission, you necessarily would have detected the presence of herpes encephalitis. Do you recall that questioning?

A. Yes.

30

Q. You have given evidence that a subsequent lumbar puncture test was performed in respect of Patrick?

A. Yes.

35 Q. And that subsequent test was some time after his first admission?

A. That's true.

40 Q. Do you know the date of that subsequent test?

A. I'd need to be reminded. I think it was about two weeks approximately.

45 Q. Would you necessarily have expected to have seen the presence of the telltale red or white blood cells in that CSF, the cerebral spinal fluid?

A. Well, I can tell you from experience, and this is actually experience, I have treated a baby with herpes encephalitis quite recently and I don't - I think it is important to give an example, a true example - and in this case we treated this baby for about two weeks, three weeks 50 with very powerful anti-viral agents and the child, even weeks later, came back with full signs of herpes encephalitis. In other words, what I am saying is that Patrick's very short course of anti-viral drugs which he 55 just had basically as a precaution, if he had incurred herpes encephalitis, it would not have been adequate and, therefore, I would have expected the second lumbar puncture, if he had herpes encephalitis, would be

abnormal.

Q. And was Patrick's second lumbar puncture abnormal?

5 A. No, and his repeat virological blood test was also negative.

10 Q. You conducted virological tests which you told my friend about earlier under cross-examination when you said you were looking for viruses. Did the results of those tests reveal the presence of any virus?

15 A. Well, in the initial presentation, the test I specifically did was look for viruses causing, for example, bronchiolitis or a chest infection, to use, perhaps, less accurate but generally understood language, and there was no evidence at all on the virological testing that he had had a respiratory virus. That was what I was looking for in that context. So we are looking for a virus that might have caused a lung problem or a breathing problem and I found no such virus and then I was 20 looking for a virus that might have caused a brain problem and I found no such virus again.

25 Q. My friend asked you questions about looking at the condition of Patrick with your expertise as it was back in 1990 and you indicated that you had the advantage of intervening years of experience. With those intervening years of experience, can you say what caused the seizures in Patrick?

30 A. I cannot say beyond a doubt what caused the seizures in Patrick. All I can do is make conclusions.

Q. And with the advantage of the intervening years of experience, what do you conclude caused the seizures in Patrick?

35 A. My experience over the years has embraced quite a lot of babies who have had asphyxia and hypoxia, that is, lack of oxygen to the brain. I have seen many babies since that time and also quite a number of babies with meningitis and encephalitis and I have no doubt that the 40 whole scenario, as I said yesterday, is most consistent with some catastrophic event that caused the lack of oxygen to the child's brain on the morning of October 18.

45 Q. And did you find a medical cause for that catastrophic asphyxiating event?

A. No, I did not find any medical cause.

CROWN PROSECUTOR CULVER: Thank you, doctor.

50 HIS HONOUR: The Court is grateful to you, doctor, for staying until today. You are excused.

<WITNESS RETIRED AND EXCUSED

55 HIS HONOUR: We shall take the morning tea adjournment now, ladies and gentlemen.

SHORT ADJOURNMENT

RESUMPTION

5 HIS HONOUR: Ladies and gentlemen, before I forget I must
tell you that there is a commitment of mine tomorrow
morning which may cause me to be a few minutes late
arriving at Court. You will understand why we are
starting late if we started late. The case will be listed
for 10. I will ask you all to attend as for a 10 o'clock
start.

10

MFI #17 CT SCAN REPORT FOR PATRICK OF 05/11/90 AS REFERRED
TO BY DR DEZORDI

15 <IAN ARTHUR WILKINSON(11.56AM)
SWORN AND EXAMINED

20 HIS HONOUR: If you have some notes there and if you feel
the need to refer to them in order to answer any question,
you are free to do so.

CROWN PROSECUTOR CULVER: Q. Is your full name Ian Arthur
Wilkinson?

A. That's correct.

25 Q. Did you obtain a Medical Degree from the University of
Queensland?

A. I did.

30 Q. Did you subsequently train in general paediatrics in
Sydney before training in neurology in Sydney and
Milwaukee in the United States?

A. That's correct.

35 Q. Is it the case that you have a total of four years
training in general paediatrics and four years training in
neurology?

A. That's correct.

40 Q. Have you been in practice as a consultant paediatric
neurologist in Newcastle for the last 18 years?

A. It is now 22 years.

45 Q. Is it the case also that you have been recently
elected to an international body concerning neurology?

A. That's true.

Q. What body is that?

A. The Executive Board of the International Child
Neurology Association.

50

Q. What position have you been elected to?

A. Just as a member of that board.

55 Q. Now, doctor, over the years in which you have been a
consultant neurologist, paediatrics neurologist that is,
have you seen something in the order of over 12,000
patients?

A. I think it is in the order of about 15,000 now, yes.

Q. What is neurology?

A. Neurology is the study of the nervous system, which includes the brain, the spinal cord and the peripheral nervous system, as well as muscular diseases as well.

Q. Being a paediatric neurologist, does that mean that you specialise in neurology as it relates to children?

A. That's correct, yes.

Q. What position do you currently hold?

A. I'm a staff person and a staff employee at the John Hunter Children's Hospital. I am a director of medicine and also a practising paediatric neurologist.

Q. At what hospital?

A. John Hunter Hospital in Newcastle.

Q. As a paediatric neurologist, did you see a patient by the name of Patrick Folbigg?

A. I did.

Q. Was the first time you saw him on 20 October 1990 at the Mater Hospital at Newcastle?

A. It was in the period of the 18th to the 20th, I think. I'm not sure exactly what the first date was. It was during that admission.

Q. When you first saw him, how did he present?

A. He had presented on that occasion with what was described as breathing difficulties. He had stopped breathing and certainly he appeared altered in his conscious state and his responsiveness. He seemed very subdued when I first saw him. It was of concern at that stage that there may have been some primary problem within his brain. He subsequently developed seizures, fits, convulsions on about the second or third day of his admission to that hospital.

Q. Did you find that, in fact - sorry, were you going to say more?

A. No, that was it.

Q. Did you find, in fact, Patrick had suffered damage to the back part of his brain?

A. Yes, we did. During that admission a number of investigations were carried out, including CAT scans, which showed changes, particularly in the back part of his brain, and also his EEG, his electroencephalogram, which is a test for the electrical functioning of the brain, which during that time progressively deteriorated.

The one when he first arrived had been normal, but subsequent ones showed increasing abnormalities and, in particular, progressive development of epileptogenic change. By that I mean there were episodes of short-circuiting in the brain wave of a type that induced epileptic fits, so he certainly had deterioration in

encephalographic findings, as well as change on the CAT scan, during that time.

5 Q. (Shown exhibit R) Do you recognise that document as an EEG report for Patrick dated 18 October 1990?

A. Yes, I do.

Q. Was that the EEG report in respect of his EEG scan taken upon his first admission on the 18th?

10 A. That's correct. It was on the day of his admission, yes.

Q. Can you explain for the jury what is an EEG?

15 A. Right. Well, the brain is like a computer. It functions on electrical circuits. It operates on fractions of a volt. We can use the electrical activity of the brain to interpret functioning of the brain, so the EEG is a test whereby electrodes are placed on the surface of the scalp in the usual situation and, by use of
20 amplifiers, the voltages are much magnified and they are then portrayed on - in those days, it was a big paper tracing. These days it tends to be displayed on a video screen and, by looking at those waves in different parts of the brain, most of the modern EEGs, for instance, have
25 about 20 different channels, looking at different parts of the brain. By looking at those recordings, we can determine what we call the background activity, and the background activity gives us an overall idea of how well the brain is functioning. It can be slowed if there is
30 some acute or chronic process going on in the brain. So, the waves become more slow than you would expect, but also it can demonstrate areas of short-circuiting, what we call spikes and sharp waves. These indicate a temporary
35 interruption of the normal rhythmic electrical activity.

So, we look at EEGs for basically two plain things: (1) to see the normality of the background rhythm for the continuous functioning of the brain; but we also look for
40 changes that are consistent with an epileptic process going on.

Q. So, when you conduct an EEG test, is it possible to locate areas of possible damage to the brain?

45 A. It is.

Q. In this case was it identified that Patrick had damage to the occipital lobes, being the back part?

50 A. I think the CAT scan was more indicative of changes there. The EEGs demonstrated changes in multiple areas of the brain, not just in the occipital area. It was the CAT scan, I think, that localised things more occipitally.

Q. Were you concerned to conduct a multitude of tests to try to determine the cause of damage?

55 A. We certainly were, on the basis of Patrick's own situation, but on the basis I was aware that he had a sibling who had already died, so we considered, in our minds, the possibility that there could be some disorder

running through the family that had produced abnormalities within both children.

5 We did an extremely exhaustive system of testing at that stage. We looked at a number of markers in the body for abnormalities of biochemical pathways. In other words, the body's chemistry functions on a system whereby chemicals are broken down into enzymes by another chemical and so on. So, there are numerous chemical
10 pathways in the body and there is a whole range of inherited chemical metabolic disorders that are known to mankind.

15 By looking at the chemicals in the urine, we can see whether there is any increased amount of certain substances that can give us a clue to a chemical abnormality in the body, but also we look - particularly, we send blood to the Adelaide Children's Hospital, which is the reference laboratory in this country, and overseas
20 also for other disorders that are called neurodegenerative diseases, and these are conditions where the enzyme deficiencies exist in the brain. As a consequence of a deficiency, or absence of such an enzyme, substances can build up to abnormal levels within the brain and result in
25 dysfunction.

We also did a rectal biopsy. By looking at the lining in the membrane, lining in the rectum, it is one place in the body where nerve cells happen to be contained as well as
30 outside the brain, so we looked at that rectal biopsy and we had it specially tested in Sydney, at the Prince of Wales Hospital in Sydney, to see whether any neurones or nerve cells appeared abnormal. This often can be a clue that there is some abnormal, inherited thing going on.
35 That was negative.

We also had white cells stained for a similar process, to see if there were what we called occlusions. Again, that was all negative.
40

We did all those tests that were available in 1990 at our disposal to look for inherited diseases that might have brought about neurological abnormalities.

45 Q. Did you find any inherited disease?
A. No, we found absolutely none.

Q. Did you ever find out how Patrick suffered that damage to his brain?
50 A. We never had any absolute explanation for that.

Q. Was that damage to Patrick's brain consistent with him having suffered from a catastrophic asphyxiating event from unknown causes?
55 A. Absolutely.

Q. If there is such damage to the brain, can that damage in turn cause seizures to develop within a few days?

A. Yes. It's a very typical sort of story that a child, who's suffered some asphyxial damage to the brain, may then, over the next few days and weeks, develop progressive change within the brain that produces
5 seizures. So, it is quite common that, although the child having suffered such an event and survived, it may not have seizures initially. It's quite common to find that further down the road they may have seizures.

10 In Patrick's case it became apparent, further down the line, that he had lost visual function. That is, again, something I have seen in a number of situations, where children have suffered various asphyxial events and
15 subsequently developed visual problems. I believe that is because the visual part of the brain is extraordinarily sensitive to lack of oxygen. It is one part of the brain that, following oxygen deprivation, may show malfunction - perhaps even in an isolated fashion.

20 Subsequently, development of his seizures and the progressive changes on the EEG, electroencephalogram, and the changes on the CAT scan, which became progressive over time too - I think that was all quite in keeping with his
25 having suffered an asphyxial event at the beginning of that, and then evolved over time.

Q. Can you explain to us why it is that the seizures would normally happen a few days after the catastrophic asphyxiating event?

30 A. Yeah, well, it's not clearly understood. I mean, there is a lot of swelling that goes on in the brain as a consequence of asphyxia. That may not reach its maximum until the second, third or fourth day.

35 Also, we know that scarring can occur as a result of lack of oxygen, what we call gliosis, and the development of that scarring may result in an irritation of the normal
40 electrical activity of the brain and then produce seizures, but it is not uncommon to find that there is a gap, really, between the event and then the development of seizures.

Q. If the seizures are repeated, is that then a condition of epilepsy?

45 A. Yes. Epilepsy, by definition, is the situation of recurring non-febrile seizures.

Q. Did you again see Patrick on 13 February 1991 at about 10.30am at the Mater Hospital in Newcastle?

50 A. I did.

Q. Did it become clear to you that Patrick had died and that there was no point in continuing further resuscitation of him?

55 A. That's correct.

Q. Did you discuss that with Mr and Mrs Folbigg?

A. Yes, I did, I did, at the time, in the casualty

department, as I remember, did discuss it with Patrick's parents, and indicated that I thought he was already dead and that it was futile to continue resuscitation attempts.

5 Q. Did they agree to you stopping those resuscitation attempts?

A. Yes, they did. They did.

10 Q. When Patrick was being resuscitated at the hospital, did you, in fact, examine him?

A. Yes, I saw him during that episode.

Q. What did you observe when you examined him at that point?

15 A. He was quite lifeless; quite unresponsive. He had no spontaneous breathing. He had no cardiac beat at all. He was a somewhat pale colour, as I recall. He was still - his body was still warm. I thought he was dead, although I thought the warmth in his body indicated that it was a
20 fairly recent occurrence.

Q. Was his appearance consistent with his having suffered a recent catastrophic asphyxiating event from an unknown cause?

25 A. Yes, it certainly could have been.

Q. Did you, accordingly, list asphyxia due to airway obstruction on Patrick's death certificate as a condition leading directly to his death?

30 A. Yes, I did.

Q. Did you know specifically what had caused that asphyxiation?

35 A. No. I had no specific knowledge at that stage.

Q. Did you ever conclusively find what caused that asphyxiation?

40 A. No, we didn't. The post-mortem certainly didn't help us. There was no evidence of the things that might be associated with asphyxiation, such as vomit. Sometimes epileptic patients vomit and it gets into their lungs and causes asphyxiation. Sometimes their airways become swollen; things like that. No, post-mortem did not reveal
45 any cause as to the event.

Q. In the absence of knowing what caused Patrick's asphyxiation, did you form theories as to what could have caused asphyxiation?

50 A. Yes. I felt it was quite possible that he had had an epileptic seizure.

Q. Did you know back then that Patrick, in the months prior to his death, had suffered epilepsy?

55 A. Yes. I had been involved in the treatment of his epilepsy during those months, yes.

Q. With that knowledge, did you think back then that Patrick could have experienced an epileptic fit which

resulted in obstruction of his airway?

A. Yes, I did.

5 Q. Also, with that knowledge, did you think that an epileptic fit could have resulted in cardiac arrest and cerebral anoxia; in other words, lack of oxygen to the brain?

A. Yes, I did.

10 Q. In the absence of any other findings medically of what caused the asphyxia, did you list on the death certificate of Patrick that epileptic fits gave rise to Patrick's asphyxia?

A. Yes, I did.

15

Q. That was a theory at that time?

A. That was a theory at that time of his death, in advance of the knowledge of the post-mortem and in advance of other knowledge as well.

20

Q. (Shown document) Do you recognise that as a copy of the death certificate which you signed for Patrick?

A. That is true, yes.

25

MFI #18 DEATH CERTIFICATE OF PATRICK FOLBIGG.

Q. Can I show you another set of documents (shown)? I have just shown you MFI 14. Do you recognise that folder as containing the hospital records in respect of Patrick?

30

A. That is true.

Q. That is for his first admission?

A. Yes.

35

Q. Where he was treated on 18 October 1990 and subsequently, and then later when he was admitted upon death?

A. Yes. In fact, his first admission was when he was admitted at two weeks of age, to investigate the possibility of his having a problem associated with SIDS because of the death of his sibling. We had some investigations done quite early on, so that was the first admission.

40

45

Q. Were they sleep studies?

A. Sleep studies, barium swallows and so on.

Q. Are they routine tests performed when a sibling has died?

50

A. Yes.

Q. Did those tests, in respect of Patrick, reveal any abnormality which led doctors to think that he was at some risk?

55

A. No. Those tests were within normal limits.

Q. Now, do you recognise the later records in that folder as being the hospital records relevant to Patrick's

admission on 18 October 1990 and his subsequent admission when he died?

A. Yes, I believe they are a complete set of those records.

5

Q. Since Patrick's death, have you had time to consider those hospital records in respect of Patrick?

A. I have.

10

Q. Have you also had a chance to consider a post-mortem report in respect of Patrick?

A. Yes, I have.

15

Q. I will show you another document (shown).

(MFI 14 was returned to Crown Prosecutor Culver.)

20

Q. Do you recognise that document as a post-mortem report prepared in respect of Patrick?

A. Yes, I do.

25

Q. Can you see the author of that report?

A. That particular one is Dr Jan Bishop and Dr Singh-Khaira.

Q. Can you see the date of that report?

A. That report is dated 14 February 1991.

30

MFI #19 POST-MORTEM REPORT DATED 14/02/91 FOR PATRICK FOLBIGG

35

Q. Since Patrick's death, have you also had the opportunity to consider a histopathological report by Dr Khan?

A. I have.

40

Q. I show you a document (shown). Do you recognise that as the histopathological report?

A. I do.

Q. Can you see the date on that document?

A. That was dated 24 June 1991.

45

Q. Can you explain what a histopathological report actually reports on?

50

A. Yes. Pathology consists of a number of different parts; different aspects. First of all, there is a macroscopic or gross post-mortem, in which the pathologist looks at the tissues; forms opinions about the tissues at macroscopic or gross level, without necessarily cutting them.

55

The second part of the autopsy would be to actually do sections of the various organs and have a look at them to see if they show any abnormality, and then usually would proceed on to taking specimens, little parts, smaller parts, of individual organs and having them processed and

looked at under the microscope, to give a very much more precise look at the tissues.

Q. That's what has been done to create that report?

5 A. Yes, that's right. This is a report from this particular, very experienced neuropathologist, looking at sections I believe.

Q. You say that he is an experienced neuropathologist. Do you know his qualifications?

10 A. No, I don't formally know them, but I have had dealings with him over the years and I know he certainly is a respected and regarded neuropathologist. I do not know his formal qualifications.

15 MFI #20 HISTOPATHOLOGICAL REPORT.

Q. After considering all those documents and with your knowledge at the time of the tests conducted in respect of Patrick, are you still of the view that the direct cause of Patrick's first emergency trip to the hospital on 18 October 1990 was a catastrophic asphyxiating event of unknown cause?

20 A. Yes, I am.

Q. From your experience, are you able to say whether or not smothering could have been the cause of that asphyxiation?

25 A. I believe it could.

Q. After considering the hospital records and the post-mortem report and the histopathological report by Dr Khan, are you still of the view that the direct cause of Patrick's death later, on 13 February 1991, was a catastrophic asphyxiating event from unknown cause?

30 A. I believe it could have been.

Q. Why is it that you believe that?

40 A. The presentation at the time, at the time of his demise, I think, was in keeping with that, in that he had no breathing; no heart beat. I think that's in keeping with an asphyxial event.

45 The fact that we found absolutely no other cause at post-mortem to explain his death I think is in keeping with, consistent with, there having been an asphyxial event. There is certainly no other cause that was found that I know of at post-mortem that explained his actual death.

Q. From your experience, are you able to say whether or not smothering could have caused the asphyxiation at Patrick's death?

50 A. Yes, I believe it could have.

55 Q. Was there anything in the post-mortem report which points more to asphyxiation than any other cause for Patrick's death?

5 A. Yes. The changes on the histopathology within -
carried out by Dr Khan, had some fairly clear-cut changes
that I think are consistent with an asphyxial episode. He
believed that at the time. In particular, there are
things called laminar cortical necrosis, and also the
particular--

Q. Can I just ask you to explain laminar cortical
necrosis before we move on?

10 A. I am not a pathologist, but, basically, the nerve
cells in the brain are lined up in different layers, nine
or so layers, within the cerebral cortex. They form
laminae. A lamina is a layer. By examining the brain
under the microscope, you can look at the positioning of
15 the different nerve cells and say whether that was in the
lower layers or the superficial layers. Laminar necrosis
means - necrosis is the death of nerve cells or death of
any cells for that matter. Laminar necrosis is where the
death appeared to carry through in certain layers more so
20 than others.

Q. Is that typical of an asphyxiating event causing that?

A. I believe so. Totally so.

25 Q. I stopped you earlier. Could you please continue now?
What else in the post-mortem were you going to refer to as
pointing more to asphyxiation than any other cause of
death?

30 HIS HONOUR: Doctor, do you mind if I try to ask you to
speak more slowly and, Madam Crown, would you mind just
keeping control of the situation? This is all going very
fast.

35 WITNESS: It was also the areas of the brain that were
particularly affected at post-mortem, and the occipital
areas, which are the parts of the back of the brain.
That, it was felt, was consistent with asphyxial episodes.
That part of the brain is exquisitely sensitive to lack of
40 oxygen.

CROWN PROSECUTOR CULVER: Q. In your experience, in what
other sorts of asphyxiating events would you expect to see
this laminar cortical necrosis?

45 A. It could be any range of causes of asphyxia. I have
certainly seen it amongst patients who have had drowning
episodes and things like that. Obstruction to airways for
a range of causes. Suffocation from a range of causes
could do it.

50 Q. Can you explain the significance of Patrick's
blindness?

A. Yes. The blindness became progressively obvious
during his admissions after that first one in October.
55 Now, it is very hard to assess visual function in a very
young infant, but it really wasn't commented upon until, I
think, his third admission to hospital.

Now, that, I think, is in keeping with the sort of progressive change that can go on following an asphyxial event. Just as if, when people faint, if someone is standing upright and they faint through lack of oxygen being delivered to the brain, we find that quite often people will experience visual dulling and so on, as a very early sign, indicating that that part of the brain, the back part of the brain, the visual part of the brain, is very sensitive to lack of oxygen.

I think, similarly, when there is a catastrophic event that results in lack of circulating oxygen, we know that that part of the brain seems to suffer particularly. I have had patients, as I have said, who have had near drownings and other reasons for asphyxia who, in fact, have developed very major visual impairment as a consequence of that, although they did not have a lot of other physical signs to show it. So, it is a part of the brain that is very sensitive to lack of oxygen.

Q. Was there anything in Dr Khan's histopathological report from which you drew significance in considering the cause of Patrick's death?

A. May I just have another look at that report?

Q. Yes, I hand you MFI 20 (shown)?

A. There was also some calcium. There was some laying down of calcium in that part of the brain. We recognise that after damage, through lack of oxygen to parts of the brain, it is not uncommon for calcium to be deposited there in an abnormal fashion. There is not usually calcium within the brain. He commented on that. That was found there.

He commented that the distribution of the changes he found in the microscope slides was far more likely to be the result of an episode of cardiorespiratory arrest. He felt this was quite in keeping with the changes that one would see following cardiorespiratory arrest or asphyxia.

Q. So, does that strengthen your view that Patrick died from a catastrophic asphyxiating event?

A. Yes, but also more so that the original event was a catastrophic asphyxiating event.

Q. In terms of the asphyxiation that you say in your view caused Patrick's death, are you able to say whether or not smothering could have caused that asphyxiation to Patrick?

A. Yes, it could have.

Q. Now, again from your experience, are you able to say whether or not you would necessarily see signs that Patrick had been smothered as opposed to experiencing some other asphyxiating event?

A. No. In a child of that age I think it is quite possible that smothering could occur without any external visible signs.

Q. Having considered the hospital records, the post-mortem report, Dr Khan's histopathological report, are you still of the view that epileptic fits led to the asphyxiation which caused Patrick's death?

5 A. No, I am not of that conviction any more.

Q. Are you able to say whether there has been any other information, apart from the medical records we have just discussed, which has led you to reconsider your earlier indication in the death certificate that epileptic fits led to Patrick's asphyxiation?

10 OBJECTION (COOK). QUESTION NOT PRESSED.

15 Q. Now, from reading the hospital records, the post-mortem report and the histopathological report, are you able to exclude that Patrick had encephalitis?

A. Absolutely. I do not think there is any evidence that he ever had encephalitis.

20 Q. What is it that causes you to say absolutely there's no evidence in your opinion?

A. Encephalitis is an infection in the brain most commonly caused by viruses as opposed to meningitis, which is an inflammation of the surrounding of the brain, which is commonly caused by bacteria. So, with encephalitis, as I said, most likely due to virus, you expect to see a number of changes. Very commonly children, when they present with encephalitis, have a fever. Patrick didn't have a fever during that first admission in October until, I think, the second or third day.

30 More particularly, he did not have any changes on lumbar puncture. Lumbar puncture is the procedure whereby a needle is placed into the lower spine and fluid is drawn off. That fluid is in continuity with the brain. It is the same space, so, by sampling fluid down there, it is possible to know what is happening to the fluid around the brain.

40 Now, one expects to see, in encephalitis, inflammatory cells; what we call white cells in the spinal fluid. That is one of the hallmarks of encephalitis, to see inflammatory change. Patrick certainly, on the 18th, that first admission - I cannot remember the exact date - but that first admission--

45 Q. 18 October 1990?

A. --there were zero white cells in his spinal fluid. Subsequently it was repeated, I think, during his third admission, and again there were zero white cells, so I do not see any evidence of any form of encephalitis that we have.

55 I know that consideration was given to herpes simplex encephalitis. That - if I may explain, herpes simplex encephalitis is the most catastrophic encephalitis that humans suffer. It has a mortality rate, without

treatment, of somewhere between 80 or 90 per cent. It is just a totally disastrous condition. Neurologists fear that condition enormously.

5 We also know that the outcome from that condition is very much related to how early treatment can be initiated for that condition. So, it is policy, I think, fairly accepted policy nowadays, as we - or at least in the 1990s - we had no specific test for herpes simplex encephalitis.
10 There was no specific test for it. It was all to do with circumstantial evidence that it might have been. It was my policy, and I'm sure the policy of all my colleagues, if there is a vague hint of that condition, then it is better to offer the treatment for that condition and try
15 to establish a diagnosis further on down the line, if needs be.

Q. Was the EEG report taken on 18 October 1990 in respect of Patrick of a type that one would typically see if a
20 patient had suffered from herpes simplex encephalitis?
A. No. Absolutely not. In fact, there is a fairly specific EEG pattern that one sees in herpes simplex encephalitis.

Q. Did Patrick have that EEG pattern?
25 A. He certainly did not. He had a normal EEG at presentation. Even the subsequent EEGs done during that particular admission - at no stage did they show the classical changes of herpes simplex encephalitis.
30

Q. Can I show you a document, MFI 16 (shown)? Is that the subsequent EEG report, dated 5 November 1990, from which you conclude that the pattern of Patrick's EEGs were not at all typical of herpes simplex encephalitis?
35 A. Yes.

(MFI 16 was returned to Crown Prosecutor Culver.)

Q. Are you able to say whether or not the post-mortem findings of Patrick's brain, including the distribution of lesions, were unusual for herpes simplex encephalitis?
40 A. Yes, they were. They were not of the type one would normally see. In fact, Dr Khan made the comment that the
45 distribution of the lesions is unusual for herpes simplex encephalitis.

There were also some clinical features, I think, during his illness, that were also totally against the concept of
50 herpes simplex encephalitis. 95 per cent of children, people presenting with that condition, have a fever. He did not have that.

We subsequently looked for antibodies against herpes
55 simplex, and they were done on two successive occasions, I think, about two weeks apart, and they were negative on both occasions. I would have expected, if he had had herpes simplex encephalitis, they would have demonstrated

a positive result on one of those two occasions.

5 Q. Can you draw any significance from the fact that the seizures in Patrick were not typical of focal seizures; that is, localised seizures in the brain?

10 A. Yes. It is quite common in herpes simplex encephalitis that they will have focal seizures because the virus tends to migrate into a particular part of the brain. One theory is that it travels up from the nose into the temporal lobe.

Q. You are pointing there. The jury cannot see that side of your face?

15 A. The brain has a number of different lobes it is broken up into. The temporal lobe is the one in this part of the brain (witness indicated) and is the temple, as we know the temple. Now, the temporal lobe is closely connected to a pathway from the nose. In herpes simplex
20 encephalitis, it is quite frequent to find that the virus seems to lodge in the temporal lobe, so we expect to see changes. We see the changes on the CAT scan. We seem to see the changes on the EEG, but also, clinically, it is not uncommon to find that the seizures are generated from that part of the brain. So, the part of the body which is
25 appropriate to that part of the brain has the seizures. So, seizures can particularly involve the face and the arm. So, if I was to describe perhaps a typical presentation, it would be that they would have some focal seizures in and around that area.

30 Q. So, putting all those things together, the test results and Patrick's clinical presentation, you were able to exclude herpes encephalitis as the cause of Patrick's seizures?

35 A. Absolutely.

Q. With all of the information that you have now, the benefit of hindsight with hospital records, the
40 post-mortem, the histopathological report by Dr Khan, would you today sign a death certificate with a specified cause of death for Patrick?

A. No.

Q. Why not?

45 A. We couldn't demonstrate a particular cause for death. I would have been - obviously with hindsight, I mean the subsequent events--

OBJECTION (COOK).

50

CROWN PROSECUTOR CULVER: Thank you very much.

55 HIS HONOUR: Ladies and gentlemen, I have had some discussions with counsel this morning. It is desirable that the cross-examination of Dr Wilkinson be deferred until a later day in the trial. I am going to let the doctor go now. You might expect to see him again at a later stage.

Thank you for your attendance today and thank you for your preparedness to come back later on. You are excused for the time being.

5

<WITNESS STOOD DOWN

<MURRAY HETHERINGTON(12.41PM)
AFFIRMED AND EXAMINED

10

CROWN PROSECUTOR: Q. Would you please tell the Court your full name and your place of work?

A. Murray John Hetherington. Toronto Ambulance Station in Toronto.

15

Q. Because of the rain, speak right into the microphone. Get close to it so everybody can hear you.

You were an ambulance officer in February of 1991?

20

A. That's correct.

Q. At about 10.02 that day, I think you were dispatched to 36 Rawson Street, Mayfield, in relation to a baby boy, Patrick Folbigg, who was possibly deceased?

25

A. That's correct.

Q. You attended at that house, together with other officers, namely Officers Coyle and Mullins?

30

A. That is correct.

Q. I only want to ask you about one particular area. Did you see any sign at all that the baby was breathing when you got to the house?

35

A. No, I did not.

Q. Can you categorically state one way or the other whether the baby was breathing when you saw him?

A. He was categorically not breathing.

40

<NO CROSS-EXAMINATION

<WITNESS RETIRED AND EXCUSED

45

CROWN PROSECUTOR: The next thing to be done, trying to catch up with where we should be, is the re-examination of Mr Craig Folbigg.

<CRAIG GIBSON FOLBIGG12.43PM)
ON FORMER OATH

50

<RE-EXAMINATION

CROWN PROSECUTOR: Q. For the record, please, your name?

55

A. Craig Gibson Folbigg.

Q. You previously gave evidence in this matter?

A. I have.

Q. I would like to ask you some questions that arise out of the cross-examination by my learned friend, Mr Zahra. Firstly, Mr Zahra asked you a great number of questions about lies that you told to the police?

5 A. He did.

Q. I would like to ask you some questions about those lies. Now, firstly, you told the Court that the first time that you spoke to the police was when Detective Sergeant Bernie Ryan came to your home on, I think it was, 14

10 September 1999?

A. That's correct.

Q. Now, when you spoke to Detective Ryan at your home, did you tell him the truth, or did you tell him lies?

15 A. Told him the truth.

Q. Sorry, it is 14 May. You told him the truth?

20 A. I did.

Q. On that day, was there any written statement at all?

A. No.

Q. Was the next contact that you had with Detective Ryan on 19 May 1999, when you went to the police station?

25 A. Yes.

Q. On that occasion did you do the first part of a typewritten statement?

30 A. I did.

Q. Was that a statement that Detective Ryan was typing on a word processing computer?

35 A. Yes.

Q. On that occasion, did you tell Detective Ryan the truth or lies or both?

A. The truth.

Q. Was the next occasion when you went to see and speak to Detective Ryan on 23 May 1999?

40 A. Yes, it was.

Q. I think you have told the Court that in the interim you had had some contact with your wife Kathleen?

45 A. Yes, I - I - yes.

Q. When you went to the police station to see Detective Ryan on 23 May, did you tell him the truth or lies or some truth and some lies?

50 A. Some truth and some lies.

Q. Why was it that on 23 May you told Detective Ryan some lies?

55 A. It stemmed from the Saturday night; conversations that I had had with Kathy. I had actually made an accusation to Kathy and from that - from talking things over with Kathy and feeling basically like a mongrel--

Q. "Like a mongrel" did you say?

A. Mongrel.

5 Q. Yes.

A. I went back to Bernie Ryan and asked Bernie Ryan to reverse back through everything, so we could change it.

Q. Why did you feel like a mongrel?

10 A. Kathy had said to me, you know, "How could you say those things about me. You know I loved them" and, you know, "you saw how much I loved those babies", and stuff, and we just talked about life together and parenting together, and Kathy had said, you know, "You've got to tell them the truth. You've got to tell them. You know I loved those kids" and, yeah, I had seen how she had loved them. So, when I went back to Bernie, I asked him to rewind back through his machine, and told him what I wanted him to change.

15

Q. Did you know at the time that you were telling him lies?

A. Yes, [STRIKEOUT BEGINS]

20

[STRIKEOUT ENDS].

OBJECTION.

25

HIS HONOUR: What is the relevance of that?

CROWN PROSECUTOR: I do not press it.

30

HIS HONOUR: The answer before last will be struck out after the word "yes" and the following question and answer will be struck out.

35

CROWN PROSECUTOR: Q. Was the next occasion that you had significant contact with Detective Ryan on 19 April 2001, when he conducted a recorded - tape-recorded - interview with you?

40

A. Yes, it was.

45

Q. I think you said in evidence to Mr Zahra that that was an occasion on which Detective Ryan had arrested you and told you that you would be charged?

A. Yes.

50

Q. Did he tell you with what charge you might be charged?

A. Yes, he did.

Q. What was that?

A. Hindering an investigation.

55

Q. What did you understand that to mean?

A. That he knew that I had lied.

OBJECTION. QUESTION PRESSED.

HIS HONOUR: The question and the answer may stand.

5 CROWN PROSECUTOR: Q. Did he tell you that you might be charged before, during or after that recorded interview?

A. He told me when he arrested me.

10 Q. Before the interview?

A. Before the interview.

Q. How did that make you feel?

A. Very frightened.

15 Q. What were you frightened of?

A. My name being associated as a criminal. Possible gaol. I didn't know what the charge carried; only that it was serious.

20 Q. Did that cause any change in your attitude?

A. Yes.

Q. What sort of a change?

A. I told the truth.

25 Q. Did you tell the truth to Detective Ryan in that recorded interview?

A. As best I could.

30 Q. I would like to take you to some of the specific answers that you gave to Mr Zahra. Firstly, on the first day that you were cross-examined, you told the Court that after you had read the diaries, certain things about your life had become clear. Do you recall saying that?

A. I do.

35 Q. Which diaries were you referring to?

A. The diary I gave Detective Ryan at that time was a little greeny, motley-coloured one.

40 Q. Was that this one (shown)?

A. No.

Q. Was it this one (shown)?

A. Yes.

45 CROWN PROSECUTOR: He is referring to MFI 5.

Q. That was the diary that you had given to Detective Ryan when you first had contact with him?

50 A. Yes.

Q. What was it that became clear about your life after you had read that diary?

A. That everything wasn't how it appeared.

55 Q. You have told the Court that you read some entries in that diary?

A. Some.

Q. Prior to giving it to Detective Ryan?

A. Some, yes.

5 Q. Did those entries relate at all to your wife's attitude to the children?

A. Yes.

10 Q. Those things that you read about her attitude to the children, were those things that she had ever expressed to you before then?

A. No, never.

15 Q. Were those attitudes that you read in the diary anything that you had seen before or experienced before or witnessed before in Kathleen prior to reading those diary entries?

A. No.

20 Q. Is that what you were referring to when you said that there were certain things about your life that became clear?

A. Yes.

25 HIS HONOUR: I will have a note made that the diary which was shown to Mr Folbigg which turned out not to be the one he had read was exhibit J. It was after that that he was shown the diary marked 5 for identification.

30 CROWN PROSECUTOR: Q. In relation to lying to the police, Mr Zahra asked you, or suggested to you, that you didn't mind lying to the police, to which you responded "I did mind but I couldn't do anything about it". Why couldn't you do anything about it?

35 A. I was - basically I was trapped. I had told a lie. I had told a lot of lies; changed a lot of stuff and - Kathy and I resumed our relationship. What could I do if I went back? It was dysfunctional. If I went back to change it back, it just would have painted me as vindictive and
40 vicious, so I was pretty much just trapped with it.

Q. It was also suggested to you by Mr Zahra that you were prepared to say whatever you believed was going to suit your objectives, even if it was lying to the police, and
45 you said that you would have done, I'm not sure whether you said anything or everything, to keep peace and harmony at home?

A. Yes.

50 Q. What did you mean by that?

A. I pretty much don't like arguing. It doesn't really get you anywhere. Most of the time you end up coming out the bad guy, so I used to head off to the garage, and so a lot of the time at home you just said things Kathy wanted
55 to hear, so you can get to the garage; just get out of the way.

Q. After Laura's death, during the time in May 1999 that

you were having contact with Detective Sergeant Ryan, what was the situation between you and Kathy regarding that?

A. I'm sorry, I didn't understand the question.

5 Q. In May of 1999, after Laura had died, what was the relationship between you and Kathy like in terms of your trying to keep peace and harmony at home?

A. Pretty much the same as it always had been.

10 Q. How did she treat you?

A. In May 1999?

Q. Yes.

15 A. Not too bad, because we had just got back together.

Q. I'm sorry?

A. Not too bad because we had just got back together.

Q. After that?

20 A. It fell apart after that.

Q. Did she dominate you?

A. Yes, she did.

25 Q. In what way would she dominate you?

A. She would berate me; call me weak; tell me how I pined over the kids; how I wouldn't move on; how I liked to just dig big black holes and bury myself in them.

30 Q. How did that make you feel?

A. Terrible. Terrible.

Q. You were asked some questions by Mr Zahra about a six page letter that Kathy gave you, I think it was two weeks before Laura died. Do you recall those questions?

35 A. I do.

Q. You told the Court that you had typed up a typewritten response to her but when you came to reread it you were not able to bring yourself to give it to her. Do you recall that?

40 A. I do.

Q. In that letter that Kathy gave you, she expressed some things about not coping with Laura?

45 A. Yes.

Q. Were you aware before she gave you that letter that she was not coping with Laura?

50 A. No.

Q. After that, did you take steps to try and help her cope with Laura?

55 A. I had a go. I did the best I could.

Q. What did you do?

A. I tried to knock off work as soon as I could, like of a day. It's pretty hard doing what I do. You can't just

shut the gates at 5 and go, but I tried.

5 I spent a hell of a lot more time with Laura. Kathy included an extra gym class into what she was doing, which was great, because it gave me Laura for Sunday afternoons.

10 Q. You were also asked questions by Mr Zahra about the fact that you had seen Kathy openly writing in diaries over the years and that she used to just leave the diaries lying around?

A. Yes.

15 Q. You have told the Court in your evidence-in-chief that you had read an entry in a diary, an entry that was written on the day that Patrick was born. Do you recall that?

A. Yes.

20 Q. Did you ever read any other diary of Kathy's after that, up until the time that she left the home after Laura's death? Do you understand the question?

A. I do. After - I read a diary which caused me to ring Carol and ask Carol to come and give me a hand.

25 Q. That is when Patrick was very sick?

A. Yes.

30 Q. When I say "sick", that is not entirely correct. When Patrick needed a lot of care because of his blindness and epilepsy?

A. Yes.

35 Q. That is when you read an entry in the diary that you told us related to her inability to cope and her intention to leave?

A. Yes.

40 Q. Did you read any other diaries of hers after that but before she left?

A. Never.

Q. Why was that?

45 A. After Carol came over and helped us out, sorted things out, Kathy said she couldn't believe that; where do I get off; she couldn't believe that I would have read her diary. I said "I didn't know what was going on. You wouldn't talk to me and I wouldn't talk to you, so I read your diary, because you seem to tell it everything", and she made me promise that I would never read another one of her diaries, so I never did.

50 Q. Did you promise her?

A. I promised.

55 Q. Did you ever read any more of her diaries up until the time you left the matrimonial home up until Laura died?

A. Never, but I wish I had.

Q. In one of the answers that you gave, when Mr Zahra was asking you about your main statement for the police made on 19 and 23 May 1999, you said that you had kept it in the bottom of your budgie cage?

5 A. Yes, I said that.

Q. Did you literally keep your statement in the bottom of your budgie cage?

10 A. No, I still have that statement.

Q. So, why did you say that?

A. Basically because that's about what it means to me; that statement. It's only good enough to be on the bottom of the budgie cage.

15 Q. Why was it good enough to be at the bottom of your budgie cage in your view?

A. Because it was all lies.

20 Q. Is that what you were trying to convey?

A. That's what I tried to convey.

Q. You were also asked about a conversation that was in one of the tapes that was read to you by Mr Zahra. It was a tape during a conversation, I think, between you and Kathy, in which you said something about hiring Harry Miller?

25

A. Yes.

30 Q. Are you able to say why you said that?

A. It was a flippant, throwaway remark, meant to add levity to an otherwise tenseful situation.

Q. Did you really intend to hire Harry Miller or try to hire Harry Miller?

35

A. I wouldn't know how to, even if I fell over him. I never intended to.

Q. You were also asked about a conversation you had with Kathy where you, in essence, were saying to her that the allegation that she may be responsible for the death of the children was as preposterous as if you had been responsible for the deaths of the children. Do you recall that conversation being read to you?

40

45 A. I do.

Q. Why did you say that to Kathy?

A. To try to distress her at that time and to get a reaction from her.

50

Q. What sort of reaction?

A. I really did think I would get a shocked reaction or - I don't know what the word for it is, but a shocked reaction, and I didn't. I got the shock reaction from my boss, but I didn't get it from her.

55

Q. You were asked some questions by Mr Zahra about what had happened to Sarah, your third child, on the day before

her death and the day of her death. Can you recall that it was suggested to you that you had not told the police that you had seen your wife, in effect, hitting Sarah on the backside. Do you recall that?

5 A. No, I'm sorry, I don't recall. I don't recall that question.

10 Q. Do you recall that you gave evidence that one of the things that you saw your wife do was hitting Sarah on the backside?

A. Yes, I recall that.

15 Q. On 25 October last year did you have a conference with myself, my learned junior, Miss Culver, and our instructing solicitor, Miss Bagley?

A. Yes, I did.

20 Q. Did you say words to this effect during that conference: "Sarah would hate going to bed. I watched 22 nieces grow up. Never saw sisters" - "she would trap one arm behind her and sit there. The day Sarah died"--

OBJECTION.

25 CROWN PROSECUTOR: I will put it in a more succinct way. I think that is the nature of the objection.

Q. Did you tell us the day that Sarah died that your wife had hit the child?

30 A. I think what I was trying to convey and I tried--

HIS HONOUR: Q. Just answer the question please?

A. Yes.

35 Q. Did you say that or did you not?

A. Yes.

CROWN PROSECUTOR: Q. Did you also say to us during that same conference that your wife would force-feed Sarah?

40 A. Yes.

Q. One of the things that you were asked about was a statement by you, I cannot remember to whom, that you used to use Laura to sell cars. Do you recall that?

45 A. Yes.

Q. What did you mean by that?

50 A. When people come in to the car yard you, as I expressed to Mr Zahra, draw on your life's experiences. I recall many times where I would explain to people how Laura's car seat fitted in this car, or it was easy to get Laura out of that car, or you could pack in all the stuff you take, because I was a father and I was proud of the fact I was a father, and a lot of times when people want to change their motor car is impending parenthood or
55 extensions of their family, or what other reasons. That's what I meant by that.

Q. Do you recall that you were asked some questions by Mr Zahra about Friday, 26 February 1999, and it was suggested to you that your wife had not gone out that night and you said that she had?

5 A. Yes.

Q. That being the Friday before Laura died?

A. Yes.

10 Q. Would you have a look at this (shown diary)? Do you recognise that book?

A. Yes.

Q. What is that book?

15 A. It was Kathy's little pocket diary.

Q. For 1999?

A. For 1999.

20 Q. Would you have a look at the entry for 26 February 1999?

A. Yes.

Q. Do you recognise that writing?

25 A. Yes, it's Kathy's writing.

Q. What does it say?

A. "Girls' night out".

30 MFI #21 1999 DIARY OF ACCUSED

EXHIBIT #S PHOTOCOPY OF DIARY ENTRY OF ACCUSED FOR 26 FEBRUARY 1999 TENDERED, ADMITTED WITHOUT OBJECTION

35 Q. You were asked some questions by Mr Zahra about whether your wife was inconsolable after Laura died?

A. Yes.

Q. You said it didn't appear that way?

40 A. It didn't.

Q. Do you recall the circumstances of Laura's wake?

A. I do.

45 Q. Would you tell the Court about that?

A. It was the day of Laura's funeral. Everybody gathered outside of the church. We had been taken down there by Kathy's sister - adopted sister and niece. They were taking us back home. There were a lot of people going
50 back up to the house.

We got in the car and it sort of kind of started then. We got in the car and Kathy said - well, you have to excuse me- Kathy said "Well thank fuck that's over. Now I can
55 get on with things." I just, at the time, thought it just means whatever is going on back at home.

We got back home and I went through the house. The

majority of my family was outside, on the back pool area, so I went out to be with them.

5 Eventually I came back inside and Kathy was laughing and talking with the girls from the gym. They were just talking about memories and stuff, and part of those memories was about, like, us meeting and growing up, I guess, because I recall being made fun of over a white suit that I had owned once.

10 I didn't really want to take much more of it, so I left them and sat in the lounge room with all the old people. So, yeah, I remember the wake.

15 CROWN PROSECUTOR: There is one further question I wish to ask which does not arise from cross-examination. It is a very simple question.

20 HIS HONOUR: If it is going to be short ask it now. I may give Mr Zahra leave to cross-examine further of course.

CROWN PROSECUTOR: Yes.

25 Q. (By leave) Did either you or Kathy smoke in the presence of the children in any confined spaces during the time that they were alive?

30 A. I've always been a smoker. Kathy never smoked. I think she had had the odd puff. That was about it. I've always been a smoker. I smoked all the way through, until we bought our house at Mayfield and Kathy fell pregnant with Caleb, and she asked me if I would not smoke in the house because she didn't like it and had never liked it, so I never smoked in the house again, none of the houses we ever owned, and I never smoked around my children in a
35 confined space, no.

ZAHRA: I have nothing arising out of that.

40 <WITNESS RETIRED

JURY EXCUSED

LUNCHEON ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour, I must admit we were expecting the proceedings in relation to Dr Wilkinson to go much more slowly today. As a result, we don't have any other live witnesses here today.

10 However, I can inform your Honour that, as a result of the evidence of Dr Dezordi and Dr Wilkinson, subject to cross-examination of Dr Wilkinson, it may well be that there are four other doctors that we don't need to call. So, it might, in fact, have resulted in a considerable
15 saving of time, and my learned friend is of the view that we are on schedule in terms of his estimate of the length of the trial.

20 What I propose to do this afternoon is - there are a few things to be read out, and then to ask your Honour to adjourn. I have a statement of a police officer, I have the post-mortem report of Dr Cummings in relation to Caleb, and there is a statement, exhibit O, which is
25 already in evidence, which is a statement made by the accused to her solicitor. I have copies, but I think it might be suitable for it to be read out.

HIS HONOUR: I can read it out if that is what is
30 desired. Are you ready for the jury then, gentlemen?

CROWN PROSECUTOR: Yes.

HIS HONOUR: Mr Crown, would you mind saying in the
35 presence of the jury what you have just told me?

CROWN PROSECUTOR: Yes, your Honour.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Your Honour, the evidence of Dr
Wilkinson this morning went a lot quicker than we thought
it would, particularly in light of the fact that his
cross-examination hasn't taken place. As a result, we
don't have any live witnesses here for the remainder of
10 today. We will have a considerable number tomorrow. We
have some written documents that we can read out for a
little while this afternoon, and then we will be asking
your Honour to adjourn for the day.

15 HIS HONOUR: Thank you, Mr Crown. I understood from
something that you said to me earlier that, as a result of
the way the evidence has gone and things that have passed
between yourself and Mr Zahra, it won't be necessary to
call some of the witnesses that you thought?

20 CROWN PROSECUTOR: Yes, your Honour. As a result of the
evidence thus far, we are fairly confident that there are
some witnesses that we will not have to call, and I think
we both feel that we are on schedule. We have slightly
25 differing estimates of how long the trial is going to
last, but both of us think we are on schedule.

HIS HONOUR: Thank you, Mr Crown.

30 CROWN PROSECUTOR: Your Honour, the first document that I
tender is a statement of Senior Constable Kerry Bryant of
the Mayfield police. It is not dated. It relates to the
death of Caleb Folbigg.

35 ZAHRA: I have no objection, your Honour.

HIS HONOUR: The statement will be exhibit T.

40 EXHIBIT #T STATEMENT OF SENIOR CONSTABLE KERRY BRYANT
TENDERED, ADMITTED WITHOUT OBJECTION. READ TO JURY.

HIS HONOUR: Yes, Mr Crown?

45 CROWN PROSECUTOR: Yes, I next tender, again in relation
to Caleb, a copy of the post-mortem report under the
Coroner's Act 1980 of the post-mortem examination
conducted by Dr Cummings who is now deceased, together
with a toxicology report dated - it looks like - the date
is a bit obscure - 1 May 1989 from Rosalind Burgess of the
50 Department of Health.

HIS HONOUR: The two reports together, the medical report
of Dr Cummings and the toxicology report concerning Caleb,
are exhibit U.

55 EXHIBIT #U THREE PAGE MEDICAL REPORT OF DR CUMMINGS OF
09/05/89 AND TOXICOLOGY REPORT OF R E BURGESS OF 01/05/89
CONCERNING CALEB TENDERED, ADMITTED WITHOUT OBJECTION.

READ TO JURY.

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Your Honour, I think that that completes the evidence in relation to the birth, life and death of Caleb.

10 Your Honour will recall that, during the evidence of Mr Craig Folbigg, we tendered a document which became exhibit O. It was a document in the accused's handwriting and Mr Folbigg gave evidence that he and his wife had been advised to get legal advice when the police made it obvious that they were investigating Kathy as part of her children's death. They met with the solicitor and the solicitor asked Kathy to write an account of the day Laura had died whilst it was still fresh in her mind. Exhibit O went into evidence.

20 Your Honour, some of it is difficult to read because, on the photocopy that has gone into evidence, the photocopy that I have got, both the left and the right side of the pages are slightly cut off and some of the words are difficult to make out.

25 With your Honour's permission, might I attempt to read out my reading of it? I have been assisted by a copy from the defence, which has still a little bit cut off, but not as much.

30 HIS HONOUR: Yes, please, Mr Crown?

CROWN PROSECUTOR: It says: "Statement Kathy Folbigg re 1 March 1999". Then, in brackets, "didn't mention argument in interview", and then there is a word just above that that I can't make out.

HIS HONOUR: It is either "forget" or "forgot".

40 CROWN PROSECUTOR: Yes, it could be, "I forget" or "forgot". Then it proceeds:

45 "Morning was regular. Breakfast routine commenced at around 7am while Craig was showering."

It actually says "showing".

50 "This morning have her. He didn't get into shower. Was playing and talking with Laura while she was in high chair attempting breakfast. I remember having words with Craig, stating that she doesn't behave like this when he's not around, telling him to go, get ready for work. I had relented and let Laura out of her chair and Craig was carrying her.

I remember raising my voice and seeing Laura's

face. She was a little frightened. Craig and I rarely argued with loud voices, never in front of her.

5 I remember Craig looking at me and saying I looked like I would like to punch someone. I interpreted that he was suggesting I hurt Laura. I said, 'If I punched anyone it would be him, never her'.

10 We calmed down. I think I said I'd see her later at work. Rest of the morning went smoothly. I showered and dressed while Laura watched her favorite video, Dumbo. Packed for gym, left house approximately 8.30, 8.45am. Class started 9am.

15 Laura had a cold and cough, but otherwise was her usual self."

20 Then a bracket. I think it says:

25 "(Had forgotten to mention that in interview.) (Also hadn't recounted argument, had forgotten about it also.)

30 Class finished 10.30am. Didn't stay for coffee with ladies downstairs. Had decided to see Craig, apologise and show him everything was okay. Went there - Teasdales - from gym. Came home. Laura fell asleep in back of car, as she usually always did. Got her at"

35 - sorry, it says:

"Got her out, carried her over my right shoulder. She's a little big now - was. Took shoes off as I was going up hallway. Don't remember what she was wearing.

40 Placed her in bed on her side, left side facing"

- it could be "out" -

45 "into room. Have always done that. Conscious of airways around her. Placed throw rug, bluish with teddy bears, over her. Once she was comfortable left.

50 Semi closed door, so if she stirred she just didn't"

- it could be -

55 "get up - get up and wander out. Went about my chores. Don't remember what. If I got out of gym clothes. Know I didn't shower, rarely did if was alone in house with her. Worried I

wouldn't hear her. Usually waited till she was up and would come, be in the room with me while showering.

5 Went out on back verandah to check on dog, have
one that's scapes regularly. Had monitor with
me, had put in on bench and" something "on
10 verandah. Went out back door to" something
"dog. When she responded, returned to verandah,
heard over monitor that Laura had coughed.
Didn't go in straight away. Fixed dog's bed,
played with dog, cleaned up verandah. Time from
cough to went in to check approx 10-15 minutes.
15 Wish I had have straight away. (Had forgotten
cough and cold in interview).

When I opened door, noticed she was on her back.
Don't remember if cover was on or off. Rushed
20 over to check only because I worry when she's on
her back. Have always worried. Was thinking
that all I need to do was roll her back over.
Always did that too.

25 Looked at her, she was pale, lips slightly blue,
but not too bad and she was cool to touch, but
not cold like one of the others.

I immediately scooped her up after calling her
30 name and trying get a response of some kind.

I ran out to breakfast bar, placed her there.
We were taught that if CPR was needed it was to
be done on a firm surface.

35 I rang ambulance while doing breathing, CPR and
checked heartbeat. None immediately. Started
heart massage. Don't remember times,
conversations or even what procedure CPR is
40 anymore. I was on auto pilot. Ambulance
arrived, two officers. Don't remember anything
else after that at all."

Your Honour, we have copies of that for the jury and one
45 for your Honour. I hope that, having read it out, it will
assist them to hopefully make it out.

(Copies distributed to the jury.)

50 CROWN PROSECUTOR: Your Honour, I have a copy here which
appears to be the best copy that we have got. Might the
exhibit be replaced with this one.

HIS HONOUR: Yes.

55 CROWN PROSECUTOR: Finally, your Honour, we have that
single page from the 1999 diary containing the Friday, 26
February entry. Might I hand that up to your Honour as
the exhibit. It is the exhibit that comes from MFI 21.

That brings us to the end of the evidence we have today,
your Honour.

5 HIS HONOUR: Thank you, Mr Crown. A copy of the diary
entry is exhibit S.

10 EXHIBIT #S COPY OF DIARY ENTRY TENDERED, ADMITTED WITHOUT
OBJECTION.

15 HIS HONOUR: Ladies and gentlemen, we shall have an early
day today and resume as soon after 10 as I can be here
tomorrow morning. I shan't be very late. Will you go now
with the Sheriff's officer, please?

20
25 ADJOURNED PART-HEARD TO FRIDAY 11 APRIL 2003

oOo

25

EE:FHI:RT:8

D8

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

EIGHTH DAY: FRIDAY 11 APRIL 2003

10 70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

15 IN THE ABSENCE OF THE JURY

CULVER: There is a small transcript correction, if I can address it now. It is a very minor point.

20 HIS HONOUR: Yes.

CULVER: At page 244, at line 57, the transcription reads "you see", but the word I heard, and it is also demonstrated by the objection made, was, in fact, "so", rather than "you see".

25 HIS HONOUR: That is correct.

ZAHRA: Yes. I think the objection is over on the following page.

30 HIS HONOUR: At page 244, line 57, we will delete "you see", and substitute "so".

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, the delay in the start
this morning is entirely due to me, because of an official
function which I was obliged to attend. I do apologise to
all of you for the late start.

10 <CHRISTOPHER GEORGE MARLEY(10.45AM)
SWORN AND EXAMINED

CULVER: Q. Is your full name Christopher George Marley?
A. Yes, it is.

15 Q. Are you a general practitioner of medicine?
A. Yes, I am.

Q. Did you obtain a Bachelor of Medicine and Surgery with
honours in 1980?
A. Yes, I did.

20 Q. Then, in 1998, did you obtain the Fellowship to the
Australian College of General Practice?
A. Yes, I did.

25 Q. Is it the case also that, between 1981 to 1986, you
worked as a resident medical officer and a medical
registrar of a number of New South Wales public hospitals
and also in Swansea in the United Kingdom?
A. Yes, I did.

30 Q. Is it the case that, from 1986 until today's date, you
have worked as a general practitioner in a number of
general practices?
A. Yes, I have.

35 Q. Is it the case that, in the course of your work as a
general practitioner, you came to see Mr and Mrs Folbigg
and two of their children by the name of Patrick and
Sarah?
A. Yes, I did.

40 Q. Is it the case that when you saw Patrick and Sarah you
never saw any sign of neglect of either child?
A. I never saw any sign of neglect.

45 Q. Is it the case also that Mrs Folbigg impressed you as
a caring and concerned parent, as did her husband Craig?
A. I agree, yes.

50 Q. Did you see Patrick on five occasions?
A. I believe that's true.

55 Q. Was the last occasion on which you saw Patrick 27
December 1990?
A. This is Patrick--

HIS HONOUR: If you have some notes there with you and you

would like to refer to them to answer any question, please go ahead and do so.

WITNESS: Thank you.

5

A. The last time I saw Patrick, according to my notes, was on the fifth of the first 1991. That was for a minor illness.

10

CULVER: Q. Is it the case that on the five occasions that you saw Patrick, you saw him for routine childhood illnesses and to administer routine childhood injections?

A. Yes, Patrick was no different from many other children. We saw him for minor respiratory infections. He did have a major neurological problem, but that was mainly dealt with by his paediatrician and neurologist. That was the epilepsy and cortical blindness.

15

Q. That was in the later months of Patrick's life, is that correct?

20

A. I believe his cortical blindness and neurological problems and fitting started from the age of five months.

Q. You are aware that Patrick was being treated by Dr Ian Wilkinson for those conditions?

25

A. Yes, I'm aware that he was being treated by Dr Wilkinson.

Q. Despite those conditions, was Patrick growing and developing normally for a child of his age?

30

A. Patrick was progressing well and growing well, yes.

Q. Did he demonstrate to you any failure to grow well or failure to thrive?

35

A. No, he demonstrated no failure to thrive. We have some weights here to show that he was following his, what we call, correct centiles for a child of his age.

Q. What is a centile?

40

A. A centile is basically what we feel is an average sort of height and weight for a child. Their growth patterns, for example. At 12 months, a child is often close to 10 kilograms of weight is the average. At two years they would be 12 kilograms of weight. We will often plot the children to make sure that they are growing well and getting the right nutrition.

45

Q. So, apart from the seizures and the blindness in Patrick's later months of life, was Patrick otherwise a normally healthy baby?

50

A. Yes, looking through his notes he did not require any antibiotics from our treatment at all, which is very good.

Q. Did he have any abnormally recurrent infection?

55

A. No more than normal. Most infants have about six viral incidents a year on average. This child had less.

Q. Did you observe any life threatening condition in

Patrick apart from the seizure disorder he had?

A. No.

5 Q. Is it the case also, doctor, that you saw Sarah Folbigg on four occasions?

A. I will just look at my notes. Yes.

Q. Was the last occasion on which you saw Sarah, 16 June 1993?

10 A. The last time I saw Sarah was 6 June 1993 and she saw two of my colleagues on subsequent visits. The last visit - I'm not sure when, I think it was about March 1993.

15 Q. During those visits, was Sarah given three of her childhood vaccinations?

A. Sarah had been given three of her childhood vaccinations. The vaccinations she had in March - she had a high-pitched scream for that vaccination, so the next vaccination we took out the pertussis, which is a
20 vaccination, but she received everything else.

Q. On the other visits that Sarah made to your medical practice, is it the case that she was treated for normal childhood health matters?

25 A. Definitely.

Q. Did Sarah display any failure to develop normally or failure to thrive?

30 A. No, Sarah didn't.

Q. Did Sarah display any abnormally recurrent infection?

35 A. No, she didn't. She had a case of nappy rash, and I believe a case of viral infection and a small skin infection, but nothing out of the normal with children.

Q. Is it the case that you told Mr and Mrs Folbigg to err on the side of caution and bring their children in should they see any little sign of a health issue?

40 A. Yes, that would have been strongly suggested to the family.

Q. Is that with the knowledge of Caleb, a prior sibling, having died earlier?

45 A. Yes, there's some - my understanding from a GP's perspective is an early childhood death from SIDS is associated with viral infection in a small percentage of cases.

Q. Is it the case that Sarah did not display any abnormal infection?

50 A. She did not display anything out of the ordinary for her age group.

Q. In fact, is it the case that Sarah had no life threatening illness evident to you?

55 A. Sarah appeared to be a normal healthy infant.

<CROSS-EXAMINATION

ZAHRA: Q. Dr Marley, you have given evidence about the frequency with which you saw Mrs Folbigg with her children?

5 A. Yes.

Q. You also saw Mrs Folbigg for her ailments also?

10 A. I was part of a group practice and I attended Mrs Folbigg on numerous occasions. I believe Mrs Folbigg also saw Dr Dorothy Leeder and Dr Phillipa Hodgkins and they were her main caregivers.

Q. You were considered to be their family doctor?

15 A. Our practice would be considered to be their family doctor. Most parents tend to like one doctor better than the other and tend to sway. I have a special interest in children, so I tend to see probably more children in that practice than the others, yes.

20 Q. However, since looking at the health needs of these children, essentially your role was also in conjunction with other specialists from time to time?

25 A. Definitely with these children with their health needs they were very closely monitored by paediatricians and various specialists - very much more high powered than general practice. I think for a family to have to cope with that and see doctors all the time, we tend to play very much second fiddle and deal with the routine things.

30 Q. In conjunction with the times that you saw her with both Patrick and Sarah, running at the same time from a number of visits with specialists, firstly in relation to Patrick after the seizure disorders developed?

35 A. Yes.

Q. He was under the care of a paediatrician at that time?

A. Yes.

40 Q. And also a neurologist?

A. A neurologist and I believe there was quite intensive consultation with specialist respiratory physicians as well.

45 Q. As the general practitioner you were given updates on that treatment?

A. We were given updates from the specialists, yes.

50 Q. That applies to both Patrick and Sarah. Whenever they went to see a specialist you would receive a report about their attendance?

A. We would often receive reports. Sometimes specialists would inter-refer and then we may not get reports from the specialist and that would just go to the specialist.

55 Q. You have had an opportunity to look through your medical records?

A. Yes, I have.

Q. Have you found in your records many such reports from paediatricians?

A. Yes.

5 Q. So, if we were to look, not only at your role in the care of Patrick and Sarah as one part, there is, in fact, quite a bigger picture of Mrs Folbigg's attendance on various other medical practitioners?

A. Yes.

10 Q. In fact, it is a much bigger picture than the one you were involved in?

A. Yes, definitely.

15 Q. For example, in relation to Patrick there were many attendances at paediatricians because of his particular needs after the seizure disorders developed?

A. Yes, and probably attendances at hospitals I would expect.

20 Q. Mrs Folbigg was very diligent in attending not only upon you, but also these other specialists?

A. Yes.

25 Q. At all times when you saw Mrs Folbigg with the children, you saw her relate well with the children?

A. Yes.

30 Q. She appeared to be a very caring mother?

A. There was nothing that made me anxious about her care of her children.

Q. You are trained to look out for evidence of child abuse?

35 A. We're trained to look out for evidence of child abuse, yes.

Q. This is quite an underlying requirement of your continuing medical practice, isn't it?

40 A. It is and it is increasingly so.

Q. It is something that you are specifically trained in?

A. Yes.

45 Q. It is something that you have continuing medical education about?

A. Yes.

50 Q. In fact, in that regard, it is becoming quite a specialised part of your practice?

A. I wouldn't say I've got a special interest in looking out for child abuse, but most of the lectures I go to is in regards to paediatrics. Often that area is covered.

55 Q. It is now a very specialised area. It is something which there is particular continuing training about?

A. Very much so. We rely heavily on paediatricians too if we have any suspicions.

Q. So, what you look out for is more than just obvious signs of cuts to faces or other manifestations, physical manifestations?

5 A. Yes, you look out for inconsistencies. Like if a child has had a fall and the parents come and tell you that the child fell yesterday and obviously a bruise may be four or five days old, that would prick the ears up, or 10 if the child was failing to gain weight, or the parents may be particularly anxious or worried, or not attending I think for the routine check-ups and vaccinations.

Q. Based on your knowledge of these signs you saw nothing?

15 A. I saw nothing.

Q. You would, no doubt, from time to time have carried out physical examinations of these children?

20 A. Yes, I did.

Q. There was nothing that you saw, no bruises, no injuries?

25 A. No injuries. When we do a vaccination we routinely will check the child's hips and pelvis and strip the child down basically to nappy. It is a bit cold for the child, but yes.

Q. That occurred in relation to both children?

30 A. Yes.

Q. You saw no sign of physical injury?

A. No, I didn't.

35 Q. The children appeared to get on well with their mother. In other words, there didn't appear to be any distress the children were under in the presence of their mother?

40 A. There is no record and none of my memory that the mother was finding things difficult with the children or that the children weren't bonding appropriately.

Q. Do you have copies of the reports from the paediatricians with you there?

45 A. I might have some.

Q. Could I just take you, in relation to Sarah, there are a number of reports in your file from a Dr Geoff Hardacre, is that right?

50 A. Yes.

Q. He is, in fact, a paediatrician?

A. He was a paediatrician based in Maitland. He has now moved from there, but he was based in Maitland.

55 Q. You have a number of reports from him that show--

OBJECTION.

ZAHRA: These are records within his practice. I wish to take him to some of those reports. These are part of his business records.

5 CULVER: They are not the records of this witness. It is only opinion evidence that could be led in those circumstances.

10 HIS HONOUR: Why do they have to be records of this witness, if they are kept by him in the course of his practice?

15 CULVER: But they are not the business records created by this witness or by his practice. Secondly, I can only anticipate that my friend is going to take him to those records for the purpose of eliciting opinion evidence from the maker of the particular report.

20 HIS HONOUR: I do not know. I anticipate no such thing. The question may be answered.

ZAHRA: I will be referring to letters and statements made - not opinions, but statements of fact.

25 HIS HONOUR: Yes.

ZAHRA: Q. Firstly, there are quite a number of reports from Dr Hardacre?
30 A. Yes.

Q. I have copies of reports dated 9 November, 17 November, 1 December, 21 January, 9 March?
35 A. I've got some of them. I'm not sure if I've got them all.

Q. There is quite a number?
A. There is quite a number.

40 Q. They show that obviously she attended on Dr Hardacre with quite some frequency?
A. Yes.

45 Q. Do you have a report dated 9 March?
A. 9th of?

Q. March.
A. Which year?

50 Q. Sorry, 1993.
A. Yes, I do.

55 Q. That, in fact, is a letter to you from a Dr Elizabeth Pickford, is that right?
A. Yes, she was working as a locum for Dr Hardacre.

Q. It is under Dr Geoff Hardacre's letterhead?
A. Yes, he was, I think, in Dubbo at the time.

Q. Now, can I take you to the last paragraph?
A. Uh-huh.

5 Q. There is a note there--

OBJECTION.

10 HIS HONOUR: Ladies and gentlemen, I think I had better
deal with this in your absence.

JURY EXCUSED.

IN THE ABSENCE OF THE JURY

HIS HONOUR: What is it that you are trying to prove?

5 ZAHRA: These are a number of reports from Dr Hardacre.
They do refer to the attendances by the mother with the
child Sarah. There are a number of statements, obviously
of various diagnoses and opinions in those reports. The
10 question that I was about to ask him related to a
paragraph that reads this way:

"Mother also requested a repeat sleep study to
be performed by Dr Gus Cooper at the John Hunter
Hospital."

15 In other words, it is the recitation of a request for a
further sleep study.

20 HIS HONOUR: Was this something that Dr Marley needed to
know about in the course of his management of the
children?

25 ZAHRA: Quite clearly so. These are not just idle
letters. As the witness has said, these are letters
between the particular care of the GP and the specialist
paediatrician.

30 CULVER: It is hearsay. It is clearly not admissible
through this witness. This is a paragraph stating that
the mother has requested a repeat sleep study. This is
from someone named Dr Elizabeth Pickford who is not a
witness in this trial. It is a reference to a
conversation or some communication from the accused, so it
is even a further step removed.

35 HIS HONOUR: I propose to allow the evidence.

40 ZAHRA: There are other excerpts which relate to the
attendance by the parents and the fact that the mother and
father were understandably anxious about the care of the
children. The report of 21 January.

45 HIS HONOUR: It was Dr Marley's business to know that and
it was Dr Hardacre or his locum's business to inform Dr
Marley accordingly, is that the case?

ZAHRA: Yes.

50 HIS HONOUR: On that basis the evidence can come forward.
It is not my understanding that any medical practitioner
forms opinions in a vacuum. Every medical practitioner
that has to form an opinion about a patient has a duty to
know what other medical practitioners are saying about it,
to take those views into account.

55

IN THE PRESENCE OF THE JURY

5 ZAHRA: Q. I was just about to ask you, after we got to
the bottom of the letter of 9 March 1993, about the last
paragraph. The last paragraph reads this way:

10 "Mother also requested a repeat sleep study to
be performed by Dr Gus Cooper at the John Hunter
Hospital. I have given the mother a request
form for this."

Have you had an opportunity to read this letter?
A. Yes.

15 Q. That statement was made on a background that Mrs
Folbigg took Sarah to see Dr Hardacre and was, in fact,
seen by Dr Pickford on that day or at that time, 9 March?
A. Yes.

20 Q. And that the mother brought Sarah to see the
paediatrician because Sarah had been lethargic and
sleeping poorly for the last couple of days. Do you see
the first paragraph?
A. Yes.

25 Q. That she had been not drinking particularly well that
day and had a little vomiting and diarrhoea?
A. Yes.

30 Q. And that she had missed her vaccination because of her
runny nose. The report notes that Sarah was thriving and
was developmentally up to date?
A. Yes.

35 Q. And there was, in fact, a general complaint that a
number of members in the family were unwell with viral
illnesses?
A. Yes.

40 Q. The paediatrician was of the view that Sarah was
suffering from a viral upper respiratory tract infection?
A. Yes.

45 Q. With some enteral involvement?
A. Some enteral involvement, yes.

50 Q. What does that mean?
A. That means gut involvement. The child has diarrhoea
or vomiting.

Q. In fact, there was a recommendation that the mother
give the child Panadol?
A. Yes.

55 Q. And there was a request that there be follow-up in two
weeks time?
A. They saw me in two weeks time for the vaccinations.

Q. In that context, in the last paragraph, it appears that the mother also requested a repeat sleep study to be performed?

A. Yes.

5

Q. Do you have a copy of the report of 21 January?
A. From Dr Hardacre?

Q. Yes.

10 A. 21 January 1993?

Q. Yes?

A. Yes.

15 Q. That report notes in the fourth paragraph that the mother and father are understandably anxious and especially as she has reached the age when trouble occurred with the two boys?

A. Yes.

20

Q. In the last paragraph there is a note, I think, that her parents' anxiety is understandably high, is that right?

A. Yes.

25

Q. And there was a discussion and agreement about arranging a repeat sleep study?

A. Yes.

30 Q. Copies of this letter appeared to have been sent to Dr Cooper?

A. Yes.

35 Q. So far as Patrick was concerned, you had an opportunity to see Mrs Folbigg interact with Patrick after the seizure disorders had developed?

A. Yes.

40 Q. She appeared to be looking after the child, the child's particular needs, because of those disabilities?

A. Yes.

Q. Do you have a copy of the statement that you made to the police?

45 A. Yes, I do.

Q. Can I take you to paragraph 4? You refer there to your treatment of Mrs Folbigg?

A. Yes.

50

Q. Amongst your treatment you say that, on 24 September 1993 - the note is counselling about Sarah Folbigg's death?

A. Yes.

55

Q. In that note it appears that you treated her or she came to see you in relation to counselling?

A. She attended the practice. I haven't got Kathleen

Folbigg's notes in front of me, but she would have attended the practice for counselling. I'm not sure if she saw me or one of the other doctors.

5 <RE-EXAMINATION

CULVER: Q. You were just asked questions about the accused's attitude towards Patrick and her ability to cope--

10 A. Yes.

Q. --concerning his disabilities? Did you see any signs that the accused, Mrs Folbigg, was unable to cope with the extra demands placed upon her as a result of Patrick's disabilities?

15 A. No.

Q. Did she communicate any thought of leaving her child Patrick and her husband to you?

20 A. No.

Q. You were asked - did she communicate any thought of leaving her matrimonial home to you?

25 A. No, she didn't, but I believe I was mainly looking after the children by that stage. Although I saw - most of my visits with Mrs Folbigg were in the 1980s, I actually haven't got her notes in front of me, but I believe I wasn't seeing very much of her at this time. She was mainly seeing the other doctors in the practice.

30 Q. You were asked also about receiving reports from paediatricians in respect of the two children Patrick and then Sarah. Was there anything abnormal in those updates from the paediatricians apart from, of course, the development later on of Patrick's seizure disorders and blindness?

35 A. No. All the children - from the reports from the specialists were that the children were healthy and developing well and they could find no signs of any major medical problem to put them at increased risk.

40 Q. My friend also took you to a note from a paediatrician in respect of Sarah Folbigg and that note was dated 9 March 1993?

45 A. Yes.

Q. Do you recall being asked about a reference there to making an appointment in about two weeks from that note to see Sarah? It is a letter from the specialists to you?

50 A. Yes.

Q. Do you recall those questions?

A. Yes.

55 Q. Doctor, is it the case that you, indeed, saw Sarah later on 17 March 1993?

A. I did and at that stage she had her routine four-month vaccination.

Q. Was there any apparent life threatening condition of Sarah at that appointment?

A. No.

5

Q. You were also asked concerning the letter, firstly dated 9 March 1993, and then an earlier letter, dated 21 January 1993, from Dr Hardacre to you concerning Sarah Folbigg?

10

A. Yes.

Q. If you look at the letter dated 21 January 1993?

A. Yes.

15

Q. Particularly the last paragraph to which you were referred by my learned friend, is it the case that the request for a sleep study, in fact, originated from a discussion with Dr Hardacre?

20

OBJECTION.

ZAHRA: My friend needs to make it clear this is not the 9 March request, which was solely the request of the accused. This is a different one.

25

CULVER: I did make it clear. It is the letter dated 21 January.

30

HIS HONOUR: Yes.

WITNESS: A. Reading that letter, the nuance I get from it is that the parents were anxious. To help allay some of that anxiety, a sleep study would have been ordered. I suspect it was suggested by Dr Hardacre. Most parents wouldn't understand those sorts of investigations I suspect.

35

CULVER: Q. Looking at your file, there is nothing to indicate that that sleep study--

40

OBJECTION.

ZAHRA: The doctor indicated that his records were incomplete.

45

HIS HONOUR: We have not heard the question yet. Repeat the question, please.

50

CULVER: Q. Looking at your file and looking again at the letter dated 9 March 1993, is it your understanding that no sleep study was, in fact--

OBJECTION.

55

HIS HONOUR: Let us hear the question first, please. Let the question be asked in full, please. Then, Dr Marley, please do not answer it until I have had a chance to deal with the objection.

5 CULVER: Q. Looking at the letter dated 9 March 1993, is it your understanding that no sleep study was conducted from the time it was first raised in the letter dated 21 January 1993 to that subsequent letter on 9 March 1993?

OBJECTION.

10 ZAHRA: The doctor has already indicated that he may not have all of these letters or that all of the material may not have been sent to him. It is implicit in the question - there is some suggestion that if something did happen this witness would have known about it. I do not think that is the general nature of the evidence.

15 HIS HONOUR: Q. Can you answer the question, doctor? Just answer that yes or no?

20 A. I don't have any record, but it was specialist to specialist, so they don't necessarily send us all the results.

QUESTION DISALLOWED.

25 CULVER: Q. Looking at the letter dated 9 March 1993, is it the case that, indeed, a repeat sleep study is still required?

A. Please, could you ask that again?

30 Q. Looking at the letter dated 9 March 1993 from Dr Hardacre, is it the case that a repeat sleep study for Sarah Folbigg is still required?

A. Yeah, the letter from Dr Pickford does not make mention of a sleep study having been done.

35 Q. I beg your pardon, Dr Pickford?

A. But we didn't get any reports of sleep studies, but, because I didn't order the test, I may not get the results.

40 Q. Certainly from the letter received by you, this is the letter of 9 March 1993 from Dr Pickford, there is an indication that a further sleep study is still required, is that correct?

45 OBJECTION.

ZAHRA: It does not say that.

50 QUESTION REJECTED.

CULVER: Q. If you would turn to the letter dated 21 January, the first letter, this is the letter from Dr Hardacre?

A. Yes.

55

Q. Is it the case that Dr Hardacre says there "we agreed to arrange a repeat sleeping study"?

A. Yes.

5 Q. Is it the case, if you look at the letter dated 9 March, the later letter from Dr Pickford, that there is a request for a repeat sleep study still to be performed?

OBJECTION.

10 Q. Does it say the mother also requested a repeat sleep study to be performed?

OBJECTION.

15 HIS HONOUR: Are you simply attempting to adduce evidence of the text of the letter?

CULVER: Yes, to make the sequence quite clear.

HIS HONOUR: Why can that not be done?

20 ZAHRA: The last comment my friend makes is, in fact, the basis of my objection. It suggests that two independent circumstances which are unrelated is one following on from the other.

25 HIS HONOUR: I do not know what argument may or may not be able to be based on the evidence. Why cannot the text of the letter be brought into evidence?

30 ZAHRA: That is the best way. I would press the tender of that so it can become abundantly clear.

HIS HONOUR: Nobody is yet tendering the letter. I am simply dealing with the question. I allow the question.

35 CULVER: Q. Do you wish me to repeat the question?
A. I would like you to please.

40 Q. The letter dated 9 March, this is the later letter from Dr Pickford, does it read down the bottom: "Mother also requested a repeat sleep study to be performed by Dr Gus Cooper at the John Hunter Hospital"?
A. Yes, it states that.

45 ZAHRA: I would at this stage tender the two letters. I would ask that the witness identify and maybe extract the copy of the two letters out of his records. Perhaps the letter of 9 March and 21 January.

50 CULVER: I have a copy I can make available. There is no objection to the tender.

55 HIS HONOUR: We will not rob your file, doctor. We might get copies handed to you just so you can identify that they are truly copies of the letters that have been referred to.

(The witness was shown copies of two letters.)

EXHIBIT #3 TWO LETTERS OF 09/03/93 AND 21/01/93 TENDERED,
ADMITTED WITHOUT OBJECTION.

5 HIS HONOUR: I will not pass these letters around to you,
ladies and gentlemen. They are exhibit 3. I will read
them to you now. They are written on the letterhead of Dr
Geoff Hardacre paediatrician. They are both addressed to
Dr Marley. The first is dated 21 January 1993. The
10 heading is Sarah Folbigg with the address and date of
birth.

LETTER READ TO JURY.

15 HIS HONOUR: The second letter is dated 9 March 1993. It
is headed in the same way.

SECOND LETTER READ TO JURY.

20 CULVER: Q. If I could show you one further letter, you
will see that it is dated 9 November 1992 (shown)? Do you
recognise that as another letter received by you from a
specialist in respect of Sarah Folbigg?
A. Yes.

25 Q. Is that, in fact, the same specialist, Dr Hardacre?
A. Yes, it is.

Q. Could you read the top paragraph of that letter,
30 please?
A. "Please find extra correspondence about this baby.
When I saw her, her mother appeared remarkably calm and
she said that she felt calmer because Sarah just seems
different, quite apart from the difference in her sex."

35 EXHIBIT #3 SUPPLEMENTED BY THE ADDITION OF A FURTHER
LETTER FROM DR HARDACRE OF 09/11/92 TENDERED, ADMITTED
WITHOUT OBJECTION.

40 HIS HONOUR: This letter that has thirdly been introduced
is the first in time. It is the November. The other ones
are the following January and March.

45 Is anything raised by this new material that you want to
deal with, Mr Zahra?

ZAHRA: No.

<WITNESS RETIRED AND EXCUSED

50 JURY EXCUSED

SHORT ADJOURNMENT

RESUMPTION

5 CROWN PROSECUTOR: I call Dr Singh Khaira in relation to the post-mortem examination of Patrick.

<GURPREET SINGH KHAIRA(12.05PM)
AFFIRMED AND EXAMINED

10 HIS HONOUR: Doctor, if you have notes there and you would like to refer to them in order to answer any question, you may feel free to do so.

WITNESS: Thank you very much.

15 CROWN PROSECUTOR: Q. Doctor, could you please tell the Court your full name and your place of work?
A. My name is Gurpreet Singh Khaira. I work at the HAPS in Newcastle.

20 Q. And you are a legally qualified medical practitioner?
A. Yes, I'm a histopathologist currently.

25 Q. And doctor, as a histopathologist, do you from time to time perform post-mortem examinations?
A. That was during the time that I was doing registrar training and then for two years following that, after fellowship, I did two years in coronial post-mortems in Victoria.

30 Q. Doctor, in this case, did you conduct a post-mortem examination of the deceased child Patrick Folbigg, together with Dr J Bishop?
A. That's correct.

35 Q. And at the time where were you working?
A. I was working at John Hunter Hospital and - but John Hunter Hospital was also overseeing the Mater Hospital, Newcastle Mater Hospital.

40 Q. Did you perform the post-mortem examination on 13 February 1991?
A. That's correct.

45 Q. And I think that was, in fact, the same day as Patrick had died?
A. That's correct.

50 Q. Between the two of you, you and Dr Bishop, who was the principal pathologist performing the post-mortem?
A. In - in what way? I mean--

55 Q. Well, who was the main doctor actually doing the post-mortem?
A. I was the one who did the post-mortem and Dr Jan Bishop supervised me at that stage.

Q. He was more experienced than you at that stage?
A. Yes, she was head of my department.

5 Q. Doctor, I would like to show you two documents. One of them is already marked for identification 19 and then there is another document with it. Together, do those two documents comprise the post-mortem report of you and Dr Bishop?

A. Yep, that's correct.

10 CROWN PROSECUTOR: I tender those.

ZAHRA: I have no objection.

15 CROWN PROSECUTOR: What I propose to do, your Honour, is, rather than reading it out, to go through it with the doctor and have him explain it.

HIS HONOUR: Yes.

20 CROWN PROSECUTOR: I have a working copy of both of those for your Honour.

25 HIS HONOUR: The four-page autopsy document marked 19 for identification, together with the autopsy report, dated 13 February 1991, are exhibit V.

EXHIBIT #V FOUR-PAGE AUTOPSY DOCUMENT FORMERLY MFI 19, TOGETHER WITH THE AUTOPSY REPORT, OF 13/02/91 TENDERED, ADMITTED WITHOUT OBJECTION.

30 CROWN PROSECUTOR: Q. Doctor, do you have your report in front of you?

A. That's correct.

35 Q. If I could take you to the first page of your autopsy, part 1, firstly, you have given a clinical history--

A. Yes.

40 Q. --that Patrick had been brought into the Mater Hospital at about 10.20 by paramedics after a cardiac arrest?

A. That's correct, yeah.

45 Q. You were also told that the history was that the mother had put Patrick to bed at about 7.30 and at about 9.30 or 10 she'd found that the baby was not breathing?

A. Yep.

50 Q. And that the baby had arrived in the hospital at about 10.20. He was deceased upon admission--

A. Yep.

55 Q. --to the hospital; is that right?

A. ECG monitoring showed that--

Q. Doctor, he was deceased when he was admitted to the hospital; is that right?

A. Yep.

- Q. He had no pulse?
A. Yep.
- 5 Q. Resuscitative efforts were unsuccessful?
A. That's correct.
- Q. Did you then conduct an external examination of the
deceased?
10 A. That's correct, yep.
- Q. And did you find that he was normally formed and
well-nourished?
A. That's correct, yes.
15
- Q. And did you find that there were no signs of trauma?
A. I didn't see any.
- Q. And there was no abnormality externally to the body?
A. That's correct.
20
- Q. Going over the page, did you then examine the central
nervous system?
A. Yes.
25
- Q. The bones of the skull, the meninges--
A. Yep.
- Q. --the brain and the spinal cord?
A. Brain and the spinal cord was fixed for later
dissection and--
30
- Q. Did you see no abnormality yourself?
A. No, and Dr Bishop had also had a look at it at that
stage.
35
- Q. Did you then look at the respiratory system?
A. That's correct, yes.
- 40 Q. Did you find that the pleura, diaphragm and rib cage
showed no abnormality?
A. That's correct.
- Q. You then looked at the larynx, trachea and bronchi?
A. Yep, yep.
45
- Q. And you found that there was some frothy mucus?
A. Yep, yep.
- 50 Q. In where?
A. It was - it contained frothy mucus in the airways,
you know, like in the trachea and bronchi.
- Q. Is this correct: That you found no obstruction of
the airways?
A. No, no.
55
- Q. Is that correct?

- A. Yep, yep, that's correct.
- Q. And you then examined the lungs.
- 5 A. Yep.
- Q. You found that they both appeared to be normal?
- A. Yep.
- Q. However, both lungs had congestion in them?
- 10 A. Yep, it's in the posterior basal lobes, basal segments. What actually happens is when the baby has been lying flat, it's a normal change to expect in the basal segments.
- Q. So, is this the case: That you found no abnormality to any part of the respiratory system?
- 15 A. No.
- Q. Is that correct?
- 20 A. That's correct.
- Q. You then examined the cardiovascular system?
- A. That's correct.
- Q. Being the heart and its various parts--
- 25 A. Yes.
- Q. --of the circulation?
- A. Yes.
- 30 Q. And is this the case: That you detected no abnormality of the cardiovascular system; is that right?
- A. Yep, that's right.
- Q. You then examined the haemopoietic system?
- 35 A. System, yes, that's correct.
- Q. What's that?
- A. That's the system that controls the blood, blood
- 40 cells, the manufacture of blood cells and the immune responses to infections, and all that.
- Q. You found that the thymus was enlarged?
- A. Yes.
- 45 Q. Otherwise, there was no abnormality?
- A. That's correct.
- Q. You then examined all of the other systems of the body, including the hepatic-biliary system, the pancreas, the gastro-intestinal system, the urinary system, the endocrine system, the musculoskeletal system; is that
- 50 right?
- A. Yes, that's correct.
- 55 Q. And is this the case: That you found no abnormality in any of those systems?
- A. That's right.

Q. Did you come to this conclusion? Were you able to find the cause of death of this baby?

5 A. No, not at the macroscopic level, no.

Q. In the absence of finding any cause of death, what conclusion did you come to?

10 A. We had macroscopically noted changes in the brain and because I'm not an expert in neuropathology, so Dr Jan Bishop and myself had thought it prudent to actually refer to an opinion from Dr Alex Kan at Camperdown Hospital, Camperdown Children's Hospital, in Sydney.

Q. Right. Would you have a look, please, at MFI 20?

15 A. Yep, that's correct.

Q. Is that the report which you obtained from Dr Kan?

A. That's correct, yes.

20 Q. About Patrick's brain?

A. That's correct.

Q. And is this the case: That Patrick's brain had been made available to Dr Kan?

25 A. That's right.

Q. And sections of it?

30 A. That's right. We had actually examined it together when - at Camperdown Hospital.

CROWN PROSECUTOR: I tender that, your Honour.

ZAHRA: Might it be marked for identification?

35 HIS HONOUR: The tender is objected to, at this stage?

ZAHRA: At this stage, your Honour, yes.

CROWN PROSECUTOR: Is it pressed, Mr Crown?

40

CROWN PROSECUTOR: No, your Honour.

Q. Going on to the second part of your report--

45 A. That's correct.

Q. --did you examine the central nervous system?

A. Yes.

Q. And did that include the brain?

50 A. That's right.

Q. Did you also examine the lungs?

55 A. Yes, that was the microscopic sections on the lungs, yes.

Q. And were they examined by you and Dr Bishop microscopically?

A. That's right, yes.

Q. And did you find this: That there was small foci of alveoli collapsed in the periphery of the lung?
A. Yeah, that's right, in the basal segments again.
5 It's a dependent change if the patient's been lying down flat.

Q. Is that a normal finding?
A. Yes, that's right.
10

Q. On death?
A. Yep, yep.

Q. Otherwise, did you find no abnormality?
A. Yep.
15

Q. As a result of your examination, Dr Bishop's examination and the report of Dr Kan, did you advance any sort of hypothesis--
20

ZAHRA: Objection to the leading, and I object to the question.

CROWN PROSECUTOR: I withdraw the question.
25

Q. From your own examination--
A. That's right.

Q. --were you able to determine the cause of death?
A. No.
30

Q. In order to come to any decision, did you have to rely upon anybody else's opinion?
A. That's right.
35

Q. Whose opinion was that?
A. That was Dr Alex Kan's opinion.

Q. And as a result of the findings of Dr Kan, did you come to any view about the possible cause of death of Patrick Folbigg?
A. We had excluded--
40

Q. Could you just answer that yes or no, or does it require an explanation?
45

A. I think I better explain. We had excluded infective disorders, we had excluded all metabolic disorders that we could think of, any genetic disorders we had excluded, and in view of those - none of them being a positive indicator as to the cause of death, I mean, the changes in the brain appeared to have been caused by some event which was kind of an hypoxic event in the past.
50

Q. Now, you say "in the past"?
A. Yep.
55

Q. Did you see signs of old damage to the brain?
A. That's correct.

Q. And in what part of the brain did you see those signs, or did you see that damage?

5 A. They were many limited to the occipital part, which is the occipital cortex, which actually governs the recognition of vision.

Q. Where's that?

10 A. That's in the occipital, right at the back of the head, in both hemispheres, and also the brain. Also, there was damage also extending on to the parietal lobes, but it was focal damage and there was also old scarring, which was as a result of the previous damage, yeah.

15 Q. Now, did you see only old scarring, or did you see new damage to the brain?

A. We only saw old scarring.

20 Q. And was it consistent with being about four or five months old?

A. Yes.

Q. And was it consistent with having caused blindness?

25 A. That's right, yep.

Q. And was it consistent with having caused epilepsy?

30 A. Dr Kan had actually noted some atrophic neurons in the deeper part of the cerebellum and the brain stem, which he thought were - could have been secondary to epileptic seizures in the past.

Q. Was there anything that you observed in the brain that could have accounted for his death? What I am asking you is: Was there any new injury or damage or deterioration of the brain--

35 A. No.

Q. --that could have provided an explanation for why he died on the day that you conducted the post-mortem examination?

40 A. No, no.

Q. Are you able to say whether or not your findings on your post-mortem examination are consistent with Patrick having suffered a catastrophic asphyxiating event from some unknown cause?

45 A. In the absence of other causes, that could be one of the causes, yes.

50 Q. And are you able to say whether your post-mortem examination and its findings are consistent with him having suffered--

55 A. I'm not an expert on this. I will not be able to answer that question.

Q. Is this the case: That, essentially, you were not able to find any cause of death?

A. That's right, yep.

<CROSS-EXAMINATION

5 ZAHRA: Q. Doctor, when you examined this child, were you told that there had been a previous death of another child?

A. That's right, from Dr Ian Wilkinson's notes. I conducted the autopsy.

10 Q. And you knew that before you carried out the autopsy?
A. That's right, yep.

Q. Part of the normal process would be to look for, firstly, signs of abuse?
15 A. That's correct, yep.

Q. And the examination of the body is very detailed?
A. That's right.

20 Q. Looking for--
A. Yep.

Q. --factors which might indicate abuse?
25 A. That's right.

Q. You saw nothing about the external presentation of the body of the deceased that suggested there had been any trauma?
30 A. Yes.

Q. There was no evidence of any bruising?
A. Yes.

35 Q. There was none at all?
A. No, no.

Q. Were you also looking for, as part of the process, any signs of manual asphyxia?
40 A. Yes, we were. We were looking for petechia and changes in the airways and stuff, yes.

Q. You found no petechia?
A. No, we didn't.

45 Q. You found no other signs--
A. No.

Q. --of manual asphyxiation?
50 A. No.

Q. Can I just ask you some matters about the report itself? Do you still have a copy with you?
A. I have.

55 Q. Can I just ask you to assist in relation to the relevance, or the significance, if any, in relation to the larynx and the trachea, or bronchi; that statement that those structures were examined and contained frothy

mucosoid secretion?

A. Yes, that's correct.

Q. Is there any significance in that finding?

5 A. No.

Q. Similarly, on page 2, your finding that the thymus was enlarged?

10 A. That can be caused through stress. Sometimes a patient, undergoing stress, can have an enlarged thymus, yes.

Q. Are you able to determine the timing of that enlargement?

15 A. No, we can't, no.

Q. You ultimately, in your report, on the first page, under "Clinical diagnosis", note this:

20 "1. Encephalopathic disorder leading to intractable seizures. The underlying cause of encephalopathy was not determined on investigation."

25 A. Yes.

Q. Secondly, "Asystolic cardiac arrest at home leading to death"?

30 A. That's right.

Q. Putting to one side the diagnosis of an encephalopathic disorder, there was nothing on post-mortem to suggest that that process was not possible; in other words, based on the existence of that disorder, that there might have, in fact, been a seizure, a seizure leading to respiratory arrest, leading to cardiac arrest?

35 A. I would like - are you saying that - could you just repeat it again? I lost the line of thought.

40 Q. Is it to be understood that, from your post-mortem, firstly, there was a possibility of a seizure occurring at the time of death?

45 A. It could be possible. It's - I'm just going on what - the clinical history I got, yes.

Q. But there is nothing in your report to suggest that there was not a seizure?

A. No, no.

50 Q. So, as a possible mechanism of causing death, it may be that there was a seizure leading to a catastrophic asphyxiating event?

A. No, I - yeah - I mean, no.

55 Q. You can't exclude that?

A. Can't exclude.

Q. Your findings are consistent with that process, if

that were the process?

A. Yes, they could be, yes.

5 Q. In other words, a seizure leading to a catastrophic asphyxiating event and then leading ultimately to cardiac arrest?

A. Yes.

10 Q. And there is nothing, from what you have seen, that would suggest that that mechanism was not a mechanism that could have occurred?

A. Yes, that's correct, yep.

15 Q. And, again, that that seizure may be based on an encephalopathic disorder?

A. Depends on the encephalopathic disorder. What kind of encephalopathic disorder?

20 Q. Is it possible, if there was such an underlying encephalopathic disorder, that that could have led to a seizure at the time?

A. I mean, if there was, yes, yes.

25 Q. You indicated that, in relation to the scarring in the brain--

A. Yes.

30 Q. --that may be consistent with some history of epilepsy?

A. Yes, yes.

Q. And you are indicating that the scarring could be secondary to epilepsy?

35 A. No, what I'm saying is scarring can cause epilepsy, but it's not epilepsy causing scarring. I mean, I - that's - that's what my understanding is.

Q. But there may have been an hypoxic event which could have led to the scarring?

40 A. The scarring, yes, that's correct.

Q. And that hypoxic event could be on a background of encephalitis?

45 A. I mean, we didn't find the cause of encephalitis.

Q. I accept that, but if the history was such that there was encephalitis--

A. Right.

50 Q. --the scarring to the brain may be consistent with seizures the result of--

OBJECTION. HYPOTHETICAL.

55 HIS HONOUR: The question can be asked.

ZAHRA: I will ask it again.

Q. The scarring that you saw--
A. Yes.

5 Q. --could be consequent to seizures which themselves
were consequent to--

10 CROWN PROSECUTOR: That was the previous answer that he
rejected, your Honour. He said that the seizures come
from the scarring, not the scarring from the seizures.

WITNESS: A. Yeah, that's correct.

HIS HONOUR: That was the evidence.

15 ZAHRA: I will ask the question as I asked it previously.

20 Q. I asked you this: "But there may have been an
hypoxic event that could have led to the scarring" and you
answered "the scarring, yes, that's correct". I asked you
the question: "And that hypoxic event could be on a
background of encephalitis" and you answered "I mean, we
didn't find the cause of encephalitis"?

A. That's correct.

25 Q. "Q. I accept that. But if the history was such that
there was encephalitis, the scarring to the brain may be
consistent with seizures which were the result of
encephalitis"?

30 A. The problem is we didn't find encephalitis and we -
we - that's what we had done, viral cultures, as well as
microscopic examination, and by a neuropathologist, to
actually exclude those causes.

35 Q. Doctor, I am referring to the history of the
scarring, not the virology at the time of the scarring,
talking about the scarring?

A. Right.

40 Q. If that scarring were the result of encephalitis
that, in fact, had been treated, that scarring may be the
cause of seizures in the context of encephalitis?

A. I'm not an expert to actually comment on that.

45 Q. You indicated in evidence that that scarring could
have been secondary to epileptic seizures in the past?

OBJECTION.

50 ZAHRA: I am just referring to what he said before.

WITNESS: No, I didn't say that.

CROWN PROSECUTOR: That is not what he said before.

55 ZAHRA: Q. You recall being asked this question--

CROWN PROSECUTOR: Your Honour, what he said before was
that the scarring causes the epilepsy, not the epilepsy

causes scarring. My friend, now for the second time, has put it around the wrong way.

5 ZAHRA: I want to take him to his evidence.

CROWN PROSECUTOR: That was the evidence.

10 ZAHRA: Q. These are questions that you were asked by the Crown Prosecutor:

"Now, did you see only old scarring, or did you see new damage to the brain?"

A. We only saw old scarring."

15 A. That's correct.

Q.

20 "Q. And was it consistent with being about four or five months old?"

A. Yes.

Q. And was it consistent with having caused blindness?"

25 A. That's right.

Q. And was it consistent with having caused epilepsy?"

30 And you say here, "Dr Kan had actually noted some" - it is hard to read - you indicated that he noticed something in relation to the neurons?

35 A. He said: "In the deeper parts of the cerebrum and in the cerebellar and brain stem nuclei there are neurons showing simple atrophy. They could have resulted from this baby's epileptic seizures." That's what he said.

40 Q. You went on, in referring to that report, in relation to those observations, "In the deeper parts of the cerebellum and the brain stem, which he thought could have been secondary to epileptic seizures in the past"?

A. Yep, according to his report, yes.

45 Q. In fact, that is what you said a moment ago, "could have been secondary to epileptic seizures in the past"?

A. Yes, yes.

<RE-EXAMINATION

50 CROWN PROSECUTOR: Q. Doctor, you were asked about the enlargement of the thymus and whether that could have been caused by stress?

A. That's correct.

55 Q. When you refer to stress being a possible cause of enlargement to the thymus, if a child was struggling for their lives for the last few minutes of their life--

OBJECTION.

5 A. No, don't think so, no. I mean, for the thymus to
enlarge to the time of death, there must have been
something going on before that, for it to actually be
given the time to actually enlarge at that stage.

10 ZAHRA: Might I ask a question on that?

HIS HONOUR: Yes, you may.

ZAHRA: Q. Are you able to indicate how long before?
15 A. I can't, no.

<WITNESS RETIRED AND EXCUSED

20 CROWN PROSECUTOR: I call ambulance officer Martin. We
are now proceeding, your Honour, in the evidence, in
relation to Sarah.

<DEBORAH ANN MCDERMID(12.37PM)
SWORN AND EXAMINED

25 CROWN PROSECUTOR: Q. Could you please tell the Court
your full name?

A. Deborah Ann McDermid now. I was Martin.

30 Q. McDermid, is it?

A. Mmm-hmm.

Q. If you could speak closer to the microphone so
everyone can hear you?

35 A. No problems.

Q. Are you still an ambulance officer?

A. No, I'm not. I'm a teacher.

40 Q. In 1993, were you an ambulance officer?

A. Yes, I was.

Q. And I'd like to ask you some questions about 30
August 1993?

45 A. Mmm-hmm.

Q. On that day, were you a station officer at the
ambulance station at Beresfield?

A. That's correct.

50 Q. And where is Beresfield?

A. It's located on the New England Highway, halfway
between Maitland and Newcastle.

55 Q. And were you responsible at that time for the
management of the ambulance station?

A. That's correct.

Q. At about 1.25am, on the morning of 30 August 1993,

were you called by the ambulance controller in Newcastle to attend to a young child at 9 Dower Close, Thornton?

A. That's correct.

5 Q. And did you go to those premises on your own?
A. Yes.

10 Q. And did you arrive there at about 1.30am?
A. As far as I can remember, yes.

Q. Were you met at the front door by the accused, Mrs Kathleen Folbigg?

A. Yes.

15 Q. Was she sobbing when you first met her?
A. Yes.

20 Q. And did she direct you to the main bedroom?
A. Yes, she did.

Q. In the main bedroom, did you see the child's father, Mr Craig Folbigg?

A. Yes, I did.

25 Q. And was he performing CPR on Sarah, who was on the floor at the time?

A. Actually, the child, from memory, was actually on the bed, and I directed Mr Folbigg to remove Sarah on to the floor.

30 Q. Did you notice that in that room there was a double bed and a single bed?

A. No, there was only a double bed, from memory.

35 Q. You don't remember if there was any other bed in the room?

A. No, I don't.

40 Q. Did you then go back to the ambulance vehicle to collect your equipment?

A. Yes, I had some equipment with me but I needed some other equipment that I couldn't carry with me, so I had to return to the vehicle to collect that.

45 Q. When you went to the vehicle, did you call what's known as a code 2 over the ambulance radio, meaning a cardiac arrest?

A. Yes, I did, to request additional assistance, because I was a single officer.

50 Q. When you returned to the bedroom, was Craig Folbigg still performing CPR?

A. Yes, he was.

55 Q. And did you then try and render assistance to Sarah?
A. Yes, I did.

Q. At the time she was fully clothed?

A. Yes, she was.

Q. And did she appear to you to be cyanosed around the mouth?

5 A. Yes, she did.

Q. And did you notice she had mucus and vomit in her mouth?

10 A. Yes, she did.

Q. Was she breathing?

A. No, she wasn't.

15 Q. Did you render assistance to her in a number of different ways?

A. Yes, I did.

Q. And did some other ambulance officers then arrive?

20 A. Yes, they did.

Q. Did they also render assistance to Sarah?

A. Yes.

25 Q. At about 2.10am, which was about 40 minutes after you'd arrived, did you stop administering resuscitative attempts on Sarah?

A. Yes, we did.

Q. Was that because she appeared to be deceased?

30 A. Yes. She was non-responsive to the drugs that we'd applied.

Q. And did you then inform both Mr and Mrs Folbigg that their daughter was deceased?

35 A. Yes, I did. I said that she had failed to respond to the therapy that we'd applied.

Q. And did both the parents become very upset?

40 A. Yes, they did.

Q. Did you then ask one of the parents to go and get some other clothes for the baby, and did you remove a suit that the baby was in?

45 A. I had to actually remove the suit because part of the procedure that I gave to Sarah was to install into the top of her tibia, I think, an interosseous infusion, which is actually an infusion that goes into bone. Because she had this little ski suit on, we had to take that off anyway. Because she was almost naked and because of the fact that
50 I was worried that she might be bumped and dislodge the interosseous infusion that was in her leg, I suggested that we actually get additional clothes for her and make her more presentable, basically.

55 Q. And was that done?

A. Yes, that was done.

Q. If I showed you some photographs, would you be able

to say whether that was the room that you'd seen Sarah in, or not?

A. Possibly not, no.

5 Q. Whilst you were at the house, did Mrs Folbigg say this to you: "We've had two other cot deaths. Both were males"?

A. Yes - yes, she did.

10 Q. "One was three weeks old and the other ten months old"?

A. Yes, she did.

15 Q. Did she say this to you: "They think that I have some sort of genetic abnormality in my male children, so I'm surprised that I lost a girl"?

A. Yes, or words to that effect.

20 Q. Did the father Craig say to you that they had recently moved Sarah from an apnoea monitor, which they had got from the SIDS foundation?

A. Yes, he did.

25 Q. Did he tell you, "We took her off it because it kept alarming. She was rolling off it"?

A. Yes, an assumption was made that she was rolling off it.

30 Q. And before you left, did the police arrive?

A. Yes, they did.

Q. Did you leave the scene just before 4 o'clock?

A. Yes, I did.

35 Q. And did you convey Sarah's body to the casualty section of the Maitland Hospital?

A. Yes, I did.

40 Q. I think that you went back to their home and spoke to them again afterwards?

A. That's correct.

45 Q. And did they send you a thank you card and a letter at some stage thanking you for your assistance?

A. Yes, they did.

Q. Would you have a look at this document (shown)? Is that an ambulance report which has been filled out by you and at least one other officer?

50 A. No, just by myself, the front page. Is that what you're speaking about?

Q. The front page filled out by you?

55 A. Yeah. The second page is filled out by two other officers.

Q. And I think there is a third page?

A. Yep. That's the report - that's the document from

the control room that logs the original call into the call centre.

5 Q. In terms of skin temperature of the child, you have ticked both "skin temperature normal" and "skin temperature cold"?

A. Yes. One was crossed out. I don't exactly know where you're referring to at the moment.

10 Q. Under the heading, "Examination"?

A. Yeah.

Q. You see it says, "Skin temperature"?

15 A. Yes.

Q. And you ticked both?

A. And I did.

Q. And under "Vomiting", which have you ticked?

20 A. I ticked "nil" and crossed it out and ticked "small".

Q. Now, under the heading "History", you have written some things?

25 A. Yes, I have.

Q. Is that based upon what you were told?

A. That's based upon what I was told and what I found at the scene.

30 Q. And based on what you were told by whom?

A. Oh, I can't specifically remember, but the Folbiggs in general.

Q. Can you read what you've got there?

35 A. "On arrival - SIDS. On arrival found a 10-month-old female lying on the bedroom floor. On examination, mother stated that the child had not woken since being placed in bed this evening, pm, child usually wakes at approximately midnight. Mother had checked her as she had not woken.
40 Child's parents doing CPR on arrival. Child recently removed from monitor", and then I've got, "Specific observations" . I've written here, "intraosseous infusions, mildly cyanosed around the mouth, and this is
45 the third episode of the same, one at three weeks, one at 10 months".

Q. Those being the other children?

A. "Nil children alive".

50 CROWN PROSECUTOR: I tender that.

COOK: No objection.

55 HIS HONOUR: The ambulance service report is exhibit W.

EXHIBIT #W AMBULANCE SERVICE REPORT TENDERED, ADMITTED WITHOUT OBJECTION.

CROWN PROSECUTOR: Your Honour, I have a working copy for yourself, and a copy for the jury.

(Copies distributed to the jury.)

5

<CROSS-EXAMINATION

COOK: Q. You received this call when you were on duty in Beresfield ambulance station; is that right?

10

A. That's correct.

Q. And is this the process: The call came to you from the Newcastle Ambulance Control Centre?

15

A. That's correct.

Q. And would you expect, in circumstances like this, that that ambulance control centre had, in turn, had a triple 0 call directed to it?

20

A. Yes.

Q. That would be the usual procedure?

A. Yes, that's correct.

Q. Now, is the time at which you received the call at the Beresfield ambulance station 1.24am?

25

A. I'd have to see the document, I'm sorry.

Q. Could the witness be shown a copy of exhibit W (shown)?

30

A. The call was received into the Newcastle Control Centre at 1.24. I was actually dispatched - the printing on the log card is actually quite - not very clear really. It looks like 1.24 to me as well.

35

Q. Time out 1.24?

A. Yeah, that's the time the call came to me as well.

Q. So did the call come to Beresfield at 1.24?

40

A. Yes.

Q. And you then left, it looks like, immediately?

A. Yes. Well, I was on scene by 1.30, and it's only a short distance from - from where they lived.

45

Q. And when you got to the scene, you observed that the child was having what appeared to be CPR administered to it by the father?

A. That's correct.

50

Q. And you also observed the mother to be extremely upset?

A. That's correct.

55

Q. And she was sobbing?

A. That's correct.

Q. Was she sobbing for just about the whole time that you were at the house?

A. From memory, yes.

5 Q. You see, you make another observation of her a bit later when other ambulance officers were administering cardiac drugs to the child?

A. Yes.

10 Q. And you observed at that stage that Kathy was sobbing?

A. Yes.

15 Q. Now, you had some contact with the parents of the baby after that day; you went back and saw them?

A. Yes, that's correct.

20 Q. And did you again observe that she and, indeed, her husband, were upset?

20 A. Yes, they were, but they were actually aware that I was arriving. I had phoned them and told them that I wanted to prevent them from getting an account for the transport of Sarah from the residence to the hospital, and the only way that I could actually effect that was to turn up at the house a form for them to sign. When I went to the home, they were both visibly distressed.

25 Q. Thank you.

<NO RE-EXAMINATION

30 <WITNESS RETIRED AND EXCUSED

<STEPHEN CHARLES SAUNDERS (12.53PM)
SWORN AND EXAMINED

35 CROWN PROSECUTOR: Q. Mr Saunders, will you please tell the Court your name?

A. Stephen Charles Saunders.

40 Q. And I think you are now a farmer; is that right?

A. This is true.

Q. You were previously a police officer?

A. I was.

45 Q. I would like to ask you questions about 30 August 1993. At that stage, were you a police officer?

A. Yes.

50 Q. And where were you based?

A. I was working at Maitland police station.

Q. And, at about 2.45, on the morning of 30 August, did you go with another police officer to number 9 Dower Street, at Thornton?

55 A. Yes.

Q. And, when you got there, were there already two ambulance vehicles there and a number of ambulance

personnel?

A. Yes.

5 Q. And did you speak to one of the ambulance officers, Deborah Martin, the previous witness?

A. Yes.

10 Q. And did she give you an outline of basically what had happened in the house?

A. Yes.

15 Q. Did you go into the house and see the deceased, Sarah Folbigg?

A. Yes.

20 Q. At the time, had she been dressed in some other clothes, other than what she was wearing when she died?

A. That's - that was what I was led to believe, yes.

25 Q. And she was already deceased when you saw her?

A. Correct.

30 Q. And did she show signs of having had various resuscitative measures applied to her by the ambulance officers?

35 A. I was told - I was later told that was the case, but I noticed there was a mark on her nose consistent with an oxygen mask or something being placed over her face.

40 Q. At the time that you went in there, was the deceased child being nursed by her father, Craig Folbigg?

A. Yes.

45 Q. In the lounge room of the house, did you see both parents?

A. Yes.

50 Q. And did they both appear to be very distressed?

A. Yes.

55 Q. And were you told that these two parents had previously lost two of their children?

A. Yes.

60 Q. Did they also tell you that Sarah had been using a sleep monitor during much of her life?

A. Up until a week previous, yes.

65 Q. The week previous to her death?

A. Yes.

70 Q. Did you find out information about the background of Mr and Mrs Folbigg, about their work and other things like that?

75 A. Yes.

80 Q. And did you ask questions to ascertain what had happened to Sarah prior to her death?

- A. Immediately prior to that evening, yes.
- Q. Have you made a statement in that matter?
A. I have.
- 5
- Q. Would you like to refer to your statement?
A. I can do.
- 10
- Q. Might I direct your attention to paragraph 8?
A. Yes.
- Q. Perhaps if I could take you to the fourth last line on that page, "On the night of the death"?
A. Yes.
- 15
- Q. Could you tell us what you were told by the parents?
A. They told me that they'd had - had a meal about 5pm and the child had consumed a normal portion of food similar to what they were eating. They said the child had not displayed any signs of illness, apart from having suffered - having been suffering the later stages of a cold or flu type virus, and that had been treated by Dr Marley.
- 20
- Q. All right. Were you told that Dr Marley had prescribed something, but the course of medicine had not been completed?
A. Yes, that's correct.
- 25
- Q. What were you told about where the child slept?
A. I was told the child slept in a normal single bed in the bedroom with the parents.
- 30
- Q. And did you, in fact, see the parents' bedroom?
A. Yes.
- 35
- Q. And did that bedroom have a double bed and a single bed?
A. Yes.
- 40
- Q. Did you notice whether there were any pillows other than on the bed, or were you told anything about that?
A. I was told - I was told the child was - slept in a single bed as opposed to a cot because it - the child - became disturbed in its sleep easily, when it rolled into the bars of a cot, and so the child had been sleeping in a single bed with pillows placed about the floor, for safety reasons, if the child fell from the bed.
- 45
- Q. Can I take you to paragraph 9 and could you read to us what you were told about what had happened to the child when it was put down in its bed to go to sleep?
A. The child was put down to sleep at 9pm in a single bed in the parents' bedroom. The parents again entered that room about 9.30 or 10pm, and the child was heard to be snoring. The parents went to sleep and their mother woke at 12 or 12.30am on 30/8/93 and heard the child turning over in its sleep. The mother again woke about
- 50
- 55

I am to go to the toilet and on her return to the bedroom was unable to hear the child breathing.

Q. Now, who told you that?

5 A. It wasn't the mother. It'd be Mr Folbigg, the father.

Q. And what makes you think it was the father that told you that?

10 A. I had a conversation with his elder brother. He gave me an outline of the family history. When we first arrived, I had - I didn't really have any conversation with Mrs Folbigg because of the state she was in, and the only person there that I spoke to that would be able to
15 supply those details was Mr Folbigg.

I did have a conversation with him, but in the absence of speaking to anyone else, in relation to the matter, I don't have a clear knowledge of him telling me, but I have
20 a clear knowledge of no-one else telling me.

Q. So, what else were you told about the circumstances of Sarah's death?

25 A. What aspect are you referring to?

Q. Well, if you can just continue reading from the statement?

A. Sorry.

30 "The mother had woken at I am to go to the toilet and on returning she was unable to hear the child breathing. She turned on the light and saw that the child's skin colour was blue and woke her husband with a scream. The husband
35 moved the child to the floor and commenced CPR while the wife called on the telephone for the ambulance. CPR was continued until arrival of Beresfield ambulance officers and they were unable to revive the child. The parents dressed
40 the child as I'd first seen it when I came to the home and sat nursing the child until we'd arrived."

45 Q. Now, did some detectives from the Maitland Physical Evidence Section then attend the house and take photographs of the child, the bedroom and the house generally?

50 A. Detective Ward from the Physical Evidence Section of Maitland attended and--

Q. Sorry?

A. And a detective from their normal office attended.

55 Q. Would you have a look at these photographs, which are exhibit C, and just confirm that those are photographs taken that night by one of those detectives (shown)?

A. Yes.

Q. Is what I said correct, they're photographs taken that night?

A. They are - they're in keeping with my recollection of the bedroom that night.

5

Q. Thank you very much. If you could return those
A. (Witness complied)

10

CROWN PROSECUTOR: Nothing further.

<CROSS-EXAMINATION

15

COOK: Q. You noticed that both parents were upset; is that right, Mr Saunders?

A. Yes.

Q. And Mrs Folbigg was particularly upset, was she?

A. Yes, I found it distressing to see her in that state.

20

Q. How long had you been a police officer then?

A. Then, about 16 years.

25

Q. And the level of distress that she was displaying was such that you yourself found it upsetting; is that right? You found it distressing to observe?

A. I found - I found observing her distressing.

30

Q. And you sort of worked out the information you got about the history had come from the father, Craig Folbigg? You assume that it was him because you didn't get it from anybody else?

A. I don't think you heard me correctly.

35

Q. Right.

A. I spoke to Mr Folbigg's brother, who gave me a bit of background about the family and family history. And I got most of the information about the evening's events from Mr Folbigg, the father.

40

Q. That's Craig Folbigg?

A. Yes.

Q. The father of the child?

A. Yes.

45

Q. He was the one who told you about his wife waking up at 12 or 12.30am?

A. Yes.

50

Q. And his wife waking again at about 1am?

A. Yes.

55

Q. And about his wife, on return to the bedroom then, being unable to hear the child breathing, turning on the light and screaming? Craig Folbigg gave you that information?

A. To the best of my recollection, yes.

Q. And just to confirm this, the reference to lam given to you by Craig Folbigg was that that was the time that his wife had woken up to go to the toilet; is that right?

5

A. Yes.

Q. You made a statement about this within a few weeks after it, didn't you?

A. The date on my statement is--

10

Q. As I read it, 12 September 1993?

A. That's correct.

Q. And can we take it that those times that you've outlined are accurate as to what you were told?

15

A. I accurately recorded what I was told. As to their accuracy--

Q. It's an accurate record of what you were told?

20

A. Yes, yes.

Q. And did you later supply information to the coroner about this matter?

A. Yes. By way of - not by word of mouth. By submitting the relevant forms and paperwork.

25

Q. Can we take it that any paperwork you supplied in relation to the history of the times given to you of the mother waking up and going to the toilet and seeing the baby, would have been based upon your statement that you made a couple of weeks afterwards?

30

A. No. All the details in my statement, and the information I supplied to the coroner by way of the report of the death form, were taken from - taken from my notebook.

35

Q. And you made notes in your notebook--

A. At the time.

Q. --on the morning or at the scene?

40

A. Whilst I was at the home.

Q. And it is in that notebook that you recorded the lam for the mother waking up, going to the toilet and later screaming?

45

A. Yes.

Q. To your knowledge, was there a thorough investigation by the police of the scene at which the death occurred; photos taken of the relevant things; of the bed and the surroundings?

50

A. How did I feel about it then or how do I feel about it now?

Q. Did you regard it as a thorough investigation on the morning?

55

A. No.

Q. Were photos taken of the bedroom?

A. Yes.

Q. Were photos taken of the bedding; the sheets?

A. Yes.

5

Q. And those photos were taken by other police; is that right?

A. Detective Ward.

10

<RE-EXAMINATION

CROWN PROSECUTOR: Q. Mr Saunders, you were asked some questions by my learned friend about the report that you did to the coroner, and you said that it was a written report and the usual forms to the coroner?

15

A. Yes.

Q. And you said that the information in that was based upon what was it, your notes that you'd made at the house at the time?

20

A. Yes.

Q. When you wrote your report to the coroner, did you have your notes that you made at the time in front of you?

25

A. Yes.

Q. Do you know where those notes are now?

A. No.

30

Q. Would they normally be destroyed after about six or seven years?

A. They're normally - they would have been retained at Maitland police station and they're normally destroyed after about seven years, and I believe - I believe - I don't know whether that's the case, but I believe they up - they were very lax in destroying documents at one stage, but they've pepped their act up.

35

Q. So, do you think that it is highly likely that your notes have now been destroyed?

40

A. It is more than likely.

Q. Would you have a look at this document (shown)?

A. Yes.

45

Q. Is that the report of Sarah Folbigg's death that you presented to the coroner?

A. Yes.

50

Q. And does your signature appear on the first page?

A. Yes.

Q. Could I take you to the bottom part of the document? Is there provision there for you to provide a narrative of the circumstances under which the death took place?

55

A. Yes.

Q. And have you filled that in with about a dozen lines

of printing?

A. Yes.

5 Q. And is that the information which you got from your handwritten notes that were made at the time at the house?
A. More than likely, yes.

10 Q. Well, would you have had any other source of information for that narrative?
A. It would be - the only other information I would have available to me would be notes made by my partner at the time.

15 Q. Can I take you--

COOK: I object to this, your Honour. It doesn't relate to my cross-examination, with respect.

20 HIS HONOUR: I think it does.

COOK: It is a matter that is going to go to some suggested difference; that is, as I understand it, where the prosecutor is going.

25 CROWN PROSECUTOR: Your Honour, it arises from the cross-examination of my learned friend in relation to--

HIS HONOUR: It was raised in cross-examination.

30 CROWN PROSECUTOR: It was raised in cross-examination, yes.

HIS HONOUR: You may go on.

35 CROWN PROSECUTOR: Q. Could I take you to five lines from the bottom of that narrative?
A. Yes.

40 Q. Could you read to the Court the sentence that begins, "The mother"?

A. "The mother got up to the toilet at 1.30am on 30/8/93 and could not hear the child breathing, turned on the bedroom light, and saw that the child had blue colour to the skin, on the face, and a discharge from the nose."
45

Q. My learned friend read to you from your statement?
A. Yes.

50 Q. Where you put that it was at 1am?
A. Yes.

Q. In this report you have got it at 1.30am?
A. Yes.

55 Q. Are you able to explain that discrepancy?
A. No.

Q. Are you able to say whether the report to the coroner

is more or less likely to be the correct version?

5 A. It's very difficult without my original notes to reflect to, but on the weight of information supplied in my statement and on the report of the death to the coroner form, I would say it's more than likely that it would be 1am rather than 1.30am, given the information provided by the ambulance officer to me in my statement.

10 Q. Thank you. I tender the first page of that report, your Honour.

ZAHRA: There is no objection to that, your Honour.

15 HIS HONOUR: The first page of the "Report of death to coroner" is exhibit X.

EXHIBIT #X FIRST PAGE OF "REPORT OF DEATH TO CORONER"
TENDERED, ADMITTED WITHOUT OBJECTION

20 <WITNESS RETIRED AND EXCUSED

HIS HONOUR: Ladies and gentlemen, we will end this week's proceedings here, and I will adjourn the case until 10 o'clock on Monday.

25

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour, Professor John Hilton has
very kindly been waiting this morning to give evidence.
We did think we would get to him. Unfortunately, we
haven't, for which I must apologise to him because, as I
understand it, he has now retired, so he has come in his
own time. I wonder if Dr Hilton will be available on
Monday morning?

10

HILTON: Yes.

15 HIS HONOUR: I am sorry about this, Dr Hilton. A part of
the problem has been caused by me, and I feel bad about
it, because I was late arriving at court this morning, but
if you will make yourself available on Monday I am sure
everyone will appreciate that very much.

20 CROWN PROSECUTOR: Thank you.

25 There is just one other matter, your Honour. Your Honour,
in relation to bail, I understand that she wishes to
remain in Sydney over the weekend, so there is no
requirement for any major alteration, but I understand
that she wishes to have approval to go out with Major
Harmer, who is the person from the Salvation Army who has
been in court a lot. I understand she is not an officer
of the army but we are quite content for Mrs Folbigg to
remain in her presence, or, alternatively, one of the two
adults with whom she is living at the moment. We would
30 have no objection to her going out and remaining in their
direct presence.

35 HIS HONOUR: Is some amendment needed to the conditions
we have already made?

CROWN PROSECUTOR: Yes, it would need an amendment.

40 HIS HONOUR: Could you tell me now then what that is?
Draft it please, Mr Crown. Mr Crown, the difficulty is
this: There is no copy of the current conditions of bail
here. We have a copy of the original conditions, but they
were later amended.

45 CROWN PROSECUTOR: At page 5 you continued bail on certain
conditions, including--

50 HIS HONOUR: What I have asked you to do is to draft the
required amendments.

(The Crown Prosecutor drafted an appropriate
amendment to the bail conditions and handed it
to his Honour.)

55 HIS HONOUR: Is this agreed to, Mr Zahra?

ZAHRA: Yes, your Honour.

HIS HONOUR: Then I further amend the bail conditions in
accordance with the draft which I have initialled and
dated with today's date.

5

ADJOURNED PART HEARD TO MONDAY 14 APRIL 2003

10

oOo

RMC:PM:RT:8

D9

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

NINTH DAY: MONDAY 14 APRIL 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

CROWN PROSECUTOR: The first witness the Crown is
calling is Dr Cooper in relation to sleep studies for
Patrick and Sarah. Then the Crown will be calling
Dr Hilton. Dr Hilton was the doctor who performed the
20 post-mortem examination on Sarah.

Dr Hilton's conclusions were that Sarah had died from
SIDS. The Crown case is not only did she not die from
SIDS, but that based upon the norms accepted in the
25 medical community, that Dr Hilton ought not to have
found that diagnosis. Your Honour will recall the
examination-in-chief of Dr Wilkinson in which he
conceded that on reflection, that the cause of death
which he put down in the death certificate was not the
30 cause of death that he would put down now.

HIS HONOUR: Mr Crown, is this something that you are
saying merely to have it recorded or are you asking me
to do something? Are you foreshadowing an objection?
35 What is happening?

CROWN PROSECUTOR: I'm anticipating an application that
I may make during the course of Dr Hilton's evidence,
so rather the jury having go out then, your Honour can
40 deal with it now.

HIS HONOUR: An application for what?

CROWN PROSECUTOR: As I said, Dr Wilkinson conceded
45 that he would be of a different view now if he were to
sign the death certificate. It may be that Dr Hilton
is not prepared to make such a concession, in which
event it will be necessary for me to seek your Honour's
leave to cross-examine him under s 38. Our submission
50 would be that one of the thing the Crown has to prove
is that Sarah did not die of SIDS. If Dr Hilton
maintains the correctness of his then view that Sarah
died from SIDS, we would be submitting to your Honour
that his evidence is unfavourable to the Crown case and
55 that your Honour ought to give leave to the Crown to
cross-examine him. It may be I can elicit the material
in chief without cross examining him but it may be
necessary for me to seek your Honour's leave for that

purpose, so I wish to say now what the basis of that application would be.

HIS HONOUR: Thank you, Mr Crown.

5

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: I have here the hospital records for Caleb Folbigg from the Newcastle Western Hospital. I have not gone to the extent of having them identified by one of the medical officers in relation to Caleb.

ZAHRA: There is no issue.

10 MFI#22 BINDER OF RECORDS FROM THE NEWCASTLE WESTERN HOSPITAL CONCERNING CALEB

15 CROWN PROSECUTOR: MFI 16 is the second EEG report for Patrick which was referred to by Dr Wilkinson and Dr Dezordi in the course of their evidence. I tender that. I do not require it to be read. The jury will recall the evidence about the second EEG for Patrick.

20 EXHIBIT #Y ELECTROENCEPHALOGRAPH REPORT OF 5/11/1999 CONCERNING PATRICK FOLBIGG

CROWN PROSECUTOR: Dr Cooper will be giving evidence in relation to both Patrick and Sarah.

25 <DAVID MICHAEL COOPER(10.25AM)
SWORN AND EXAMINED

30 HIS HONOUR: If you have notes there and would you like to refer to them in order to answer any question, you may do so.

CROWN PROSECUTOR: Q. Please tell the court your full name and place of work?

35 A. David Michael Cooper. I'm now the director of paediatric respiratory and sleep medicine at the Mater Children's Hospital in Brisbane and associate professor at the University of Queensland.

40 Q. Were you formerly the head paediatrician at the paediatric respiratory and sleep service at the John Hunter Hospital in Newcastle?

A. Yes, I was.

45 Q. For how many years did you occupy that position?

A. Goodness, I think I was in Newcastle for a total of 12, perhaps 12 and a half years, yes.

50 Q. And the paediatric respiratory and sleep service at that hospital, was that a service which was concerned with the evaluation of children and infants suffering possible or apparent sleep and breathing disorders?

A. Yes, it was.

55 Q. And was one of the things that that service did to do sleep studies on children to see whether they had any such disorder?

A. Yes, yes it was.

Q. Could you briefly describe to the court what a sleep study entails on an infant?

A. All right. That requires a sort of a historical note with it.

5

Basically we are looking at children asleep to see how their breathing appears, to see whether it is normal or abnormal, whether they have a number of recognisable abnormalities, to see if their oxygen concentration in the blood goes down during certain parts of sleep, often to see if there are heart and other irregularities present. At the beginning of the period of time in which we were looking at sleep in children in Newcastle we were using what I describe as fairly primitive equipment. We didn't differentiate, for example, in the key area between what we would call obstructive or central sleep apnoea, which is something of a difference.

10

15

20

Q. Could I ask you to now explain to us the difference between obstructive apnoea and central apnoea?

A. Apnoea means the cessation of breathing, and that is something we all do ourselves every night when we are asleep, during dream sleep particularly. It is a normal phenomenon. It is more a quantity of what one has where the abnormality becomes. A central apnoea is when the brain does not send a signal to the breathing apparatus to take a breath. Obstructive apnoea is when parts of the airway, particularly we refer to the upper airway, are blocked, at least in large part during breathing impeding particularly breathing in, inhalation.

25

30

Q. So central apnoea is a failure of the brain to send the requisite messages to the respiratory system to breathe?

A. Yes.

35

Q. Obstructive apnoea, the messages are getting through from the brain but because of some partial or complete obstruction the air is not able to get in?

A. That's right, or maybe enough air is not able to get in, right.

40

45

Q. If you could continue with your explanation--

A. Right.

Q. --about sleep studies?

A. A year or two later, the last sleep study here for one of these children is I think 1992, isn't it?

50

Q. Two sleep studies that you conducted or supervised in this case were in 1990 and 1992?

A. Yes, the most recent of them is I think on 55 5 November '92. I don't know whether the date is written in the American way around, sometime they default, the computer programmes. Okay, they were simplistic studies. We refer to them as pneumograms.

A lot of the earlier literature, particularly from the United States, writers uses predominantly pneumograms. These are where we are looking at breathing movement, heart rate, oxygen saturation.

5

Q. What is oxygen saturation?

A. Concentration of oxygen in red blood cells as measured, usually just with a little electrode on the skin, often on the finger or on the ear.

10

Q. So those sleep studies that you were performing in 1990 and 1992 measured respiration, heartbeat and the amount of oxygen in the blood?

A. Predominantly. It gave us a good idea of the pattern of those events.

15

Subsequently, we moved to the addition of a slightly more sophisticated device in about 1994 which did a lot more analysis of breathing and events from body motion sensing, and later on, I think in 1996, we got the full so-called polysomnography where we had head leads on and we could look at brainwaves during sleep as well.

20

Q. Would this be correct to say. Since these two sleep studies in this case the techniques of conducting sleep studies have become much more sophisticated?

25

A. They certainly have. Equally our state of knowledge overall about sleep disorders and related events, particularly in infants, has become much more - been much more critically analysed.

30

Q. Now, the first of the sleep studies in this case was in a study done on 15 June 1990?

A. Yes.

35

Q. And was it conducted on the child Patrick Folbigg?

A. That appears to be the case, yes.

Q. And at the time was Patrick about one and a half weeks old?

40

A. Yes, yes.

Q. And did you supervise that sleep study?

A. Yes. I think I functioned more at that stage as a person who did them for other people. I think I was asked to do it and we did it, that was the sort of mechanism at the time, a process that was subsequently abandoned where I thought I should be much more involved in the prestudy analysis of what was going on, the child, the events, et cetera. But yes, sure, this was done under my auspice.

45

50

Q. And the sleep study that you conducted on Patrick Folbigg, did that demonstrate any episodes of apnoea at all?

55

A. It appears that there were none at all. There was none.

Q. And was the result of the sleep study which was conducted on Patrick entirely normal?

A. Yes.

5 Q. Please look at these documents. (MFI 14 shown) That is a folder of documents from the John Hunter Hospital. Do the records relating to the sleep study conducted on Patrick appear on the first admission?

10

Q. You have to say "Yes" or "No".

A. I'm still looking. The first admission. To be honest, I'm having some trouble finding them. Here it is, so yes.

15

Q. Please look at this other folder which is not marked for identification. We have tabbed the appropriate part (Folder shown.) Is that a folder that relates to Sarah Folbigg, and does your sleep study in relation to Sarah Folbigg appear in those documents?

20

A. Yes.

CROWN PROSECUTOR: Might the whole folder be marked for identification? Again I don't anticipate any dispute in relation to the authenticity of the folder.

25

ZAHRA: That's right.

MFI#23 FOLDER OF RECORDS CONCERNING SARAH.

30

Q. On 5 November 1992 did you supervise a sleep study on the child Sarah Folbigg?

A. Yes.

35

Q. And at the time was she about one and a half months old?

A. According to the number on the top it was three and a fraction weeks old.

40

Q. I'm sorry, three weeks old?

A. Mm.

Q. Was a sleep study conducted on Sarah because of the past family history?

45

A. Yes.

Q. Would you tell the court what the result of her sleep study was?

50

A. This showed a very small handful of apnoeas, and as I mentioned earlier in my remarks I can't tell whether they are central or obstructive, but we would assume in an infant of this age, particularly with the accumulated knowledge of many, many years and many publications, that they are very likely to be central. There were a few shallow breaths which I allude to as hypopnoeas and there wasn't any desaturation at all noted. There weren't any reductions in oxygen saturation during the course of the study.

55

Q. Is it normal for children or infants of that age to have short periods of apnoea?

5 A. Yes, yes it is.

Q. And the kind of mild apnoea which you observed on Sarah, was that normal?

10 A. Yes, it is and in particular with another 12 years of you know, experience, science and analysis and so forth we would certainly be only too pleased to say that this goes along with a normal study for age in a child at this age.

Q. The periods of shallow breathing that were observed, were they also perfectly normal?

15 A. Yes.

Q. And in your conclusion was the sleep study conducted on Sarah Folbigg a normal one for her age?

20 A. I would say yes, certainly.

Q. Now, one of the thing that you noticed was a quite long period of shallow breathing, is that right?

25 A. Yes, yes.

Q. What do you say about how you would deal with that today with the modern technology that you have available?

30 A. Well, with today's technology I could be much more precise about how that was quantified, there wouldn't be any doubt about that at all. Indeed, I now do three, four, five, six, seven studies on predominantly premature infants every week, and we would say that the thing that worried us, these very minor changes 10 or 35 11 years ago, 12 years ago, would be classed as completely normal for an infant of you know, of these ages, certainly.

40 CROWN PROSECUTOR: Q. There is one further thing which I wish to discuss with Mr Zahra. Would your Honour adjourn briefly to allow me to do that?

HIS HONOUR: Yes, certainly.

45 SHORT ADJOURNMENT

50 CROWN PROSECUTOR: Thank you, there is one further area my friend and I have agreed I will be asking questions of the doctor.

CROWN PROSECUTOR: Q. Doctor, were you involved in sleep studies, apnoea and investigation of SIDS before you started at the John Hunter Hospital?

55 A. Yes, I was. I actually created a sleep investigation service in the step down unit of the intensive care unit which I used to run in the Alberta Children's Hospital in Calgary in 1980.

Q. Calgary, of course, being in Canada?
A. Western Canada, yes.

5 Q. I'm sorry, when was that?
A. I think it was 1982.

10 Q. You have been involved for many many years in three hospitals now running apnoea studies in sleep centres?
A. Certainly.

15 Q. Are you able to tell the court about what the situation was during the early 1970s and after that, about the use of sleep monitors in an attempt to try and pick up kids who may have been susceptible to SIDS and how those views changed over time during the eighties and 90s.

20 A. They certainly have changed a lot. Back to the seventies, there were a number of names that have probably been heard in court already?

Q. They wouldn't have been.
A. Steinschneider.

25 Q. He was a researcher in the early seventies?
A. Yes, yes he was.

Q. In the United States?
A. Yes.

30 Q. Did he promulgate--

35 A. He promulgated the notion that first of all SIDS was often familial on the one hand, secondly that one might be able to investigate it and predict it in families. Thirdly, he advocated very strongly, and this was supported by the NIH, National Institute of Health, a big research place based in Washington USA, that these children should have home monitor, little motion sensing devices that would hopefully alarm and give people warning that their child was in grave
40 danger.

Q. Was there also a belief at that stage about ALTEs acute life threatening events?

45 A. Yes, yes, certainly there was. The sort ALT, often loosely referred to as ALTE, was a term that evolved from what people initially called near-miss SIDS. We thought that near miss SIDS was a very unfortunate term because it implied that we believed that if those
50 children hadn't been found or caught and resuscitated and so forth that they would go on to die, and, indeed, quite a body of experts believed that might be the case at the time. But subsequent information--

55 Q. Could I ask you to pause there.
A. Yes.

Q. As a result of that belief in the early 1970s, were doctors encouraged to arrange for apnoea monitors to be

given or lent to parents or sold to them so that children considered to be at risk could use these apnoea monitors at home?

5 A. Yes. That was widely promulgated in a number of centres. I might add there was a wonderful study done in Britain where they didn't have enough monitors for everyone where they randomised everybody to have a monitor and classic training or resuscitation. On the other hand they had terrific training for baby
10 resuscitation, but a period of counselling with a trained social worker who knew a lot about things, and at the end of it they assessed, among other things, survival and on the other hand parent, as it were. That is, consumer satisfaction. We were all a bit
15 shocked because the people who had the social worker, not the monitor, did a lot better.

Q. Better in terms of survival?

20 A. They survived better, were happier and better adjusted. There was a message in that which some of us were a bit slow to pick up on.

Q. Over time did the medical community change its views on the effectiveness or possible effectiveness of the apnoea monitors?

25 A. Oh, certainly.

Q. Could you tell us when that happened and what happened?

30 A. Well, there were several strains of thought. There were some really cynical individuals who guided centres who never went the monitor way, but a lot bigger and particularly more affluent centres were
35 enthusiastically into monitors. The Royal Alexandria Hospital at Camperdown at Sydney had a big monitoring centre for quite some time. Somewhere in the late eighties, early 90s, much more understanding of what was going on started to accumulate, appeared in
40 particular a number of papers about the follow up, the outcome of people who had ALTEs started to appear and they appeared from all over the world - Australia, Britain, Germany, quite a nice one from Iceland, Israel et cetera.

45 Q. The United States?

A. Yes, and some of the people who didn't like the science of that fellow who was hard to spell, Steinschneider, were right in on that. A fellow called
50 Brooks wrote some contrary views, quite soundly, I think. So generally speaking the view became that it had been a lot of well-meaning but wasted effort, it hadn't changed things, and that people who were adequately counselled, as in the British study, tended to do better. Equally then the various back to sleep
55 campaigns got into process.

Q. We will come back to that. Firstly, did the figures show that there was any benefit in terms of

saving kids from SIDS in the use of apnoea monitors?

5 A. In one of the most bold leading articles on the subject, the emphatic statement was made that not a single life had been saved, and I think that's probably true. There was no good quality data showing dramatic improvements, no improvement prompt at all.

Q. No improvement at all?

10 A. Not really, no.

Q. Was there any link shown between apnoea and SIDS?

15 A. Not in full-term children. In the very premature babies some links, but not strong links. In other words, the problems that premature babies had were often more strongly linked we thought to the complications of this prematurity than their apnoea as such. Their apnoea was a consequence of being premature, not a primary cause--

20 Q. In babies who had normal births, not premature birth, was there any link shown between apnoea and death from SIDS?

A. No.

25 Q. And was there any link shown between ALTEs and death from SIDS?

30 A. No, that was one of the big surprises, really. Indeed, it did, past tense, cause great doubts on a number of the investigations and hard work that had been done.

35 Q. So what has been the policy of the medical community in Australia and the departments of health in Australia since the mid 90s in relation to the use of apnoea monitors?

40 A. Oh, the policy, except with a few fringe outliers is not to recommend infant home monitors at all. There is a policy from the New South Wales Department of Health that states emphatically in about half a page that apnoea monitors are not recommended for children except under the most unusual circumstances.

Q. Did you have any involvement in that policy?

45 A. I used to sit on a committee that, you know, put that together.

50 Q. So doctor, summarising it, is this the situation: That despite initial views in the seventies, the generally accepted view in the medical community now is that apnoea monitors are not recommended?

A. Certainly.

55 Q. That there is no established link between apnoea and death from SIDS?

A. I think that's a true statement.

Q. And that there is no established link between ALTEs and death from SIDS?

A. True.

5 Q. Now doctor, in the early 1990s was there a programme introduced in Australia and, indeed, around the world at other times called the back to sleep campaign?

10 A. Yes, there was. I think in its initial introduction it wasn't called that because it was done in Holland and I'm not quite sure what they called it. And, indeed, the Dutch original work was reported almost as just a letter to the editor, not as any attempt to high powered science, but it is really absolutely striking.

15 Q. What was the back to sleep campaign?

20 A. This is just putting babies to sleep on firstly mattresses without any stuffed toys and no pillows and one thing and another, and they had to sleep on their back rather than on their sides or face down.

25 Q. What effect did that campaign have on the incidence of death from SIDS around the world?

30 A. Oh, it was dramatic. More than halved the prevalence, so it was really quite dramatic. Interestingly enough, the number of so-called ALTEs went down with them. We tried to mount a multi-centre study to look at ALTEs again recently around Australia and we couldn't find enough children to do it on, so we gave it up.

35 That was a dramatic impact, it had its biggest effect probably in the south island of New Zealand and in Tasmania and this country. Curiously enough, there are more - there were more past tense SIDS in colder places further away from the equator for a lot of reasons that we are not completely certain about.

40 Q. And are monitors recommended in a family where a child has already had a death that has been unexplained, possibly SIDS?

45 A. We persisted with this for a long time, but for no good reason. I think that this was on the basis that it might offer those families some comfort, some reassurance. It's been my personal practice and lots of other people's in the business to try very, very hard not to do that. In other words, if people were extremely anxious I'll send them home with one, but they have to come back and see me next week or something and we will talk about it again and again and again and, if needs be, we will demonstrate that the baby breathes normally and we will take it away if someone gave it to them.

55 Q. Over time has it been established that there are certain environmental factors which seem to raise the incidence of SIDS?

A. Yes, there are some and there have been a number of false claims.

Q. Now firstly, does it include smoking by either parent?

5

A. Yes, smoking is the big risk factor.

Q. Does it include the socioeconomic status of the family?

A. Yes, yes it does.

10

Q. You have already mentioned that the colder climates seem to raise the incidence of SIDS?

A. Yes, that's true.

15

Q. Are there any other environmental factors that have been shown statistically with a higher incidence of SIDS?

20

A. Oh, particularly, you know, drug use during pregnancy I suppose, that is one of the most important ones. Cigarette smoking has been the major and most difficult to eliminate problem with an enormous increase in statistical risk of a bad outcome for a baby born to someone smoking at or about the time of conception, even in the first stage of the pregnancy even if butts are stubbed out at that stage and there is no smoking.

25

Q. What about the age of the parents?

A. Yes, young maternal age is important.

30

Q. The mother's age?

A. Yes.

35

Q. When you say young, is it the younger the mother the higher the incidence of SIDS?

A. Yes.

Q. And the older the mother the less the incidence of SIDS?

40

A. Yes, until one get to an extreme age.

Q. Are there any other environmental factors that seem to correlate with a higher incidence of SIDS?

A. I think they are the most important once.

45

Q. Because there are these correlations statistically, does that mean that any of those factors are a cause of SIDS?

50

A. Correlation and cause of action are often poles apart. With cigarette smoking and the work that has been done with breakdown, product and nicotine and so forth, there is hard science, best quality evidence that all sorts of very bad things happen to the children of people who smoke, they have more infection of any cause in the first year of life, they are more likely to die of any cause, apart from cot death. They are more often born small and to be mildly intellectually delayed, et cetera. It goes on and on, the list is substantial.

55

Q. Now--

5 A. There are certain bedding things if you wanted to go into things.

Q. I'm sorry?

10 A. Certain items to do with children's bedding. People were very excited about mattress in Britain, but we don't think that that pertains in Australia for a variety of reasons.

15 Q. Would you just pause before you answer this question. In terms of the age of the child, are you able to say what the parameters are in terms of death from SIDS?

A. Maybe you could restate that and--

20 Q. Death from SIDS is the unexpected deaths of a young child?

A. Certainly.

25 Q. During sleep, where the child is otherwise well and no other cause of death can be found upon post-mortem?

A. True.

30 Q. Are there also age parameters in relation to the age of the child at the time of death?

A. Cot death or SIDS, much more likely to occur in children between two and four months old. It becomes much less common after six months of age, extremely uncommon in the second or subsequent years of life. For what - it is of some interest, insofar as it is the younger children who would comprise the majority, whose deaths went down with the back to sleep campaign.

35 Q. And is this the case, that as yet the medical community does not know what is the cause of death from SIDS?

40 A. Yes, that's true.

<CROSS-EXAMINATION

45 ZAHRA: Q. Do I understand from your evidence in relation to the child Sarah that the test in fact showed that there were in fact some sleep apnoeas?

A. Yes, there were a few.

50 Q. However, you are of the view that that was in fact judged within normal limits?

A. I think that is quite within normal limits, yes.

Q. Can I show you this document? (Document shown.)

A. Right, that is a letter I wrote.

55 Q. Is that a copy of a letter that you wrote on 16 November 1992?

A. Yes.

Q. And was that to a Dr Henry who was a paediatrician?
A. That's right.

5 Q. And the date, 16 November 1992, was about 11 days, I think the tests that you performed on Sarah was on 5 November that year?

A. Right, yes, I think that, yes.

10 Q. So about 11 days later that you wrote that letter to Dr Henry?

A. Yes. I think you will find that is probably the date of typing rather than the date of dictation. They are often a few days apart.

15 Q. But you had arranged for that letter to be sent after the tests, presumably, of the 5th?

A. Yes. That was normal practice, a written letter every time.

20 Q. And soon after?

A. Yes.

25 Q. You indicated in that letter that there was a modest amount of periodic breathing and only a very small number of distinct apnoeas, is that right?
A. Yes.

Q. You however say:

30 "But there were some quite long hypoventilation, hypopnoea event, one of them about 40 seconds."

A. Yes.

35 Q. You were concerned about that?

A. At the time a number of us, me included, were concerned. We had read some work and, indeed, I'd had a fellow who did a, you know, a postgraduate trainee who had done a higher degree looking at various aspects of respiration in infants, and we had determined, as had a number of other people, that when milder abnormalities of respiration could be identified in infants we could change them with central stimulants, 40 in particular theophylline, which was not a particularly nice drug but which had an almost immediate effect, and later on, particularly in German speaking countries, caffeine was used instead. It was a safer drug, we thought. I was recommending its use 45 under those circumstances at the time. I certainly don't do it any more.

50 Q. In fact, you go on to reflect on that in this letter. You say:

55 "One wonders if theophylline would be of help here. I will leave that in your hand and restudy Sarah again if you see a need."

A. Yes.

5 Q. You were, however, sufficiently concerned about Sarah's apnoea at that time, particularly in the light of one of the hypopnoea events being 40 seconds?

A. Yes.

10 Q. I think you indicated that the presence of apnoea in children of Sarah's age at that time was not unusual?

A. It is invariably present.

Q. And you would expect that over time that that would cure itself?

15 A. Yes, as we grow up, so that those abnormalities or not abnormalities, so those identifiable breathing patterns go away.

20 Q. There was in fact no such follow up in the present case?

A. No. I could perhaps qualify my remarks by saying that were I really - had I been very worried all sort of other steps would have been taken. I'm really under these circumstances identifying some minor changes to a colleague and leaving them in his hands. It wasn't
25 this - it would be entirely different if I had had serious concerns about the child's outcome at the time.

30 Q. What about the length of one of the events being 40 seconds?

A. Yes. This is a shallow breathing pattern, and again I'd perhaps take the court's attention back to the remarks I made about the lack of sensitivity and sophistication of the equipment we used then. I
35 recognised pauses at least that long in the premature babies I deal with quite often today and we deal with them, we sometimes give them additional oxygen, but only the premature babies have demonstrated that their oxygen saturation is low.

40 In the absence of oxygen saturation changes we recognise that these shallow breathing patterns are really just perfectly normal and part of sort of life's evolution in the first year of life.

45 Q. With the equipment that you had at this point of time, were you able to effectively monitor the oxygen saturation levels in conjunction with that 40 second--

50 A. Yes, and there was no drop in oxygen saturation. In fact it is probably in her greater record, but we used to send a copy of the oxygen saturation profile out with the report and the letter.

55 Q. You indicated in your evidence that from what you had examined here, that this apnoea was likely to be not obstructive but central?

A. Yes.

Q. What are the indications of that?

A. Predominantly from other people's work, I suppose, at the same time who had more sophisticated equipment who demonstrated to us quite convincingly that most
5 children had either - well, I think every child has a degree of central apnoea during dream sleep, rem sleep, and what I identified there, I think there is a spelling error in relation to there, I'm missing a "P", that this hypopnoea, it doesn't matter, but they are
10 commonplace, we see them all the time, and at the time we recognised that other people with more sophisticated equipment could demonstrate that. And that true obstruction of a child in that age without desaturation would be quite uncommon.

Q. You were asked a number of questions in relation to the effectiveness of the use of apnoea monitors in determining vulnerability to SIDS?

A. True.

Q. In fact, you were asked a number of questions and ultimately it was distilled in relation to some simple proposition, that there is in fact no established link between apnoea and SIDS?

A. Yes.

Q. Now, that simple proposition has been distilled from essentially historical studies of those persons who had apnoea blankets or apnoea monitors and the incidence of SIDS?

A. Yes.

Q. Do I understand your evidence that you are able to distil that conclusion because there have been many
35 people who have performed studies on the effectiveness of the apnoea blankets in indicating a vulnerability to SIDS?

A. The basis of the apnoea blanket really was more that an assumption was made that having demonstrated perhaps apnoea on some studies or having a family
40 association, this was the idea promulgated by Steinschneider and one or two other people, I think Shannon and Kelly, who I quote as my normals on the report at the time or reference values, were heavily
45 promulgating that line. There wasn't very much good science at all.

Perhaps another way to put it would be the laboratory I work out of now does predominantly, about half our
50 patients in whom we do detailed sleep investigations are on premature babies who are at a much higher risk statistically of SIDS than are full- babies. We have been monitoring them, treating them, doing this for a - I say "we". I've only been there three years, that is
55 my current sort of term there, as it were, but for the 10 years or so they have been doing it, there's not been a single death. Children under that degree of surveillance, it just hasn't happened. That, I might

add, is better than other people's figures from other places, but most people doing exactly the same thing have only had a very small handful of deaths.

5 Q. Do I understand from your examination of the studies in relation to sleep monitors that at the end of the day it appeared that the incidence of SIDS for those who used the monitors was the same as for those who didn't use the monitors?

10 A. Yes.

15 Q. So in a sense that is the reason you are able to reach this simple proposition that was put to you, that there is therefore no established link between apnoea and SIDS?

20 A. That is one of it. There is an enormous welter of data, though, between the beginning, 20 or something years ago, and where we are with a simple I think distillation of it. Certainly there has been no demonstration in any centre that using monitors reduced SIDS and, indeed, in terms of satisfaction and happiness and so forth, people who were counselled and didn't have the monitor were generally happier and they didn't have more deaths.

25 Q. So in a sense there has been a conclusion that there is really no utility in the apnoea blankets because the apnoea blankets can't tell you which of the children are more or less vulnerable to SIDS, we have the same proportion of people dying of SIDS with the apnoea blankets and the same proportion without?

30 A. Yes, that is the case.

35 Q. But at the same time, these studies do not exclude the possible link between apnoea and SIDS?

40 A. I think there is a large body of data which says that it is extremely unlikely. Ultimately, of course, when all of us die we have an apnoea, we stop breathing, but the link between identifiable apnoea in small children and SIDS is remote, and perhaps the most important thing perhaps is that since the very simple public health campaigns were instituted, rather than hard science, SIDS has diminished to such an extent that it is a very uncommon event now and ALTE, the apparent life threatening events, has gone the same way.

45 Q. You see, the proposition that was distilled, put to you that there was no established link between apnoea and SIDS, do you recall that being put to you?

50 A. Yes.

55 Q. And is it to be understood by that that in a sense persons with monitors had the same frequency of SIDS deaths as those who did not, and therefore you can't establish by the use of the monitors that there was in fact a link?

A. I think one often has to sort of lean on nature's

5 experiments to look at these things differently, and
centres that never used the monitor, ever, not once,
had exactly the same experience in terms of reduction
in cot deaths when they underwent very simple public
health measures of cleaning up bedrooms, reducing, et
cetera, et cetera. So sure, equally, despite the fact
that the NAH in America in particular had spent
millions of dollars on promulgating public health
programmes, public health nurses, visiting premises
10 over the telephone, downloading of sort of more
intelligent monitors that could search events, they
still could never demonstrate a process, a fabric
whereby you could actually demonstrate that apnoea in
these children in the home was associated with an
15 increased risk and, furthermore, that spending millions
and millions of dollars on doing everything that they
could think of to reduce the risk did not change the
outcome one bit.

20 Q. The study of the effectiveness of the blankets can
also be distilled into this simple proposition, that
ultimately it didn't disprove the link, it just showed
that it was impossible to be able to distinguish it?

25 A. In a sense, yes, I suppose. But I think there is
so much good evidence that with more and more
sophisticated measures with more and more, there are
some really excellent animal models on some of the work
being done right here, particularly the University of
Sydney, without doing anything dreadful to the animal
30 model, you know, starving it of oxygen for most of the
time. You can't induce a horrible state without trying
very hard that will lead to death.

35 Q. But ultimately these studies about the use of the
blankets could not be considered to be evidence
disproving the link?

40 A. Oh, they have disproved themselves and have gone
completely out of business, and that probably is -
that, you know, that part of it rests, I think.

45 Q. But the reason they have gone out of business or
are not using them is because at the end of the day you
can't tell the incidence and the likelihood because the
incidence is the same for people who use them and
people who don't. Is that the reason they are not
used?

50 A. And the prevalence for everyone has gone down, so
it would be extraordinarily hard to make a case for
their utility and improving things.

55 Q. Particularly when one is resourced so starved, if
you have a monitor that doesn't indicate anything to
you about the particular vulnerability, obviously you
don't use it?

A. You won't, no. We could use our money to much
better effect.

Q. And that is the reason they are not used?

A. Yes.

Q. You were asked generally some questions about the fact that we still don't know what causes SIDS?

5 A. No, we don't.

Q. But it is in fact still happening?

A. It is.

10 Q. And no doubt that from time to time certain theories are put up about possible connections between, as you say, environment factors?

A. Yes.

15 Q. And SIDS?

A. Yes.

Q. And initially some of these theories are ridiculed?

20 A. From time to time, yes.

Q. The back to sleep programme was one of those types of theories at the outset that was in fact quite ridiculed?

25 A. I think people who read from the beginning and read the Dutch literature particularly and then some of the others wouldn't ridicule it, no. It was very convincing. Giving it an explanation was a different matter entirely, but it worked and that speaks for itself.

30 Q. But there were significant experts who are of the view that that was not firmly based at that time?

35 A. Yes. Not too many of them persisted in their indifference.

Q. But when it was first ventilated, that certainly caused some divergence of view in the scientific...

40 A. Yes, it did. I think it had - the strange thing that happened first was that, you know, four people tried to promulgate this as an approach. They held up hard data from Holland and said God knows why it worked but there are many fewer dead babies, there is obviously something in it. I think that is probably a much more compelling argument than many of the, you

45 know, clever theories that people had about a variety of illnesses where there is a theory but no data. Here there was hard data and very simple interaction and an amazing outcome that was really lacking a explanation.

50 Q. Obviously now a strong foundation?

A. Oh, very strong.

Q. In medical research?

55 A. Yes.

Q. That shows that the incidence of SIDS is reduced by merely sleeping on the back?

A. Yes.

Q. But again, I think as you have indicated, even now we still don't know why that mechanism reduces the incidence of SIDS?

5 A. There is some good science for it but it is not completely sown up. We know perfectly well that people who sleep face down sleep deeper, sleep longer, they are more likely to arouse from sleep. Indeed many of us, the only thing that gets us up in the morning, have 10 this primary sort of arousal that gets us out of sleep, et cetera. So yes, there is some acquired science accumulated. I guess the other thing that is happening too is people become much better at determining what has been regarded as, you know, accidental suffocation and so forth, children caught in the corners of 15 dangerous rocking cots and so on and so forth which used to be included in the sort of really a grab bag or waste bag called SIDS which are no longer called SIDS. People say this is not sudden unexpected death, this 20 was quite expected given the circumstance.

Q. However, at the present time we don't know completely why it is that the back to sleep programme was in fact so successful?

25 A. Oh, no. As with a lot of public health measures it is complicated by the fact that there were coincidental things done which one can't tease out completely. You know, there is much more awareness of the need for better maternal health, much more awareness of the need 30 to not have young mothers or people who intended to become mothers, people who had become mothers and were nursing their babies, to smoke for example. Dispensing with the cigarette, which is, I might add, a very tough job, has had a good effect. I think there were many 35 other public health benefits and these are often replica affects, they happen coincidentally, they are hard to eliminate, but better maternal health, better awareness, better need for more and better immunisations. They all become a part of it. 40

Q. At the same time, as we now know with the back to sleep campaign, there is a lot that we still don't know about SIDS?

45 A. Oh, my word, yes.

Q. And we can indicate some of these environmental factors, but again none of them are indicators of the causal link to SIDS?

50 A. Links with cigarette products are very strong but they are not universal, of course. I think ultimately we have to back off and say that sudden infant death is certainly multifactorial, there are a number of very strongly identified social factors, maternal age, et cetera. They are very important ones, but one probably 55 needs several of them.

Q. But none of them are at the state where they could be predictors of SIDS, that one does not know?

A. Not precise predictors, no. Warnings, certainly.

Q. No higher than that?

A. No.

5

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour, I think it is
appropriate for me to notify the court what I would
wish to re-examine on because it is an area that I know
my friend had objected to me leading in chief from
Dr Cooper.

10 HIS HONOUR: Do we need to keep Dr Cooper seated in the
witness box?

CROWN PROSECUTOR: No, perhaps he could remain at the
back of the court.

15 WITNESS LEFT THE WITNESS BOX

20 CROWN PROSECUTOR: The doctor gave evidence that SIDS
is a multifactorial disease, that there are social
factors, that none of them are predictors of SIDS and
in particular he was asked about the fact that there
have been a number of theories to date about SIDS and
that some theories initially have been the subject of a
lot of ridicule. What I wish to ask the doctor is what
25 he says as to the theory that SIDS may have a familial
link, or that it might be a disease with a familial
aspect to it. I anticipate that he would say, because
he has told my learned friend and I, that the generally
accepted view in the medical community is that SIDS is
30 not a familial disease. That is, that the incidence,
it doesn't have cluster in families and that the
incidence of, say, a second child is pretty much the
same as with a first child subject to those social
factors coming into play.

35 HIS HONOUR: That indication has been made, Mr Zahra,
will that give rise to any objection?

40 ZAHRA: I did restrict the question to environmental
factors. The question was restricted in that way.

HIS HONOUR: The young age of the mother is not an
environmental factor, is it?

45 ZAHRA: No, that was a matter that my friend had
raised. I did not cross-examine on that. If my friend
is suggesting I have raised an issue in
cross-examination that now permits him to raise an area
of genetics.

50 HIS HONOUR: Let us come to the heart of this: Are we
concerned with whether something fairly arises out of
cross-examination or are we dealing with questions of
admissibility?

55 ZAHRA: I indicated to my friend after discussion with
the witness that so far as his present research is
concerned and his expertise, that whilst he has read
material that this area of expertise was not a matter

5 that he was particularly skilled in other than reading
research reports and the evidence was proposed to be
limited in that way. The witness did in fact raise the
question of familial links somewhat unresponsive to my
friend's question. I'm not suggesting that he led that
despite our discussion. I've purposely restricted the
issue to environmental issues in cross-examination. My
friend wishes to raise evidence in relation to possible
genetic familial links but that is not something which
10 I believe is in this witness's expertise, apart from
reading research reports.

15 HIS HONOUR: I don't know whether it is, and that is
the only source of difficulty you see.

ZAHRA: Yes.

20 CROWN PROSECUTOR: I could clarify his expertise, your
Honour.

HIS HONOUR: The jury are not here and Dr Cooper is
here, does anybody want to ask him questions about his
expertise?

25 CROWN PROSECUTOR: Yes, I will.

EXAMINATION ON THE VOIR DIRE

30 CROWN PROSECUTOR: Q. You have told us about the three
hospitals where you have worked in sleep and
respiratory clinics?

A. Yes.

35 Q. You have also told us that you served on a
committee in relation to SIDS, is that right?

A. Yes, yes.

Q. What sort of committee was that?

40 A. That is the New South Wales Health Department's,
you know, committee on, I forget precisely what we
called it but, you know, sudden infant death I believe.

Q. And you have told us that you are a professor, was
it at Brisbane University?

45 A. Yes, yes.

Q. At the University of Queensland?

A. University of Queensland.

50 Q. What areas do you teach in?

A. Oh, respiratory medicine in children, respiratory
physiology, sleep medicine and physiology.

55 Q. Does that cover, amongst other topics, hypotheses
about the origins of SIDS and the causes of SIDS?

A. Yes.

Q. And do you have trainee specialists who have

trained under you?

A. Yes, certainly.

Q. For many years?

5 A. Yes, 20 something.

Q. Is that included in the area of SIDS?

A. Yes.

10 Q. And I think you have also acted as a referee on many occasions looking at articles before they are published?

A. Yes, I do that as a regular habit, as it were.

15 Q. In paediatric journals?

A. Certainly and adult journals.

Q. Covering the area of SIDS?

A. Yes.

20

Q. And do you have any knowledge as to the current status of knowledge and current views accepted in the general medical community about theories concerning the origin or causes of SIDS?

25 A. Yes, I believe I do.

Q. And do you consider that you have expertise from what you have read, from your attendance at conferences, from your discussions with colleagues around the world and from your own experience as a medical practitioner, to be able to comment on theories that have been advanced in recent times concerning possible genetic or familial incidence of SIDS?

30 A. Particularly I think the familial incidence of SIDS, I'm sure I can address that.

35

CROWN PROSECUTOR: I press it, your Honour.

40 ZAHRA: Q. So far as the familial or genetic links in SIDS, are you presently carrying out any research in this area?

A. We are doing, my predominant research right now is not specifically in SIDS but we are, what we might say, I'm obliged to audit a variety of our functions and that is right up there with it.

45

Q. What is it that you audit? Are you talking about other research reports?

50 A. In terms of auditing, we audit our entire, you know, every facet of the function of a large and complex department.

55

Q. Is what you are saying that your knowledge in relation to familial or genetic links is based on reading other research reports?

A. Predominantly, yes.

Q. Is it the sole basis at the present time?

5 A. Sole basis? I suppose it probably is although, you know, I've been working in the area and doing a number of these tests for 20 years, you know. One has more than a nodding acquaintance with what is happening.

10 Q. What about the committees in relation to SIDS with the New South Wales Health Department? Are you currently on any committee that touches upon this particular area, the genetic or familial links?

15 A. Not any more. I made a move to Queensland about three years ago and dropped off those.

15 Q. When was the last time you participated in those, so far as they related to SIDS?

15 A. Oh, 1999 I think.

20 Q. Have you kept up with researches, for example, in relation to the connection with, of SIDS with prolonged QT syndrome?

20 A. I have a fair, you know, prolonged QT has been around for a long time. I am familiar with several forms of it.

25 Q. What about current research in relation to the connection between prolonged QT and SIDS?

25 A. I don't know if I've specifically reviewed that for a while. I've been involved with a child with prolonged QT here, not a long time ago.

30 Q. What about--

HIS HONOUR: Please let Dr Cooper finish the answer.

35 WITNESS: I'd finished, continue.

ZAHRA: Q. Have you read Ackermann's article?

A. No, but if you pass it under my nose - I don't think I have, anyway.

40 Q. What about serotonin?

A. One hears about serotonin from time to time.

45 Q. Were you aware of recent studies at the Mayo clinic in relation to the connection between serotonin?

A. No, I'm not, not, not specifically.

50 Q. When was the last time you read a research article in relation to familial or genetic links and are you able to identify it?

55 A. Probably the week before last. I've been reviewing a number of things from a number of authors including, you know, I started off, the other day with Brouillette - my French spelling is even worse than my English. Must have a double L in that for that pronunciation, I'm sorry.

So, certainly you know, one keeps in touch. I've seen a child with prolonged QT just a few weeks ago who

5 didn't, I might add, have any ALTE experiences. It was an infant who had an arrhythmic presentation. I have been associated with a number in the past who usually had seizure presentations, but not necessarily.

Q. Ultimately what can you now say about the question of familial or genetic links?

10 A. Oh, we can say that the likelihood of a second SIDS in a family whose had had one is probably no higher than in the general population.

Q. Is it the case that it may be a little higher?

15 A. People will debate whether it is a little higher or no higher at all, but it is certainly not the several-fold that was argued in the past.

Q. Is that the extent of the evidence that you could give here today, that the incidence of SIDS or, sorry, the likelihood of a second SIDS death is probably no higher than the first?

20 A. Well, that is pretty good evidence in this day and age.

Q. I wasn't suggesting otherwise?

25 A. It used to be quoted as sort of several-fold. Now it's back to an argument as to who has the statistics right as to whether there is a prevalence. The only people present that I would see who we would consider to be at some risk are people who have children with product in multiple pregnancies, twins, triplets, 30 quadruplets et cetera, who have the combining factors of prematurity and multiple pregnancy both of which add increased, substantive increased risks.

35 CROWN PROSECUTOR: Q. You have said that the likelihood of a second SIDS death in the one family is no higher than the incidence in the general population. Putting aside multiple pregnancies?

40 A. Yes.

Q. There has been debate about whether it is just a little higher or no higher at all?

A. That's right.

45 Q. Based upon those conclusions what does that say about whether or not SIDS is an inherited or familial disease?

50 A. It says it is very highly unlikely that it is familial, very highly unlikely.

ZAHRA: Q. But can't be excluded?

55 A. Not absolutely. But I tell you what, a lot of people who worked at that for a long, long time and the answer is really no.

Q. But can't be excluded?

A. Oh no, no, not absolutely.

ZAHRA: I think if my friend asked those questions, I don't know if my friend want to leads that.

5 CROWN PROSECUTOR: I'm content to lead the questions that I asked in re-examination and the questions that Mr Zahra asked.

10 HIS HONOUR: There is no longer any issue about whether Dr Cooper has the expertise to give the evidence.

ZAHRA: Limited to those general propositions, no.

EXAMINATION ON THE VOIR-DIRE CONCLUDED

15 SHORT ADJOURNMENT

20 HIS HONOUR: Mr Zahra, I passed up the question whether this strictly arises out of cross-examination, but if you want to ask questions after the Crown, I will give you that opportunity.

ZAHRA: Thank you.

25 CROWN PROSECUTOR: I will seek to qualify the doctor in the way that I did on the voir dire as well.

IN THE PRESENCE OF THE JURY

<RE-EXAMINATION

- 5 CROWN PROSECUTOR: Q. I would like to ask you some
more questions about your areas of expertise. You told
us about the three hospitals that you have worked in
and you have told us about the committee that you have
10 been a member of here in New South Wales. Firstly,
could you explain to the jury what that committee was?
A. We have a - did have, I am sure it still exists but
I used to be a member of a New South Wales Department
of Health committee on various matters relating to
sudden infant death syndrome, who should have monitors
15 and various public health matters.
- Q. Have you attended numerous conferences on SIDS?
A. Yes.
- 20 Q. You have present papers on SIDS?
A. Yes.
- Q. And have you been a referee for paediatric journals
where you have been asked to look at articles that have
25 been submitted for publication and you have been asked
to assess whether the articles are good enough for
publication?
A. Certainly.
- 30 Q. And has that included articles on SIDS and the
causes, possible causes of SIDS?
A. Yes.
- Q. And various theories that have been proposed as to
35 the causes of SIDS?
A. Yes.
- Q. Over the time that you have been at these three
40 hospitals have you had a very large number of trainee
physicians that have had their training under you?
A. Yes, many.
- Q. And has that included training them in the area of
SIDS?
45 A. Yes.
- Q. Doctor, what do you say as to the likelihood of a
second SIDS death in the one family?
50 A. You might recall earlier that my reference to
people like Steinschneider and others who really tried
to promulgate this notion, but as the dust settled and
I think analysis became more critical and better
studies were done, we came up with a rather surprising
fact, I think, that really having one SIDS didn't
55 predispose the family to another, and really there's
probably no increased risk at all, or perhaps a very
slightly increased risk. Whereas the literature of ten
years ago would say that the risk was indeed very high,

much increased, but that's simply not substantiated with extensive work.

5 Q. When you say "extensive work", is that studies that have been done on the statistics of actual babies that have died of SIDS?

A. Yes, yes.

10 Q. And that view that you have just expressed, that the incidence in a family that has already had one SIDS death is exactly the same as the incidence in a family that has had no SIDS deaths, what do you say about whether or not that's now the generally accepted view of the medical community?

15 A. Yes, it is, and there's actually excellent Australian data to go for that too, as well as regional data. Your colleague was asking earlier, your friend, I think is the term, about other names and things, and of course in New Zealand there is a person called
20 Mitchell who has done the most extensive analysis of cot death statistics and in Australia it has been particularly in the Menzies Institute in Hobart at one stage and some colleagues of mine in Monash. So
25 extensive local statistical analysis as well as anything from overseas.

30 Q. Now, is this the case, that that view is a view that refers to normal births, that is, not premature births and not multiple births; is that right?

A. Yes.

Q. Multiple births being twins, triplets et cetera?

A. That's right.

35 Q. And premature births being births of babies before their full term of pregnancy?

A. Yes.

40 Q. In your view what does that conclusion say about any theory of SIDS having some inherited or familial causation?

A. It suggests that it is extremely improbable.

45 Q. And what do you say about that view, that it is extremely improbable that SIDS is an inherited or familial disease? What do you say about whether or not that view is accepted in the general medical community throughout the world?

50 A. I think it's the view that will be, you will find, accepted in the vast majority of centres, particularly where good quality critical review is held, certainly.

55 Q. If a disease has an inherited or familial cause, what sort of statistics would you expect?

A. Oh, the formerly claimed figures, in fact some of the older literature I looked at before coming here made wide-spread, sweeping remarks, very much increased, et cetera, and the original estimates were

at least a three times increase in prevalence. But that's certainly not the case.

<FURTHER CROSS-EXAMINATION

5

ZAHRA: Q. Doctor there is, however, continuing research around the world concerning the possibility of familial or inherited links?

A. Oh, yes.

10

Q. And that research is carried out by some of the most eminent institutions in the world?

A. Yes. We have one of them in Australia at the sleep meeting last year, a Dr Redline.

15

Q. There are significant overseas studies from significant institutions?

A. Oh, yes. There's a lot of work, but in terms of finding familial links to other, what I would call other sleep disorders, but certainly obstructive sleep apnoea running through families we can find very strong links, but very, very poor linkage between, you know, SIDS and family matters.

20

25

Q. The current state of research, however, one can't exclude the possibility of a familial or inherited risk?

A. One cannot definitely exclude it but, you know, the largely familial includes interrogation that were reported originally really have gone away. They just don't really exist in today's literature, you know Steinschneider's index case eventually became remorseful and admitted that she had actually done away with her children, and that particular family was the basis for an enormous amount of that work.

30

35

Q. But this research has certainly not been put to one side, it is currently being undertaken by significant institutions around the world?

40

A. Yes, but I would say we would be heading in quite different directions now to looking for a simple hopefully unigenetic, you know, a single simple pattern of inheritance which was strongly suspected, say, 20, perhaps 15 years ago, and the likelihood that people will find that is remote. The likelihood conversely that they will ultimately find some sort of gene marker which probably puts people at risk is possible.

45

50

Q. And there is significant research being done in those areas?

A. A great deal.

55

Q. You talked about examining statistics and whether there has been any variation in the statistics where there may be a question of underlying factors, and the statistics don't mean a great deal in linking the frequency of SIDS to underlying conditions. Can I ask the question in this way to make it simpler. For

example, in relation to smoking, as you indicated earlier. Well, there is now very strong bodies of evidence that suggest that smoking may have some causative element for SIDS?

5 A. Yes.

10 Q. But the statistics don't bear out the concern at the same time in the sense that in smoking families we don't have multiple or increased frequency of multiple SIDS deaths?

15 A. If one is into fancy modern statistics there is a calculation the epidemiologists use, called an odds ratio, and in the New Zealand study, to which I referred a few minutes ago with that chap Mitchell, they had odds ratios of about seven. In other words, that gives you about a 700 times higher chance of having a child with SIDS if a person was a heavy smoker and had a few related risk factors.

20 Q. It didn't matter--

A. She didn't have many.

Q. So the use of statistics--

25 CROWN PROSECUTOR: I don't think he finished his answer.

30 WITNESS: I think it is fair to say a variety of social interventions have taken place and if a person probably, you know, it is likely that if a person continued to do all of those things and smoke three packs a day et cetera, they might have subsequent SIDS. That person who is at very high risk from cigarette smoking also has a very high spontaneous abortion rate, by the way, and most of those children will not get to fruition anyway.

40 ZAHRA: Q. Could it be put simply as this; we suspect causative links but at the same time we are very wary of using statistics to show that for smoking?

45 A. No, we are very confident of the links with smoking, but causation and so forth, ultimately you have to get back to some very fundamental reproducible biological, you know, demonstration in a laboratory setting.

Q. We don't have that.

50 A. Or we would likely fall guilty of falling into the traps that some of our predecessors did.

Q. We just don't have that foundation?

A. We are very close.

55 Q. But we don't have it?

A. Not quite.

<FURTHER RE-EXAMINATION

5 CROWN PROSECUTOR: Q. You said there is a 700 times higher chance of SIDS with a smoker. Did you mean 700%?

A. Yes, I'm sorry, 700%, you are right, seven-fold.

Q. Not 700 fold?

10 A. That was a slip of the tongue.

Q. You were asked about the environmental factors such as smoking. The success of the back to sleep campaign and other campaigns like the antismoking campaign, you have told us that that had an effect of reducing SIDS?

15 A. Yes.

Q. What does that say to you about any familial or genetic link?

20 OBJECTION

A. I would have thought--

25 HIS HONOUR: Why can't the question be answered?

ZAHRA: They seem to be two unrelated facts, two unrelated areas of study.

30 HIS HONOUR: I think the doctor can answer the question. Perhaps they are. We will find out if they are.

CROWN PROSECUTOR: Q. Doctor?

35 A. I think that they are probably important, it is an important link insofar as the--

Q. If I could just clarify my question?

A. Say again, yes.

40 Q. The success of the back to sleep campaign in reducing the incidence of SIDS and the successes of antismoking campaigns to reduce the incidence of SIDS, what does that say to you about whether or not there is any genetic or familial link in relation to SIDS?

45 A. It says that if you can reduce something by more than 50%, by doing a simple social intervention it can't be anything to do with breeding.

<FURTHER CROSS-EXAMINATION

50 ZAHRA: Q. At the time we don't know what the causes are and the causes might be multifactorial?

55 A. The causes are undoubtedly multifactorial. The back to sleep campaign success, however, is truly remarkable because it simply takes a whole range of possibilities really out of the possibility, out of the question.

Q. We can't rule out the possibility that there is a familial or inherited link and on top of that things like smoking don't help?

5 A. Yes, that may eventually be the case, who knows.

<WITNESS RETIRED AND EXCUSED

10 CROWN PROSECUTOR: I call Professor John Hilton. It is in relation to the post-mortem examination of Sarah.

<JOHN MILLAR NAPIER HILTON(12.36PM)
SWORN AND EXAMINED

15 HIS HONOUR: Q. If you have some notes and you would like to refer to them to answer any question, you may do so?

A. Thank you.

20 CROWN PROSECUTOR: Q. Would you please tell the court your full name?

A. John Millar Napier Hilton.

Q. You have recently retired, have you, from the Institute of Forensic Medicine?

25 A. Well, I am in the process of.

Q. The Institute of Forensic Medicine is situated at Glebe?

30 A. Yes.

Q. And it is associated with the morgue, or it is the morgue?

A. No. The mortuary is part of it, yes.

35 Q. Your qualifications please?

A. Bachelor of Medicine, Bachelor of Surgery, and a Fellow of the Royal College of Pathologists of Australasia.

40 Q. For how many years have you been a pathologist?

A. I got my fellowship in 1972. I had some five years training in pathology before getting the fellowship.

45 Q. Doctor, for how many years were you the head of the Institute of Forensic Medicine at Glebe?

A. Twelve years.

Q. Doctor, do you have any notes that you would like to refer to?

50 A. Yes, I do, yes, thank you.

Q. On 31 August 1993 did you conduct a post-mortem examination on the deceased child, Sarah Folbigg?

55 A. I did.

Q. That was, I think, the day after she had died?

A. Yes.

Q. As a result of that post-mortem examination, did you produce a report for the coroner?

A. Yes, I did.

5 Q. Would you have a look, please, at this report? (Shown.) Is that your report?

A. It is.

10 EXHIBIT #Z PROFESSOR HILTON'S REPORT TO THE CORONER, TENDERED ADMITTED WITHOUT OBJECTION

Q. If I could take you to your report. Firstly, did you conduct an external examination of Sarah Folbigg?

A. Yes, I did.

15

Q. You noticed that there was some lividity present on her body?

A. Yes.

20

Q. Lividity is just pooling of the blood, is that right?

A. It is pooling of the blood in the lowest part of the body that is available at the time.

25

Q. After death?

A. After death.

30 Q. And in this case the lividity was of no significance in terms of working out the cause of death; is that correct?

A. It is of no significance working out the cause of death, that's correct.

35 Q. Did you notice that there was a 1.5-centimetre scratch on the anterio lateral aspect of her right upper arm?

A. Yes, I did.

40 Q. Could you show us on your own arm where it was on the child?

A. Approximately there (indicating).

45 Q. Were you able to say whether or not that scratch appeared to be a recent scratch?

A. Yes.

Q. What was it?

A. It was recent.

50

Q. Was it recent?

A. It was recent, yes.

Q. Did you take a photograph of that scratch?

A. I didn't take any photographs at all.

55

Q. Do you sometimes take photographs of injuries?

A. Yes.

Q. Why was it in this case that you didn't take a photograph?

5 A. Well, I usually don't take photographs. If it is a suspicious case there is a scene of crime officer or a police photographer present and they do the photographs.

Q. Was there a police officer present during this examination?

10 A. No, not that I can recall.

Q. At the time did you consider, sorry, prior to conducting the post-mortem did you consider it to be a suspicious death?

15 A. Not a frankly suspicious death, no.

Q. Did you also find on Sarah that there were two tiny punctate abrasions medially below her lower lip on the left side for one of them and slightly to the left side of the midline of the chin for the other?

20 A. Yes.

Q. Firstly, what do you mean by a tiny punctate abrasion?

25 A. Well, an abrasion is an extremely superficial injury involving the outmost layer of the skin. Punctate means it is pinpoint.

Q. Could you show us, please, on yourself where these two pinpoint abrasions were?

30 A. They were immediately below the lip.

Q. That's immediately below the lower lip?

35 A. Yes, and one was just to the left of the midline and the other was slightly further to the side.

Q. Just show us on yourself?

40 A. (Witness complied.) Just one left to the midline, the other somewhat lateral.

Q. Were they both within a centimetre or two of the lower lip?

A. Yes.

45 Q. Are you able to say whether or not those punctate abrasions were recent?

A. Yes, and they were, yes.

Q. They--

50 A. Were recent.

Q. Are you able to say whether or not those punctate abrasions were consistent with some sort of force being applied to the area of the child's mouth?

55 A. Yes, and yes.

Q. What do you say they could be consistent with?

A. They could be consistent with any very minor

application of force, either by the child or by another party.

5 Q. Apart from those findings was there nothing else of any significance that you found on an external examination?

A. No. The baby's body was clean and well nourished.

10 Q. Is that correct what I said, there was no other significant finding on the external examination?

A. Yes, that is correct.

15 Q. Did you then conduct an internal examination of the body?

A. Yes, I did.

20 Q. Did you conduct an examination of each of the cavities of the body?

A. Yes.

25 Q. Including the respiratory system?

A. Yes.

30 Q. Firstly, if I could ask you this. Was everything about the head part of the body found to be normal?

A. Yes.

35 Q. If I could come to the throat area just a little bit later?

A. Yes.

40 Q. Could I take you next to the thoracic cavity, which is the chest cavity.

A. Yes.

45 Q. Did you find that both lungs showed focal areas of collapse of a geographic pattern?

A. Yes.

50 Q. Could you explain to the court what "focal areas of collapse of a geographic pattern" means?

55 A. Yes. The one consists of lung, consists of lobes, three on the right, two on the left. Each lobe in turn is made up of globules and there are small further groups of air sacs within these globules. Now, what I mean by geographic areas of collapse, there were areas where groups of globules had collapsed and looked dark or darker and more solid than the rest of the lung and in essence, if you look at the surface of the lung under these circumstances it has some, albeit somewhat fanciful, resemblance to a map.

60 Q. Did you also find occasional petechial haemorrhage of the lungs?

65 A. On the lungs.

70 Q. On the lung?

A. Yes.

Q. And particular petechial haemorrhages, are they little bleeds from the small blood vessels in the lungs?

5 A. Yes.

Q. Did you also find minor congestion and minimal oedema?

10 A. Yes.

Q. Oedema being the build up of fluid?

A. Yes.

15 Q. Those findings in and around the lungs, are you able to say whether or not they are consistent with the child being asphyxiated to death?

A. They are consistent with an asphyxial mode of death.

20 Q. By "an asphyxial mode of death", does that include a deliberate smothering of the child?

A. Yes.

25 Q. Does it also include other causes of asphyxiation?

A. Yes. And, indeed, other things as well. There is nothing very specific about these little blood haemorrhages in that particular.

30 Q. It is not a specific finding for smothering; is that correct?

A. That is right.

35 Q. But is it a finding that is commonly found if a child has been smothered?

A. It is a finding which has been recorded in smothering. In my own experience I can only recall one case of deliberate inflicted suffocation which showed these little blood spots on the surface of the lung. So in a limited sense it is indicative, but only indicative.

40 Q. If a child is smothered and there is a disparate attempt by the child to open up the lungs to allow in air, is it that that causes the petechae to bleed into the lungs?

45 A. It is that that is thought to cause the very smallest blood vessels to rupture and bleed, which is the petechium, yes. It is a negative pressure from the attempts to inhale.

50 Q. Did you find that the blood circulation to the lungs was perfectly normal?

A. Yes.

55 Q. Did you also examine the heart and the area around the heart?

A. Yes.

Q. Did you find that to be perfectly normal?

A. Yes.

5 Q. Did you examine the thymus gland?

A. Yes.

10 Q. Did you find that there were occasional petechial haemorrhages on the surface and within the substance of the thymus?

A. Yes. Can I just go back to something you asked me a moment ago.

15 Q. Yes, certainly?

A. When you talked about the heart, was the heart structurally normal, the heart was structurally normal but there was an occasional little haemorrhage on the surface of the heart.

20 Q. Is that also something which you would expect to find in a case of asphyxiation?

A. It is something that one can find in asphyxiation without, at this stage, going into the cause of the asphyxiation.

25 Q. And the petechial haemorrhage that you found on and in the thymus, is that also something that you would expect to find in a case of asphyxiation, putting aside the cause of the asphyxiation?

A. Yes.

30

Q. Did you examine the whole of the abdominal cavity?

A. Yes.

35 Q. Did you find everything there to be perfectly normal?

A. Yes.

40 Q. Did you examine the bones, joints and skeletal muscles?

A. Yes.

Q. Did you find all of that to be perfectly normal?

A. Yes.

45 Q. Did you conduct an x-ray examination of the child?

A. Not on this child, no.

50 Q. Is that something which you would normally do where you suspected child abuse prior to the post-mortem examination?

A. It depends upon the indications of child abuse. I mean, if it is physical abuse, yes. If it is not physical abuse, no.

55 Q. If you had suspected possible physical abuse of this child would you have, amongst other things, done a skeletal x-ray of the child?

A. Not necessarily. I would have done certainly a

5 fairly comprehensive autopsy and in most cases of physical child abuse there are manifestations of that, such as healing or fresh fractures of the ribs which are preferably diagnosed by direct vision rather than the shadows cast by an x-ray machine.

Q. Doctor, you said that you would certainly have done a fairly comprehensive autopsy. Was this a comprehensive autopsy?

10 A. In the terms of fairly comprehensive, yes, it is. It is a fairly standard autopsy technique for unexpected death in infants.

Q. Coming now to the throat area.

15 A. Yes.

Q. On examination of the body when it was intact did you notice anything abnormal to the throat area?

20 A. No.

Q. Did you then dissect the throat area for further examination?

A. Yes.

25 Q. Did you conduct that further examination of the throat area during the time that you were examining the rest of the body, or later on?

A. Yes, same time.

30 Q. When you examined the throat area, what did you find?

A. In small infants, certainly to this age, the anatomy of the upper part of the throat is much more crowded than it is in the adult, and that was the case here. What I did find, it was on dissection what I found there was quite abnormal was the uvula, which is that little piece of tissue hanging down the back of your throat. Although it wasn't disproportionately large it was reddened and the tip of it was lying in front of another structure called the epiglottis. Now, the epiglottis is a little trap door that stops your food going down the wrong way, so you have got the tip of this little thing hanging down sitting in front of this other little trap door sticking up. Now, I have never actually seen this phenomenon in any of the 2000 plus babies whom I have personally examined, and I don't want to put too much emphasis on this because this was seen during the course of the dissection. The baby had, as I understand, been subjected to resuscitation. Plus, of course, there is at least the potential for the disturbance of anatomical relationships in the course of dissection.

55 Q. What do you mean by "the disturbance of anatomical relationships"?

A. The very active dissection may cause movement of structures and the adoption of relationships which didn't exist in life.

5 Q. Is this what you are saying, that the uvula, the dangly bits at the back of the throat, may have in fact been moved by the process of you dissecting the throat area?

A. Yes.

10 Q. So it may have been in its normal position when the throat was intact with the body?

A. Yes. The normal position, in a baby of this age, there isn't very much separation but there is separation and it may just have been a dissection artefact, if you like.

15 Q. When you were looking at the body when it was intact, did you examine inside the mouth?

A. Not at that time.

20 Q. Did you examine the mouth and throat area at all prior to dissecting the throat?

A. I examined the inside of the lips and the gums, but you've got a problem with stiffening of the body portion on rigour mortis which would in fact entail, if it were to go further than that we would have to use a instrument, the very use of which would disturb the normal anatomical relationships.

25 Q. Is that why you dissect the throat?

A. Well, the dissection of the throat is part of a comprehensive autopsy, yes.

30 Q. So what you are saying is that by the time you came to examine the dissected throat, the epiglottis was in an abnormal position?

A. Yes.

35 Q. As compared to the epiglottis--

A. In the living position. The epiglottis was in an abnormal position when I did my examination in comparison to what I would anticipate as the normal anatomical position.

40 Q. The epiglottis, when you examined it, was it in the open--

45 A. Sorry, the epiglottis, sorry. We are confused or I am confused, rather, I beg your pardon. The epiglottis was in a normal position for an infant of this age but the uvula was not.

50 Q. So was the epiglottis in the open position?

A. Yes.

55 Q. Allowing air to go in?

A. Yes.

Q. You have told us the uvula, the dangly bit at the back of the throat, was not enlarged?

A. It wasn't disproportionate to the uvula of a child

of this age. Now, when I say that, there's obviously a spectrum from very small to quite big.

Q. You have told us that it was red?

5 A. It was red, yes.

Q. Is that consistent with the child having a mild infection?

10 A. A mild infection or some, perhaps, abnormal movements of the uvula, such as in snoring.

Q. Doctor, in your view was the position of the uvula when you saw it in the dissected throat in its abnormal position, was that of any significance in terms of assessing the cause of death of the child?

15 A. It was of significance in the sense that it was there, I saw it and I commented on it. I've got grave doubts that it was necessarily there before the child died and before I started my dissection. It may have been, I just cannot tell.

Q. Do I take it from what you have just said that in your view it was of no significance in terms of explaining the cause of death?

25 A. Well, it could have been. But the degree of uncertainty as to whether it was, what I was seeing was real or artefact, to my mind diminished its significance or caused me to question its significance.

Q. Doctor, in your pathology report did you summarise your pathology findings?

30 A. Yes, I did.

Q. On the top of page 5 of your report?

35 A. Yes.

Q. And did you summarise your pathology findings in these terms, firstly that there had been focal pulmonary collapse?

40 A. Yes.

Q. Does that mean, in effect, that the child had stopped breathing?

45 A. No.

Q. What does it mean?

50 A. It means just, we discussed this before, that some portions of the lung had become airless and dark and the fact that they are airless, the cell walls collapse down, the walls collapse down.

Q. Secondly, did you find modest pulmonary congestion and minimal oedema?

55 A. Yes.

Q. That being fluid and mucous?

A. No. Oedema is, in actual fact, quite watery fluid that comes out of the circulation into the air sacs.

The congestion is just an excess, whether it is an excess of blood or certainly a dilatation of the blood vessels in the lung itself.

5 Q. Did you thirdly record occasional petechae on the pleura of the lungs, the epicardium of the heart and on and in the thymus?

A. Yes.

10 Q. You have already told us about them?

A. Yes.

Q. Fourthly, congested, question mark, haemorrhagic uvula lying anterior to the epiglottis?

15 A. Yes.

Q. And fifthly, aspiration of gastric content?

A. Yes.

20 Q. What, if any, significance is there in the aspiration of gastric contents?

A. Well, again this could well have been artefactual and have happened--

25 Q. What do you mean by artefactual?

A. Well, it is real in the sense that it's there but it didn't happen as a part of the process leading to the child's death. It could have happened either by attempts at resuscitation or, indeed, by a passive flow of stomach contents, fluid stomach contents up into the back of the throat and then just back down into the air passages.

30 Q. So that could have been caused by resuscitative measures?

35 A. It could have been caused by resuscitation or it could have been caused just by movement of the body after death.

40 Q. Did you send some of the parts of the body for further examination under microscope?

A. Yes. I didn't send them, I took them and I did the microscopy. I did send the brain for examination by a specialist neuropathologist.

45 Q. Did you send the uvula for microscopic examination?

A. Yes.

50 Q. Did you send the larynx for microscopic examination?

A. Yes.

Q. Did you send the salivary glands?

A. Yes.

55 Q. Did you send some of the diaphragm muscle?

A. Yes.

Q. Did you obtain a report from a Dr Pamphlet who examined these items microscopically?

A. No, I examined these, I microscopically, along with a lot of other items.

5

Q. You examined?

A. Yes.

Q. I think there were a lot of other items you examined too?

10

A. Indeed.

Q. Including thymus, the heart, the thyroid, tonsils, pancreas?

15

A. Yes.

Q. A whole lot of other parts of the body?

A. Yes, indeed.

20

Q. Were there any significant findings on microscopic examination by you?

A. Some of them were significant in the sense that they were negative. Do you wish that I go through them?

25

Q. Yes. When you say they are significant in terms of they are negative, what do you mean by that?

A. Well, there was no abnormal finding.

30

Q. Did you find any abnormal finding on any of these items when you examined them microscopically?

A. Yes.

35

Q. What did you find?

A. The uvula showed marked vascular congestion, particularly in the pharyngeal aspect adjacent to the base. I am reading from the report.

40

Q. Did that tell you anything at all about the cause of death?

A. It is a brick in a wall of diagnoses. It is indicative - it confirmed the reddening that I saw and described to the naked eye. The larynx showed a light mixed lymphocytic inflammatory infiltrate deep to the respiratory epithelium. That was a light degree of inflammation present in the larynx, that's the voice box. In the diaphragm there were two foci of individual muscle fibres which looked not quite healthy. The spleen was congested. There was a little bit of probably fatty infiltration of the liver, but that's not unusual. That's often accompanying the process of death.

45

50

The rest of the sections were normal until the lungs and in one section of the lung there was some interstitial acute inflammatory infiltrate which could be seen around the occasional bronchial. Now, the bronchials are the smallest of the respiratory passages

55

and there was just a very light inflammation around these little air passages. In another section of lung there was polymorpho nuclears. These are inflammatory cells within the lymph glands and again some
5 interstitial infiltration by these inflammatory cells.

Q. If I could just take you to, does that conclude your findings on microscopic examination?

10 A. Yes.

Q. Firstly, going to the uvula. You found vascular congestion of one aspect of the uvula?

A. Yes.

15 Q. Is that consistent with a mild infection?

A. Yes.

Q. The kind of infection that might cause a mild sore throat?

20 A. Yes.

Q. The larynx showed a light inflammatory infiltrate?

A. Yes.

25 Q. To the epithelial layer?

A. Yes.

Q. Is that also consistent with a mild respiratory infection?

30 A. Yes.

Q. Did you also find that the salivary glands had an area of inflammation?

A. Yes.

35

Q. Is that also consistent with a mild infection?

A. Yes.

40 Q. Going to the lungs, you found a light inflammatory infiltrate of a part, a certain type of cell in the lungs?

A. Yes.

45 Q. Is that also consistent with a very mild respiratory infection?

A. Yes, indeed.

50 Q. And you also found some other abnormal finding within the lungs, which I won't repeat because they are just technical words?

A. This is a child who had mild manifestations of a respiratory tract infection.

55 Q. And the findings on the spleen and the liver, are they just consistent with something having caused death?

A. The findings are commonly seen as part of the dying process, irrespective of the cause of death.

Q. Could I summarise your microscopic findings by saying that what you found was consistent with the child having had a mild respiratory infection?

5 A. Yes.

Q. Otherwise they told you nothing about the cause of death?

10 A. No. The answer is yes.

HIS HONOUR: Q. You are agreeing with the proposition?

A. I am agreeing with the proposition.

15 CROWN PROSECUTOR: Q. Did you obtain a toxicology report in relation to samples that you took from her body?

A. Yes.

20 Q. And did those toxicology reports, did you get a toxicology report back?

A. I did.

Q. Which showed that there were no poisons that were detected?

25 A. There were no, yes, no common poisons. That includes drugs of - in fact it says "extensive screen test for drugs and the other common poisons were negative."

30 Q. Did you also send some samples of her body to the Royal Prince Alfred Hospital to the department of microbiology there?

A. Yes, I did.

35 Q. To see whether any microorganisms could be detected in the body?

A. Yes.

40 Q. And you got back some results from the Royal Prince Alfred Hospital?

A. Yes, I did, yes.

Q. In your view, were any of the results that you got back of any significance in explaining her death?

45 A. Yes. There was certainly considerable negative significance. There are a number of infections which we test for in babies who die unexpectedly. We look for virus infections and in fact there was no evidence of any virus infection. The lung was looked at for germs. It was looked at for viruses which was
50 negative. It was also looked at for germs, and two groups of germs were grown from the lung. One was streptococcus and the other was staphylococcus, also known as golden staph. That last organism was there in
55 scanty proportions, even on growth. The streptococcus was there in profuse growth.

Q. What do you say about the significance, if any, of

those findings to the cause of death?

A. The staphylococcus I think is of no significance whatsoever.

5 Q. Why is that?

A. Because I think it is a post-mortem contaminant.

Q. Is that a contaminant that you regularly find post-mortem?

10 A. Yes.

Q. When you say a contaminant, do you mean it is something that attaches to the samples after death?

15 A. Yes.

Q. What about the streptococcus?

A. The streptococcus was a bit more difficult. The fact that there was profuse growth might indicate that at or about or prior to the death there was a genuine streptococcal infection present in the throat or in the respiratory tract, most probably within the throat, and this again would help to explain the reddening of the uvula and perhaps the inflammation, the light inflammation in the larynx.

25

Q. In your view was it in any way related to the cause of death?

A. That's a very difficult question to answer, in a one size fits all sort of context. I don't know how much it takes to kill a child, that's the problem, and the more I see of babies that die unexpectedly, the less certain I have become of how much it takes to kill a child. I would normally not have expected this degree of inflammation to have contributed significantly to this child's death.

35

Q. In your pathology report to the coroner did you state a view as to what was the cause of death?

40 A. Yes.

Q. And what was the view that you put in your report to the coroner?

A. Sudden infant death syndrome.

45 Q. Is sudden infant death syndrome a disease or illness of unknown causes or unknown origins?

A. It's not a disease and I'm not sure about the other part of it, but it is not a specific disease.

50 Q. Is it a cause of death of unknown origin?

A. It is a cause of death of unknown origin.

55 Q. Is it a cause of death of unknown origin which is diagnosed by pathologists such as yourself in the absence of any other identifiable cause of death?

A. If there is an identifiable cause of death seen at autopsy then the diagnosis of SIDS cannot be applied.

Q. So did you record in your post-mortem report to the coroner that the direct cause of this child's death was SIDS?

A. Yes.

5

Q. And can we take it from that that you diagnosed that as the cause of death because you were unable to find any other cause of death?

10 A. In part on negative findings and in part on positive findings. The negative findings, I might add, are the more important.

LUNCHEON ADJOURNMENT

RESUMPTION

CROWN PROSECUTOR: Q. Doctor, over the lunch hour did I give you the opportunity to examine a policy statement by the American Academy of Paediatrics?

5

A. Yes.

Q. Have you had an opportunity to read that over the lunch hour?

10

A. Yes.

Q. Would it be correct to say that you are very familiar with that policy statement?

15

A. Well, I am aware of it and I had read it before, yes.

Q. It is not something that you have seen for the first time today?

20

A. No.

Q. Professor, do you agree with the statements contained in that policy statement?

25

A. On balance I agree with most of them. I don't agree with them entirely.

Q. Would you tell us what you don't agree with?

30

A. Yes. This is a policy statement from the American Academy of Paediatrics and it is called Distinguishing Sudden Infant Death Syndrome from Child Abuse Fatalities.

Q. It is a policy statement from the American Academy of Paediatrics dated 2001?

35

A. Yes.

Q. And in particular it is a policy statement produced by that Academy's committee on child abuse and neglect?

A. Yes.

40

Q. And it has been published in--

A. Paediatrics.

Q. In a journal by the name of Paediatrics?

45

A. Yes.

Q. Thank you.

50

A. My disagreements - put it this way, I am in broad agreement with most of what this policy statement says. I have some minor disagreements with certain individual points and the first is that they are seeking to define or confine the diagnoses of SIDS to infants dying at less than one year of age. Now, I don't agree with that because although it is, as it says here, the commonest age group for SIDS, which is much younger than years.

55

Q. Is the commonest age between 2 and 4 months?

A. It certainly was. It is tending to move a little

bit younger, at least in New South Wales it is tending to move a little bit younger, but I think to confine it to one year maximum is a nonsense, because infants do die unexpectedly and suddenly at ages older than one year.

Q. Would you agree that the vast bulk of SIDS cases are less than one year?

A. Yes.

OBJECTION (COOK)

COOK: This amounts to cross-examination of this witness. He proffers an opinion, he is challenged about it and I anticipate that will go further in light of what's in this document.

HIS HONOUR: Where has the professor given evidence to the contrary of the proposition put to him and the question objected to?

COOK: He said he few moments ago that it is a nonsense, the proposition is a nonsense. Then he is asked the question, but would you agree that the vast majority.

HIS HONOUR: What proposition is a nonsense?

COOK: The proposition, as I understand it, in the document, that 12 months is a terminal age, as it were, for the definition as SIDS.

HIS HONOUR: I propose to allow the question.

QUESTION ALLOWED

CROWN PROSECUTOR: Q. Could you continue, doctor? I think you answered the question that you agreed with basically what I said?

A. Yes.

Q. Could you continue, please.

A. So that's the first area of disagreement. There is a statement on page 2 of the nine paged document, it is a dot point which says, "Thorough deaths investigation and the review of clinical history are negative", and it is implied without this the diagnosis of SIDS cannot be made. Now, if that were true in New South Wales there would be no SIDS in New South Wales at all because deaths - there is no mechanism that's applicable throughout New South Wales for what I would regard as adequate or thorough deaths in investigation.

A further statement on page 3, previous recurrent cyanosis that's blue, apnoea, that's breath holding, or apparent life threatening events while in the care of the same person. Now, that's certain. The document says, however, certain circumstances should indicate a

possibility of intentional suffocation, including - I would say it goes no further than indicating a possibility.

5 Q. That's what the statement says though, isn't it?
A. Yes.

10 Q. "Certain circumstances should indicate the possibility of intentional suffocation"?
A. Yes.

15 COOK: I object to this process. This amounts to cross-examination on a document, with respect. He is being asked what he disagrees with within this document.

CROWN PROSECUTOR: I am just clarifying what he says he agrees with, or disagrees with, your Honour.

20 Q. Does the document state "Certain circumstances should indicate the possibility of intentional suffocation", including that which you have read?
A. Yes.

25 Q. Do you disagree with that?
A. I agree that it is a possibility but no more than a possibility.

30 Q. But do you disagree with the statement "Certain circumstances should indicate the possibility of intentional suffocation"?
A. I have already said I agree it is a possibility, but I would put it no higher than a possibility.

35 Q. But isn't that exactly what is stated in the policy?
A. That is the form of words used, but I am a bit concerned about the intent.

40 Q. Is there any other part of the policy statement that you disagree with?
A. Yes. There is a statement in a dot point at the end: "Discovery of blood on the infant's nose or mouth in association with" (the contraction ALTEs) "apparent
45 life threatening events", this is a method of interpretation as to what constituted blood. Very often babies dying of SIDS do have blood tinged froth at the nose or mouth. Now, whether this occurs in an
50 apparent life threatening event or an actual life threatening event is, I think, open to some perhaps pedantic debate.

55 Q. Are those the four areas that you don't agree with?
A. These are the areas that I have got qualms about at the present moment. The other thing which, again I have qualms, is the statement on the dot point on the recommendations.

Q. Page?

5 A. This is page 6 of 10. "Examination of the dead
infant at the hospital emergency department by a child
maltreatment specialist". To my way of thinking the
10 examination of the dead body, an external examination
of a dead body of an infant is probably better
performed by the paediatric forensic pathologist or the
forensic pathologist or a forensic pathologist with
paediatric experience and that should be performed by a
prompt autopsy. But these are the only areas in which
I say I have mild disagreements or qualms.

Q. Otherwise do you substantially agree with what's in
that article?

15 A. Yes.

Q. Otherwise do you agree that that article accurately
states criteria in which doctors can attempt to
20 distinguish between sudden infant death syndrome and
death from child abuse?

A. Yes.

DOCUMENT TENDERED. OBJECTED TO

25 MFI #24 POLICY STATEMENT FROM THE AMERICAN ACADEMY OF
PAEDIATRICS CALLED DISTINGUISHING SUDDEN INFANT DEATH
SYNDROME FROM CHILD ABUSE FATALITIES

Q. In this case your final diagnosis to the coroner
30 was that this child had died of SIDS?

A. Yes.

Q. You have told the court before lunch that this
35 autopsy was conducted by you with the view that it was
not a suspicious death?

A. I approached the autopsy with an open mind. It is
not--

Q. Mr Cook has suggested that the wording that you
40 used was that this was not frankly suspicious?

A. Yes.

Q. Would that be correct?

45 A. Yes.

Q. Were you aware at the time which you conducted the
post-mortem examination that there had been two
previous deaths of siblings of Sarah in this family?

50 A. Yes.

Q. Were you aware that there had also been an
unexplained acute life threatening event for one of
those two children?

55 A. I'm not sure that I was aware of the acute life
threatening event with, I think, it was with a second
child at that time.

Q. You might have found that out after your autopsy?

A. Yes.

Q. Were you aware that for the first two children that no actual cause of death had been found?

5 A. No, I wasn't. In fact as I was aware at the time, the second child had died with, and this had been shown at autopsy, this child had died with a brain condition, which would indicate a propensity for convulsions.

10 Q. Were you aware that the first child who was called Caleb Folbigg, had been diagnosed as SIDS?

A. Yes.

15 Q. SIDS of course being a diagnosis where there is no other cause of death?

A. Yes.

20 Q. Were you aware that there was one of the two children that had previously died where there had been no cause of death found?

A. Could you repeat that question, please?

25 Q. At the time that you conducted your post-mortem examination of Sarah, firstly were you aware that two previous siblings had died?

A. Yes.

30 Q. Were you aware that one of those siblings had died in circumstances where a cause of death was not found?

A. Yes.

Q. Did that cause you any concerns in relation to your diagnosis of SIDS?

35 A. Yes. That is always a cause of concern whether there has been a previous death in the family or not. The unexpected death of any infant is always a cause for concern. This is perhaps heightened by a history of a previous death which has been attributed to SIDS, as I believe was the case in the case to which you are referring.

40 Q. And you have told the court that the policy statement of the American Academy of Paediatrics contains, as it were, a warning that certain

45 circumstances should indicate--

OBJECTION (ZAHRA)

50 ZAHRA: This is a matter that relates to the tender of the document. I probably need to make some submissions about that.

HIS HONOUR: Yes, I think it probably does, Mr Crown.

55

IN THE ABSENCE OF THE JURY

HIS HONOUR: You are really trying to get the document
in.

5

CROWN PROSECUTOR: Yes.

IN THE ABSENCE OF THE WITNESS

10 CROWN PROSECUTOR: I would formally ask your Honour for
an order under section 38. We would submit that his
evidence is unfavourable to the Crown case. I ought to
be permitted to cross-examine him on why it was that he
15 diagnosed SIDS when he knew that there had been a
previous diagnosis of SIDS and I ought to be able to
put to him that it was not an appropriate diagnosis in
the light of medical standards then and now and that he
ought to have determined the cause of death being
undetermined.

20

HIS HONOUR: That's what SIDS is, isn't it? You have
been calling SIDS a disease. That's not what I
understand SIDS to be. SIDS is a label which is put
upon a death which is believed to be natural to which
25 its cause cannot be attributed. Isn't that all SIDS
is?

CROWN PROSECUTOR: But it is the belief that it is a
natural death that is of significance. By ascribing it
30 to SIDS Professor Hilton is, in effect, saying this was
a death from natural causes to a disease that we know
nothing about.

HIS HONOUR: We will have the debate in a moment. A
35 couple of things need to be established first, though.
How long is this going to take? I will have to let the
jury know what's happening.

CROWN PROSECUTOR: I really don't have any submissions
40 to make. We submit that it is unfavourable and the
cross-examination won't take long.

HIS HONOUR: Am I dealing also with your tender of the
45 American paper?

CROWN PROSECUTOR: Yes. I would wish to tender it but
perhaps if there is an objection to that, that can wait
another time. I am just concerned that Dr Hilton can
get away today because he is going on holidays and he
50 is anxious to get away today.

HIS HONOUR: What do you want to say to the jury about
Dr Hilton's conclusions about the death of Sarah?

55 CROWN PROSECUTOR: What I wish to say is that he ought
not to have ascribed it to SIDS, which is a death from
natural causes, but he should have determined that it
was from undetermined causes which includes the

possibility of deliberate suffocation.

5 Further more that the policy and the generally accepted
view in the medical community is that a prior ALTE or
death in the same family, particularly whilst the child
is in the care of the same person, rules out a
diagnosis of SIDS.

10 HIS HONOUR: That comes from the paper that the
professor was shown.

CROWN PROSECUTOR: And I expect it will come from
experts yet to be called in the Crown case.

15 HIS HONOUR: What do you say about this, Mr Zahra?

20 ZAHRA: Can I address the admissibility of the
document? Mr Cook will address the section 38 issue.
Can I treat this particular argument about a threshold
issue?

25 HIS HONOUR: The Crown is proposing to defer the tender
of the document. Do you say that it cannot be
deferred, that it is tied up with the section 38
question?

30 ZAHRA: Yes, it is. If my friend is seeking to put to
the witness that this particular policy document
indicates that a previous unexplained death raises--

HIS HONOUR: It does seem to be putting in the contents
of the document, or a significant section from it.

35 ZAHRA: That's right. My friend is putting this, no
doubt attempting to suggest the weight of this
particular document to suggest that a prior SIDS death
raises in itself the possibility of intentional
suffocation. One could understand that maybe as a
40 protocol or a policy document that these are the
indicators, but the danger of this document and this
line of cross-examination, if obviously he is permitted
to cross-examine, is elevating an issue of caution or
an issue of protocol to in fact a suggested finding of
fact.

45 HIS HONOUR: I don't see, Mr Zahra, that the Crown
cannot put that proposition to the professor without
first establishing the admissibility of the paper.
50 There may be other, the Crown has foreshadowed that
there may be oral evidence that will be to much the
same effect. If this is a simple proposition of fact
that prior unexplained deaths in a family
contraindicate the transaction, contraindicate the
conclusion of a SIDS death, it doesn't necessarily have
55 to come out of a paper.

ZAHRA: That's what I am saying. The danger here is by
suggesting this is almost a research study that in fact

concludes that this is a fact that would raise or indicate the possibility of suffocation may cause the jury to attach such weight to that as suggesting that in fact that was a process that they might use in their fact finding. That's where the danger in fact starts.

It is quite suitable to put to the witness as a general proposition that this is a factor that they should take into account, but the difficulty is that when one reads this document, in fact there are a number of matters of concern. For example, one of the statements that gives the flavour of this report is that, can I read this:

"Recently well validated reports of child...and masqueraded as apparently life threatening events have appeared in the medical literature and in the lay press."

So whilst one can understand that this institute might want to put out a policy statement to assist those, but the problem is when my friend starts referring to these under this guise that in fact the American Academy of Paediatrics is in fact suggesting that these matters are indicative of the possibility of intentional suffocation, and it elevates it to such a state that it becomes more than just a proposition of a matter that would normally be considered to a matter that seemingly has the weight of this particular organisation. But it is a policy statement. It is riddled with the comments, as I have just indicated, and indicating that no doubt these are matters that might be some indication.

But the difficulty is here the jury may elevate this to in fact a proposition that this particular institute has found that if there was a previous unexplained or unexpected death, that that should indicate the possibility of intentional suffocation. That's in fact what is stated immediately before these dot points that my friend is referring to.

HIS HONOUR: Would there be evidence from any source other than the paper marked 24 for identification, Mr Crown, that prior unexplained deaths in the family contraindicate a conclusion of a SIDS death?

CROWN PROSECUTOR: Yes, indeed, your Honour, and not only that, we are going to have--

HIS HONOUR: Thank you, that has answered my question. Now, how do you get this document in?

CROWN PROSECUTOR: I expect that at least one of my experts will give evidence that, whereas the finding of SIDS for Caleb was a reasonable one, that this finding of SIDS for Sarah was not a reasonable one because of the prior history. By way of support of that the

expert will rely upon, amongst other things, this document and his own personal knowledge and experience. So in fairness to Professor Hilton we ought to be permitted to put to him that it was not an appropriate diagnosis.

HIS HONOUR: I understand the ultimate problem. Well, Mr Zahra, why cannot the Crown take the risk? It is often done in cases when a witness has to be dealt with and a proposition of fact has to be put to that witness under comment requested upon the assumption of the establishment of that proposed fact. Then the questioner, of course, undertakes an obligation to prove the fact. Why is this case any different from any other case?

ZAHRA: This now brings into play general concerns that I have expressed, particularly in the separate trial application, in relation to this body of expert evidence that has its primary reliance on a mantra that in fact one death is SIDS, the second is undetermined, the third is homicide.

I have made many submissions in relation to whether this type of evidence should be admissible or not. As we presently stand no firm decision has been made in relation to that, although I have clearly flagged obviously that this is an area of concern and before the experts are to be called that this is a matter that needs to be further argued. That was in fact left open by Justice Wood. So there is in fact a real concern as to whether the experts ultimately will be able to give evidence. In fact, that's why my friend has not opened specifically by reference to the names of particular witnesses because this issue, particularly in relation to Dr Ophoven, Dr Beale who relied very heavily, we say, on this particular mantra as being the foundation of the evidence. We say that this is in fact an impermissible foundation and this evidence should not in fact be led.

HIS HONOUR: I must say, Mr Zahra, this proposition sounds statistically invalid to me. Isn't that what the analogy of spinning the coin says? Your chances are equal each time. If your chances are equal each time, if the rate is always 1 in 1,000 or 1 in 2,000 and there is no complicating familial or genetic factor, then surely it cannot be correct to say that because there might have been a previous SIDS death it is inappropriate to classify as a SIDS death a subsequent death.

ZAHRA: The foundation of making that conclusion, this is what my friend is going to rely on, is this statement that this circumstance should indicate the possibility of intentional suffocation. That's the danger here, that in a sense the use that the Crown wants to make of this, and they want to use this as the

vehicle to say this is the paper of the American Academy of Paediatrics. So in a sense, this for the jury would be an extremely impermissible process of reasoning. It would be an impermissible process to adopt the foundation of the mantra as a way, in fact, of dealing with this matter.

But whilst it has been presented in a different way by the Crown at this stage, if one looks at it it is the mantra, in the sense that if you have got two, this says that when you look at the second that that should indicate the possibility of intentional suffocation. That's what this says, and that's what my friend is doing. My friend is introducing the mantra.

HIS HONOUR: Mr Crown, at least three things seem to me to arise.

CROWN PROSECUTOR: Can I just briefly respond to what my friend says?

HIS HONOUR: Just let me say what I was going to say, if you don't mind.

There are three things, it seems to me, Mr Crown. The first is the admissibility of the document. I am inclined to think that you are right in your proposition that you don't need at this stage, if you don't wish, to broach the tender of the document and you prefer to defer it. The next thing is, of course if you are permitted to put the question you want to put and you don't get the document in and you don't prove your proposition by other means, you are well aware of the risk you run, because it seems to me in such an important area it might well bring the trial to an end.

The next matter that arises, it seems to me, and one on which I haven't heard from Mr Zahra, is the desirability that if you are going to submit to the jury that Professor Hilton was wrong, mistaken, then fairness demands that at least he be given the opportunity to cope with that. Now, subject to anything that Mr Zahra said I would in general terms grant you leave to cross-examine at least for that purpose.

Thirdly, it appears to me that a very large question is beginning to emerge again, and that's one which raised itself before the trial began and which the parties didn't argue, but put off. Mr Zahra has drawn attention to it now, this whole question whether there is going to be evidence about the incidence of SIDS generally and in what general or particular respects. Now, that question remains unanswered and I think there is no hope of getting any answer to it before Professor Hilton goes on holidays.

CROWN PROSECUTOR: Could I say this; firstly, I am not going to recite any mantra, or get this witness to recite any mantra, as my learned friend fears. Secondly, this document, if it is admissible, is admissible not because it is some policy statement by the American Academy of Paediatrics but because this witness, subject to five exceptions which he has identified, has stated that he agrees with it, so it becomes his expert opinion.

One of the important parts that I am going to question him about is a dot point note on page 3, is a part which he has not said that he disagrees with. So what I want to do is to put to him this dot point note and suggest to him that in the light of that he ought to have found the death was from undetermined causes rather than from SIDS, thereby leaving open expressly the possibility of death from non natural causes and that by finding SIDS as the cause of death that he was acting contrary to the policy statement which he substantially agrees with.

The case of Kennedy in the Court of Criminal Appeal in 2000, 118 ACR 34, was a case in which the Court of Criminal Appeal criticised the Crown for not having sought to cross-examine an expert witness that it was going to ask the jury to disbelieve and that it intended and did call evidence to refute that expert's opinion. The CCA said that the Crown should have got leave to cross-examine and given that expert witness an opportunity to respond to the criticisms. So we suggest we have a positive obligation to put this to Professor Hilton if we are going to make a submission to the jury and that we are entitled to put to him matters that are commonly put to expert witnesses - textbooks, articles, to ask the witness to read them, say whether he agrees with them or not and then cross-examine him on the basis of what he says.

HIS HONOUR: I think you are arguing against yourself, Mr Crown. What you have just put amounts to a proposition that you must now establish the admissibility of the document which you are going to use as a basis for this question.

CROWN PROSECUTOR: As I have already submitted, the admissibility, in my submission, depends upon his answers, not upon the weight of the journal that it is in. His answers have already accepted the vast bulk of this document.

HIS HONOUR: You appear to be agreeing with me and you are now arguing why it is admissible.

CROWN PROSECUTOR: There are parts of it that are not admissible, and my learned friend has in fact read from a part which I would not argue its admissibility.

5 In my submission the best way to go about it at this
stage is for me to cross-examine the professor on
certain parts of it that we say are relevant and
admissible, leaving out parts like the one that my
10 friend identified which may not be admissible. So it
is a common way of cross-examining experts, that you
don't tender the whole article, you just refer to the
relevant part, get them to agree that that's their
opinion and then cross-examine them on the basis of it.
15 So we would submit that that's the appropriate way to
proceed at this stage.

15 HIS HONOUR: But you have deferred consideration of the
third question that I raised.

20 CROWN PROSECUTOR: I am not going to ask him about the
incidence of SIDS or the incidence of recurrent SIDS,
and it is not necessary at this stage for your Honour
to decide that, and yes, it would take longer than
today.

25 HIS HONOUR: I do not know whether you can put to
Professor Hilton the proposition that a conclusion of a
SIDS death is contraindicated if there has been a
previously ascribed SIDS death in the family without
making some assumptions about the third and very large
question.

30 CROWN PROSECUTOR: The third question, your Honour, is
that the defence object to me eliciting the actual
incidence of SIDS, and I think that I can cross-examine
him on those parts of this article that he does agree
with without referring to the actual incidence of SIDS.

35 HIS HONOUR: We had better find out where we are going.
What exactly is it that you want to do now?

40 CROWN PROSECUTOR: What I would put to him is that one
of the things that is said in this article is that
certain circumstances should indicate the possibility
of intentional suffocation, including "previous
unexpected or unexplained deaths of one or more
45 siblings." That here in this case there was a previous
unexplained death of one or more siblings. That in the
case that he conducted of Sarah, the post-mortem that
he conducted, that he found some punctate marks on her
lips which he has said are consistent with suffocation.

50 I will then put to him in the light of the unexplained
death of one or more siblings and in the light of the
punctate marks and the scratch on the arm that he ought
to have determined as his diagnosis the death was from
undetermined causes rather than from SIDS. It is as
55 simple as that. Then he can answer that suggestion
however he wishes. I have given him an opportunity to
answer it. I have signalled to the court the approach
that I wish to take to his final diagnosis. That's all
I need to do.

There is another entry on page 5 that I should really put to him.

5 HIS HONOUR: Mr Zahra, what do you say as to the
admissibility of evidence of an opinion that a previous
unexpected or unexplained death of a sibling should
10 indicate to a pathologist assigning cause of death the
possibility of intentional suffocation? Would it be
admissible for an expert to give evidence that that was
his or her opinion?

15 ZAHRA: So long as there was a solid foundation for it,
and this is the real issue here, whether there is in
fact a solid foundation for reaching the conclusion
that because there was one previous SIDS death that
that should indicate, they are the operative words,
20 should indicate the possibility of intentional
suffocation. And that's the impermissible process of
reasoning that is in fact - my friend might suggest
that it is not the mantra, but it is very much the same
thing.

25 In other words it indicates, and my friend is seeking
to use the standing of this particular institution to
put that proposition across. Now, the question remains
as to whether my friend is able to put that continuity
in the future with any stronger foundation in a
30 question in cross-examination.

It may be important that your Honour read this article.
My friend has made a number of statements in relation
to matters of general principle which I don't cavil
with. I don't cavil with the decision in Kennedy, that
35 my friend no doubt has a positive obligation to put to
this witness.

40 HIS HONOUR: The Crown is going to put to the jury that
Professor Hilton is wrong.

ZAHRA: I accept that. With the greatest respect to my
friend, when one reads the report, to suggest that
because the witness has said the majority of the report
I agree with, that suddenly the whole of the report
45 becomes a foundation for him to be cross-examined
about. Because when one looks at the nature of this
report the majority of it relates to protocol, what you
do at a death scene.

50 HIS HONOUR: I think that's a furphy, Mr Zahra.
Mr Tedeschi has dealt with that. What he is prepared
to do, if it comes to it, is to put a particular
proposition.

55 ZAHRA: It is misrepresenting--

HIS HONOUR: It is that proposition that I have asked
you to comment upon. Your answer to me is that

provided there is a proper foundation for it, evidence of such an opinion would be admissible.

5 ZAHRA: But our submission is there is none and it cannot be proved at any time in the future.

10 HIS HONOUR: If that's what happens, I will discharge the jury at some time in the future and it will all be down to the ground. Because if the Crown puts this proposition as a respectable scientific opinion held in the medical profession, then the Crown undertakes to prove it.

15 ZAHRA: This statement by this body was never intended for it to be elevated as a matter such that it could in fact be a process of reasoning.

20 HIS HONOUR: It wasn't perhaps, Mr Zahra, but as the Crown said Professor Hilton has been asked about it and it happens to be his opinion, anyway. He agrees with this proposition.

25 ZAHRA: I don't think the witness has said that, your Honour. In fact, this was one of the areas that he was concerned about, that the previous death had indicated intentional suffocation in the second.

30 CROWN PROSECUTOR: It wasn't one of the areas which he excluded from his agreement.

ZAHRA: That needs to be clarified.

35 HIS HONOUR: Well, it has been left in a way that may not be watertight, if I may say so. I haven't seen this document. The type looks small. How many pages is it?

CROWN PROSECUTOR: Nine.

40 HIS HONOUR: Nine paged, small type document. He has been asked: "What don't you agree with?" and he said "four things". The logical conclusion, of course, is that he agrees with absolutely everything else in it. But there are dangers in that sort of approach, as one
45 can see.

ZAHRA: One needs to look at the rest of the material.

50 DOCUMENT HANDED TO HIS HONOUR

CROWN PROSECUTOR: It was marked by Dr Hilton with the areas he disagrees with.

55 ZAHRA: The clear import of section 38 and what my friend is proposing to do is, in fact, precision. My friend needs to, not just on the run, indicate: Look, there is another matter on page 5 he wants to lead. This is a precise exercise. This is not a floodgate

where, in fact, he has been able to cross-examine generally. My friend should have come to court prepared to argue the precision of this document, what it is he wants to cross-examine Dr Hilton about, apart from giving it to him before he comes into court at lunch time and then indicate what parts of the document that he wants to put to the witness.

HIS HONOUR: I must say I do not myself appreciate being required to deal with this matter under the pressure which has been put upon me that something has to be done this afternoon because Professor Hilton is going on holidays tomorrow. I have been given no notice of this before, I have not seen this document, which is a substantial document, and even now the Crown is developing the cross-examination that it wishes to--

CROWN PROSECUTOR: I can indicate the two areas of relevance are firstly page 3. Does your Honour see the dot point notes on page 3?

HIS HONOUR: Well, I want to read the whole document, Mr Crown.

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: Are we going to get back to the jury this afternoon? I have to be reasonable with the jury. I have to let them know what's happening. How long is this going to take us.

CROWN PROSECUTOR: If your Honour is of the view that we can't decide about this document this afternoon then I would seek leave to cross-examine Dr Hilton without recourse to this document.

HIS HONOUR: I must say I am most reluctant to deal with this on the run with this document, Mr Crown. But it is not sufficient for you simply to seek leave to cross-examine him without recourse to the document. I think you must specify precisely in what way you would cross-examine, if granted the leave you seek.

CROWN PROSECUTOR: 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.

5 HIS HONOUR: Thank you, Mr Crown. What do you say to that, Mr Zahra?

10 ZAHRA: Again, based on what I have indicated previously, that my friend is putting these matters to the witness not as general propositions but statements, for example, that it should indicate the possibility of intentional suffocation.

My friend then also is relying on page 5:

15 "Consideration of intentional asphyxiation in cases of sudden infant death with a history of recurrent cyanosis, ALTE witnessed by a single caretaker."

20 Again this is a reference to a finding of fact. I presume what my friend is saying that these are also matters that should indicate the possibility of intentional suffocation. My friend, as I say, would need ultimately to be able to found that

25

HIS HONOUR: Oh, yes.

30 ZAHRA: And no doubt if that presents a problem at some time in the future, and I would submit that we can now see that the only way he can do this is by recourse to the mantra, and if there is something else my friend should be able to identify it now in his case that is going to be the foundation of this if it is not the

35

HIS HONOUR: Why does the Crown have to do that?

40 ZAHRA: Only that it is a very serious step to embark on this type of cross-examination when there may be obviously some prospect of the trial being aborted at some time in the future. It may be important that we obviously try and prevent that at this stage. If it does mean that we start to think a little bit laterally as to how my friend is going to prove them eventually, then it may be a very helpful exercise at the present

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50 And I would submit, unless my friend can indicate otherwise, that those words should indicate the possibility cannot be shown by him unless he has resort to the experts who essentially base their opinion on the mantra. But if your Honour is against me on that then my friend has got clear warning of embarking on

55

HIS HONOUR: I may have spoken too strongly before. What would happen if the Crown put the proposition as

the basis of a question, let's not worry about what the professor's answer might be, and the Crown later found itself unable to prove the proposition of fact. If the professor disagreed anyway nothing would have been lost, would it? That's the first thing. It might not matter at all down the track.

I spoke of bringing the trial to an end. In fact it may not be that kind of problem.

ZAHRA: As I have indicated previously, if my friend puts general statements then the risk of that would be minimised. But the danger my friend has sought to embark on, or the danger of the process my friend is seeking to embark upon draws in this particular report and draws in obviously the significance of the organisation. That's the real danger here.

My friend now is obviously indicating that he will be restricting the evidence to general propositions. What I am saying is certainly that is much better from where we started on but the underlying problem is still there. Unless I am missing something, unless my friend has resort to the experts and the mantra then my friend can't put it to that level that it should indicate the possibility of intentional suffocation. In other words, from what I can see we are never going to arrive at a situation unless the evidence is admissible in the form of the mantra that it could be put that high, that it could ever be put that high in this trial. They are my submissions: It may be that some evidence be called upon the voir dire so that the precision of my friend's cross-examination might be able to be determined.

CROWN PROSECUTOR: I have determined my position very clearly. Those are the questions that I wish to ask.

HIS HONOUR: We have a record of precisely what question the Crown wants to ask.

ZAHRA: In relation to the second question my friend wants to ask, he is raising a medical fact to a medical opinion. In other words, the child or previous ALTE was witnessed by a single caretaker is in fact elevating a finding of fact to a matter of symptom, as it were, if I could put it that way at this stage, supporting a medical diagnosis. That is the additional danger here, that it becomes a mixed medical opinion based on symptoms and the experts getting into the fact finding, particularly so far as witnessing by a single caretaker is concerned.

FOR JUDGMENT ON CROWN'S APPLICATION TO CROSS-EXAMINE PROFESSOR HILTON, SEE SEPARATE TRANSCRIPT

CROWN PROSECUTOR: Might I note on the record on Friday I notified my learned friend of my intention if necessary to seek leave to cross-examine under s 38.

ZAHRA: I accept that, your Honour.

5 HIS HONOUR: In that case I have found in your favour
anyway, Mr Crown, but I will incorporate that
intelligence in the judgment when I have corrected it.

DISCUSSION ON AVAILABILITY OF PROFESSOR HILTON

10 WITNESS RETURNED TO THE COURTROOM

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, what I told you
about our hours of sitting are all out the window today
and you have not heard the end of it yet. It may be we
are not finished by 4 o'clock, and if we are not I have
a particular reason for wanting us to finish the
evidence of Professor Hilton today.

10 If any of you has a particular difficulty sitting on
after 4 o'clock you must let me know, but it is a
possibility, a probability, I think, that we may run a
little after four today.

15 CROWN PROSECUTOR: It may only be five or ten minutes
if we do, your Honour.

20 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.
25 What do you say to that?

A. Yes.

30 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.

35 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
40 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.

45 Q. Now, I want to suggest to you that in the light of
those propositions which I have just put to you, that
you ought not to have diagnosed Sarah Folbigg's death
as being due to SIDS and that you ought to have
50 diagnosed it as being a death from unknown or
undetermined causes. What do you say?

A. With respect, I would disagree with that.

55 Q. And I want to suggest to you that particularly
because of the punctate abrasions which you saw in the
vicinity of her lips and the scratch on her arm,
particularly in the light of those findings, that you
ought not to have diagnosed her cause of death as SIDS

but rather as death from undetermined causes?

A. Again, with respect, I would disagree with that.

5 Q. Do you agree with the proposition that it is
extremely difficult, if not improper, at autopsy to
distinguish between SIDS on the one hand and accidental
or deliberate asphyxiation with a soft object on the
other hand?

10 A. It may well be.

15 Q. Do you agree with that proposition?

A. I agree it may well be.

20 Q. And would you agree with this proposition, that
Sarah Folbigg in essence died from an acute
catastrophic asphyxiating event of unknown cause?

A. No, it was my opinion then that the most likely
diagnosis on the balance of probabilities was sudden
infant death syndrome.

25

Q. Do you agree that you found that she died from
asphyxia?

30 A. There is no specific autopsy test for asphyxia
outside a period of something like six hours from the
time of death to the time of examination.

35 Q. Do you agree that she died from a cessation of
breathing?

A. Yes.

40

Q. Do you agree that you are not able to say why she
ceased to breath?

A. That is true.

45

<CROSS-EXAMINATION

COOK: Q. You told us when you were giving evidence
before lunch that you had performed autopsies on about
2,000 babies, is that right?

50 A. Yes, probably something in excess of 2,000.

Q. In excess of two or three, did you say?

A. Probably in excess of 2,000.

55

Q. Have you had particular experience in your
professional career in dealing with SIDS cases?

A. Yes. In fact at one stage I was chairman of the
SIDS International Pathology Committee. I've published
on SIDS, both in journal articles and in a textbook. I
50 have been a member of a child death review team here in
New South Wales, I've been a member of SIDS
associations in Perth, here and in Western Australia.
I have attended a number, a good number of local and
international conferences on examining unexpected
55 infant death and exchanging information about the
latest techniques and theories of causation of SIDS in
particular.

Q. Have you been instrumental in starting up particular programmes to ensure that cases of sudden death in infants are brought to the attention of a suitable qualified pathologist?

5 A. Yes, both here and in - I instigated the SIDS programme in Western Australia when I was forensic pathologist there.

Q. When did you start that, professor?

10 A. We laid the foundations of it about 1972. It really got going '73, '74.

Q. What did the programme involve?

15 A. It involved bringing the bodies of all babies who died unexpectedly to one single facility which was adequately equipped where as far as was possible I personally examined each and every one of those babies. In the Perth metropolitan area it was quite frequently possible for the autopsy to be commenced within six
20 hours of the death having occurred, as far as we could tell. When I moved to New South Wales I instituted a similar programme. It could not be identical because of various geographic and communication difficulties, but I instituted a programme where all babies dying
25 suddenly and unexpectedly anywhere in New South Wales were brought initially either to Glebe or to Westmead.

Q. When did you start that programme?

30 A. I think that was in '93. In fact I think Sarah Folbigg was one of her earlier babies to be so examined.

Q. Was it pursuant to that programme that she was brought to Glebe to be examined by you?

35 A. Yes.

Q. About how many autopsies have you conducted in total in your professional career, leaving aside, I've asked you about the infants, but in total how many
40 autopsies have you conducted?

45 A. I used to do about 400 or 500 autopsies a year for about 20 years and subsequent to that I've done considerably fewer, but I've probably averaged about a hundred autopsies a year in the last 12 years.

Q. I'm going to ask you a few matters about a few particular matters. Is it possible that when a child is suffocated, that is, intentionally asphyxiated by a person, that that leaves some signs which are
50 detectible on autopsy?

A. It may do.

Q. What are the signs that may be detected on autopsy?

55 A. The presence of petechia on locations outside the chest, on the eyelids, on the cheeks, on the surface of the eyes. There may be damage to the - there is a tiny little membrane inside the lip, both top and bottom, called the fraenum and if there is force applied to

the lips this fraenulum may tear. There may be some bruising on the inside of the lips from compression of the lips against the teeth. There may be other signs, but--

5

Q. Are they the typical ones--

A. These are the ones that would be most sought after.

10

Q. Did you find any signs like that in relation to the child Sarah?

A. No.

15

Q. Did you particularly look for such signs in conducting your examination of her?

A. Yes.

20

Q. Now, you said that the little haemorrhages that you saw to the lungs were not a specific finding for smothering. Is that right?

A. Yes.

25

Q. And what, if anything, did those little haemorrhages indicate to you in relation to this autopsy?

A. They indicated to me the possibility of an asphyxial mode of death, which mode of death is common both to asphyxiation by an outside party or an internal form of asphyxiation, such as happens or used to happen certainly in days gone by with the majority of SIDS deaths.

30

Q. And you said this to the Crown Prosecutor when he asked you whether or not it was a finding that is commonly found if a child has been smothered, you said:

35

"It is a finding which has been recorded in smothering. In my own experience I can only recall one case of deliberate inflicted suffocation that showed these little blood spots on the surface of the lung, so in a limited sense it is indicative but only indicative."

40

Do you recall saying that?

45

A. Yes.

Q. So were you telling the court then that you had only come across one case where there was such a sign in the context of deliberate suffocation?

50

A. That is the only case that I can recall where there was reasonably conclusive belief of the presence of deliberate suffocation.

55

Q. Now, you closely examined the body externally, is that right, before you commenced your internal examination?

A. Yes.

Q. Were you looking for signs of injuries, fresh and old?

A. Yes.

5 Q. And the only ones you found were the two punctate abrasions beneath the lower lip and the 1.5-centimetre scratch, is that right?

A. Yes.

10 Q. This is in a child some 10 months old?

A. Yes.

Q. What significance do you attach, firstly to the two punctate abrasions below the lower lip?

15 A. They are significant because they are there, but as to their specific significance, children at 10 months do scratch themselves from time to time. Also this child had been subject of resuscitative measures, as I understand it, so there were at least two explanations
20 of these two punctate scratches.

Q. How much force would be required to cause the two little scratches beneath the lower lip?

25 A. Minimal.

Q. And the 1.5-centimetre scratch, do you attach any significance to that, once again in a 10 month old--

30 A. Once again it is significant because it is there and an explanation has to be sought for it, but it is an area of the body which is within the reach of the child's own fingers and fingernails.

Q. So you wouldn't attach much weight to that as an indicator?

35 A. No. I'm sorry, an indicator of what?

Q. I'm sorry, of foul play?

A. No.

40 Q. In fact, it is not really an indicator of anything?

A. No.

Q. They were the only external injuries you saw to the child's body, is that right?

45 A. Yes.

Q. And you were alert, as you would be in conducting such an examination, to the presence of old or healed injuries such as fractures that had healed?

50 A. Yes.

Q. Old bruising?

A. Yes.

55 Q. Nothing like that was observed?

A. No.

Q. You were aware, of course, that this was the third

death of a child in this family?

A. Yes.

5 Q. Did that have an effect on your approach in relation to this autopsy?

A. Every autopsy should be approached as an individual problem deserving careful attention. The fact that this was the third death in this particular family I suppose would heighten and did heighten my awareness. 10 But I would again emphasise there's a fairly high degree of awareness with any unexpected infant death. There are different approaches, but there is still a heightened degree of awareness.

15 Q. And you agreed with the Crown that there are certain circumstances of background history which may indicate to a pathologist the possibility of intentional suffocation?

A. Amongst other things, yes.

20 Q. One of which is a previous unexplained death in the family?

A. Yes.

25 Q. Did you have that consideration in mind when you were conducting this autopsy in coming to your conclusions?

A. Yes.

30 Q. Now, you said to the Crown Prosecutor in response to a question to this effect, was it extremely difficult to distinguish SIDS from deliberate suffocation, and you said it may well be?

A. Yes.

35 Q. In many circumstances is it actually possible to distinguish them?

A. A baby who has died from SIDS tends to have the features which I saw on Sarah in toto. In other words, 40 there is petechia not just in one internal organ but in three separate internal organs, there are changes in the lungs which again, taken individually, all these are non specific. Taken together they tend to favour a diagnosis of SIDS in the absence of any other pathology 45 sufficient to cause a child's death.

Q. They tend to favour SIDS as opposed to intentional suffocation; is that your opinion?

A. Yes.

50 Q. If you had seen any indication which informed you as a pathologist that intentional suffocation was a real possibility here, would you have attributed the death to SIDS?

55 A. No.

Q. How would you have described it?

A. How I have described it in the past as undetermined

with - I'm trying to remember previous real cases, not hypothetical cases.

5 OBJECTION (CROWN PROSECUTOR). NOT AN ANSWER TO THE QUESTION.

Q. In what particular manner would you categorise it?
A. Undetermined.

10 Q. Perhaps with some further detail which would depend on the facts on the case?
A. Yes.

15 Q. In relation to the congested uvula, you said that was marked congestion and you described it as a brick in the wall. Do you recall that?
A. Yes.

20 Q. Could you elaborate on that, please?
A. A diagnostic process is like you get a pile of bricks delivered and you put them together and you build a wall and that wall, when it is finished, is the diagnosis. The presence of the inflamed uvula was a brick in a diagnostic wall.

25 Q. A diagnostic wall of SIDS?
A. Well, a diagnostic wall for, for in this particular instance, SIDS, yes.

30 Q. Now, in relation to the position of the uvula you have said that it could have, if it were not a postmortem artefact, created the potential for obstruction to the airways, is that right?
A. Yes.

35 Q. If that were so could that have had some role in the child's death?
A. Yes.

40 Q. Is this the position, that you were really unable to say whether its position is explicable in terms of the way it was when she was alive as opposed to how it ended up as a result of the autopsy?
A. It's inexplicable. One can speculate, but no more.

45 Q. Could you give the court a working definition of SIDS as you understand it?
A. Oh, there have been several definitions of SIDS over the years and it is still in the process of
50 evolution and if I may preface my answer with one other remark, every three years there is an international conference on SIDS and every year the definition is up for reconsideration. Now, the original definition, and I paraphrase slightly, the unexpected death of any
55 infant or a young child which a thorough autopsy fails to reveal a cause of death or pathology sufficient to cause death. So it was an essentially even then a negative definition.

Now, there have been attempts subsequently to limit the definition to various age groups, and while it is perfectly true that the vast majority of SIDS occurs under 12 months there are occasional deaths of infants beyond that which, in all other respects, can show the stigmata of SIDS such as they are, and if one doesn't call it SIDS then you have to invent a new term to describe it and there have been attempts to do that as well. So essentially the diagnosis of SIDS - oh, the other thing that has been tacked on is the necessity for a thorough death scene investigation. Now, I would support that, but I would also point out, and I have already pointed out today, that if that were rigorously applied SIDS as a diagnosis in New South Wales would not exist.

<RE-EXAMINATION.

20 CROWN PROSECUTOR: Q. You were asked questions by my learned friend, Mr Cook, about distinguishing SIDS and death from child abuse and you said that these features that you found on Sarah, namely, petechia of the internal organs and the changes in her lung, are indicative of SIDS. Do you recall those questions and answers?

A. Yes.

30 Q. I want to suggest to you that those same features are also commonly found in cases of deliberate or accidental suffocation?

A. I would not necessarily agree with that in that I - I think the general view is that nobody knows or has seen enough of definitely identified deliberate suffocation in infants to be dogmatic about that.

Q. So is this the case, that you are not able to be dogmatic about it?

A. Yes.

40 Q. So you are not able to say one way or the other whether those same symptoms are commonly found in cases of deliberate or accidental suffocation?

A. In my limited experience I would say they are much more common, there are a constellation of findings much more common in SIDS than in any other cause of unexpected death in infancy.

50 Q. You were also asked about the degree of force required to produce the punctate abrasions found below the lower lip.

A. Yes.

55 Q. Are you able to say how much force would be required to deliberately smother a 10 month old child with a pillow?

A. Again, from recorded videoed episodes of attempts at suffocation, and I can't recall what the exact ages

of the children were, a great deal of effort is not required. There is certainly - or the older the child the more vigorous the movements to try and clear the airway, but overall, in the overall scale of violence which we see in other circumstances the amount of force required is fairly small.

5
10 Q. And you referred to videoed attempts at suffocation?
A. Yes.

15 Q. Are you referring there to some videos that were made in hospitals where there were hidden cameras that recorded--
A. Yes.

Q. --deliberate attempts at suffocating children?
A. Yes.

20 Q. You were asked some questions about what external signs or, indeed, internal signs you might sometimes find in cases of deliberate suffocation, and you referred to cuts and abrasions and bruises and things like that?
25 A. Well no, what I referred to was tearing of the--

Q. The frenulum?
A. The frenula of the lips, both upper and lower lips, bruising of the inside of the lips. No cuts or abrasions.

30 Q. What do you say to the proposition that if a 10 month old child were deliberately suffocated with a pillow, that you would not necessarily expect to find any of those signs present on postmortem?
35 A. I would agree with that.

<WITNESS RETIRED AND EXCUSED

40 <JOHN WILLIAM CASH(3.55PM)
SWORN AND EXAMINED

HIS HONOUR: Doctor, if you would like to refer to any notes you have in order to ask a question you may do so.

45 WITNESS: Thank you.

CULVER: Your full name is?
50 A. John William Cash.

Q. What is your occupation?
A. Medical practitioner.

55 Q. Do you have over 30 years experience as a medical practitioner?
A. I do.

Q. Is it the case that you have acted as a visiting medical officer at Singleton Hospital?

A. That's right.

5 Q. Were you in that position at about 1.00 am on 22 June 1998 at that hospital?

A. I was.

10 Q. Do you mind raising that microphone a little and speaking into it? Thank you, doctor. At that time did you examine a child by the name of Laura Folbigg?

A. I did.

15 Q. And did you receive a history that she was said to have had a slight upper respiratory infection for several days and to have developed a croupy cough that particular night?

A. That is basically right, I think that is what I said in my statement.

20

Q. Did you in fact examine the child Laura, and is it the case that you saw that there were no signs of distress and no signs of respiratory difficulties?

A. That's right.

25

Q. And in fact was her chest clear?

A. It was.

30 Q. Did you also observe that her throat contained a small amount of mucus?

A. Yes, she did, she did have mucus in her throat which would go along with a cold.

35 Q. Were her ears clear at that stage?

A. They were.

40 Q. Is it the case also that Laura did not exhibit any neck stiffness?

A. That's right.

45

Q. And was her abdomen soft?

A. It was.

45 Q. Was she also without any fever or temperature?

A. She did not have a fever.

50 Q. Did you make a diagnosis in respect of Laura that evening?

A. I thought she most likely had mild croup and I admitted her for observation because of her history, or the history of the family. Had it not been for the history I may not have admitted her.

55 Q. When you say the history of the family, was it your understanding that Laura had three siblings who had previously died suddenly and unexpectedly?

A. That's right.

Q. Now doctor, you just said that had it not been for that history you may not have admitted her. Upon admission was Laura treated with intranasal oxygen?

A. She was.

5

Q. Was she observed overnight?

A. She was, yes.

10

Q. Was she discharged the following morning because she was in no distress?

A. I saw her early in the morning and I gave instructions to the staff that if she continued to be well she could have gone home about lunchtime. I think that is about the time she was discharged.

15

Q. Did you review her subsequently on 23 June 1998 at your surgery?

A. I did, yes.

20

Q. Did she have any signs then of an upper respiratory infection?

A. Yes, she did.

25

Q. Was she in any distress at that stage?

A. No, she was not.

30

Q. In fact was Laura later seen at your surgery on several occasions from September 1997 to 1998?

A. She had been seen on several occasions before, I think I last saw her on 23 June '98, but she had been seen at the surgery before that, yes, on several occasions.

35

Q. In fact were you fairly cautious in monitoring her, given the known history regarding her three siblings' untimely deaths?

A. I have not seen her previously. She had been seen by other doctors in the practice. The first time I believe I saw Laura was the night of the hospital admission, and I did see her again on 23 June, but I did not previously treat her. Going from my records she had been seen by other partners in my practice.

40

45

Q. Is it the case that she showed minor signs of upper respiratory infection?

A. That is what I'm led to believe by the note.

50

Q. From the notes can you also say that she never required any antibiotics to treat that infection?

A. I don't believe she was treated with antibiotics, but I would have to refer back to my notes if that is the case.

55

Q. Did you in fact make a statement doctor, to this effect, that she never required antibiotics?

A. I have, yes.

Q. Now, from your observation of Laura and from the

note which you have had available to you, has there been anything abnormal about the health of that child, Laura, for the age at which she was at that time?

5 A. From my reading of the notes I believe that to be true.

<CROSS-EXAMINATION

10 ZAHRA: Q. Do you have any particular memory of treating the child Laura or are you relying on your notes?

A. I'm essentially relying on my notes.

15 Q. But you have some memory of contact with Laura and her mother?

20 A. I can remember it because of the unusual circumstances of the family history and it was drawn to my attention by the nursing staff at the time, so that sticks in my mind. This is going back five years and it was 1 o'clock in the morning, it is hard to...I had been on call since 8 o'clock that morning.

25 Q. When you saw her at the Singleton Hospital, that was in your capacity as a Visiting Medical Officer?

A. That's right.

30 Q. Laura was with her mother when you saw her?

A. I cannot recall who was exactly there with her, her mother or father was there, I cannot honestly recall.

Q. This is about 1 o'clock in the morning?

A. That's right.

35 Q. Similarly with your other attendances upon Laura, do you have a recollection of who it was who took Laura to see you?

A. No, I don't.

40 Q. Are you able to say anything about the mother's care for the child?

A. No, I honestly can't.

45 Q. You can't remember?

A. No.

Q. Your records, however, indicate that there were many attendances at your surgery in relation to relatively minor complaints?

50 A. I don't know whether I specifically said many. I said there were a number.

Q. Do you know how many there were?

A. If I refer to my notes I can tell you.

55 Q. Might the witness do that?

HIS HONOUR: Yes.

WITNESS: She was seen on 23 February '98 by one of our doctors at the time. She was seen again on 6 March '98, 9 March '98, 27 May '98, and then when I saw her on 23 June, the day after her hospital admission.

5

ZAHRA: Q. Does it indicate in your records who accompanied the child?

A. No, it does not, but it would not be my normal practice to write that in the notes, but I assume it was one of the parents who brought her.

10

Q. Would the frequency of attendance indicate to you that the person who was bringing the child was quite caring for the child's health needs?

15

OBJECTION (CULVER). QUESTION REJECTED

Q. The attendance in your surgery was with some frequency during those months?

20

A. That is four occasions from February to May. For a child of that age I would not have thought that to be unreasonable or unusual.

Q. It is not unusual?

25

A. No.

Q. Would you agree with that?

A. I'm not an expert in that, I can't answer that.

30

Q. You also indicate that there were routine immunisations also done at the surgery?

A. That is right.

<RE-EXAMINATION

35

CULVER: Might I clarify with your honour's leave the answer to my last question in examination-in-chief. There is some room for ambiguity in the answer. I don't imagine there is any controversy involved.

40

ZAHRA: I cannot see any ambiguity

HIS HONOUR: Ask your question and then if Mr Zahra want to ask another question, he may do so.

45

CULVER: Q. From your examination of Laura and from the note to which you have had regard, was there anything abnormal about Laura's health, for a child of her age?

50

A. No, I don't think there was.

<WITNESS RETIRED AND EXCUSED

55

CROWN PROSECUTOR: I can indicate that subject to the cross-examination of Dr Wilkinson and subject to the availability of one other witness who may or may not need to be called, that completes the evidence in relation to Patrick, and I think we have also completed

RMC:PM:RT:8

D9

the evidence in relation to Sarah.

HIS HONOUR: Thank you for that indication.

5 ADJOURNED TO 15 TUESDAY 15 APRIL 2003

oOo

PM:RMC:RT:8

D10

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION5 BARR J
AND A JURY OF TWELVE

TENTH DAY: TUESDAY 15 APRIL 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

20 CROWN PROSECUTOR: The Crown case is proceeding quite rapidly, more in line with my learned friend's estimation than with my original estimation, and it looks as though we may well get to part of the Crown's expert evidence next week. What I wanted to suggest to your Honour, and I think my learned friend agrees, is that I understand that there is going to be some challenge to the admissibility of our expert witnesses. It might be suitable, if your Honour agrees, to set 25 aside Thursday morning for the argument on the admissibility of our expert witnesses. There may also be a further area.

30 HIS HONOUR: Thursday morning of this week?

35 CROWN PROSECUTOR: Yes. In other words, the jury wouldn't need to come in on Thursday. We could use Thursday morning to debate those issues and one other possible one that my friend has flagged to me.

HIS HONOUR: That sounds suitable. Do I have copies of statements of all the witnesses whose evidence will be challenged?

40 CROWN PROSECUTOR: Your Honour would certainly have their basic statements, but there might be some updates that your Honour doesn't have.

45 HIS HONOUR: Could I ask you to check on that, Mr Crown, and make sure I have seen everything?

CROWN PROSECUTOR: Yes, your Honour.

50 HIS HONOUR: I will try and read it all before Thursday morning which will save you both a bit of time and trouble, perhaps, on Thursday.

55 CROWN PROSECUTOR: If your Honour's associate could give the parts of the brief to the instructing solicitor.

HIS HONOUR: Mr Zahra, would you be adducing any evidence on the topic?

5 ZAHRA: I have spoken to my friend. I don't think he presently intends to lead any evidence from Dr Beal. We have an expert who we will call if there is a necessity, but I think my friend is indicating that his argument will be primarily based on the statements at this stage.

10 CROWN PROSECUTOR: Yes.

HIS HONOUR: So assuming no Dr Beal, you won't be adducing evidence.

15 ZAHRA: Yes. Can I indicate the judgment in the matter of Clark has been handed down in the last couple of days and we have a copy of that. I will arrange for a copy to be provided to your Honour and my friend.

20 HIS HONOUR: This was the commission of inquiry?

ZAHRA: Yes. It does address the issue of admissibility.

25 CROWN PROSECUTOR: Does your Honour have the transcript?

HIS HONOUR: I didn't get it until this morning. I haven't read it.

30

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Good morning, ladies and gentlemen. I need to say a couple of things to you before we resume the testimony this morning. One is something that I should have touched upon in my opening remarks, I think, but it has become more pertinent as the trial has progressed.

10 You have heard a number of expert witnesses now and I expect that you will hear other expert witnesses using medical terminology. To the extent that it is necessary for the terminology they use to be explained, you may expect that counsel will obtain from them, by
15 asking them questions, the necessary explanation. I say this because it is important for you to realise, as I told you, that you are to judge the issues in this trial only on the material that is put before you in the courtroom. It follows that you must not do your
20 own reference. You must not go to medical dictionaries and the like to try and find out what a particular witness meant when using a particular word or expression. If you are unsure about anything and if you do require explanation or elucidation of any of the
25 evidence given, particularly the evidence of expert witnesses, I do encourage you to write a note.

30 It is not the idea that you should go through with any lack of understanding of the evidence that has been brought before you. I just want to head off the risk that you may do your own reference. That is not permitted. The same goes for legal reference, of course.

35 As I told you at the beginning of the trial it is my job to instruct you about the law which you need to know to apply to the facts as you find them in the case, and you may be sure that I shall tell you all you
40 need to know. Not only is there no need for you to do any research of that kind, it is necessary for you not to do so because if you were to do so, you might very well misinform yourselves.

45 The second thing I wanted to say to you relates to the progress of the case. The Crown and Mr Zahra have told me that it is going well. There are occasions, as you know, when I am bound to hear argument in your absence. What I have been trying to do and what counsel have
50 been trying to do during the conduct of the trial is to keep those occasions to a minimum so that the flow of evidence is not unduly interrupted. Everybody is trying to make your job as easy as possible.

55 There is a body of evidence about which there is a dispute between the parties and about which I have to decide, and the time when I have to do that is drawing close. It will take a considerable time for counsel to argue the case that they want to put on the issues that

I have to decide. We therefore decided that on Wednesday of this week we shall adjourn the trial, so far as you are concerned, until next week. In other words, we are not going to ask you to come on Thursday at all.

If you look in the paper you will see that the case will be listed for hearing, and we shall be here, but I shall be hearing argument in your absence and, I expect, making decisions in your absence. In that way we won't need to interrupt the flow of the evidence. As I say, it will be less disruptive for you. So this week you will finish on Wednesday and we will stand it over until next week. We are not sitting on the Tuesday, so I will be adjourning the matter until the following Wednesday. You will have a very long weekend.

That is all I wanted to say by way of instruction.

Yes, madam Crown.

CULVER: This evidence relates to Laura Folbigg.

<PAUL FRANCIS INNIS(10.14AM)
SWORN AND EXAMINED

HIS HONOUR: If you have notes and you would like to refer to them you may do so.

CULVER: Q. Is your full name Paul Francis Innis?
A. Yes.

Q. Are you a general practitioner of medicine?
A. Yes.

Q. In your role as a general practitioner did you see the child, Laura Folbigg?
A. Yes.

Q. And in fact did you see her over a number of consultations from 14 August 1998 when she was aged one year?
A. Yes.

Q. I show you a document. Do you recognise that document as a copy of notes you took in respect of your consultations with Laura?
A. Yes.

MFI # 25 MEDICAL NOTES IN RELATION TO LAURA FOLBIGG

Q. (Mfi 25 shown.) Is it the case, Dr Innis, on 14 August 1998 your first consultation with Laura, she was brought into you with flu-like symptoms?
A. Yes.

Q. And is it your understanding that she had no fever?

A. Yes.

Q. That she had a background which included no allergies and her immunisations were up-to-date?

5 A. Yes.

Q. Did you examine Laura on that occasion?

A. Yes, I did.

10 Q. Did you find that she had no signs of respiratory distress?

A. Yes.

Q. Did you also find that she had a red throat?

15 A. Yes.

Q. Was it your diagnosis that she had a viral upper respiratory tract infection and you advised her mother to treat her symptoms with Panadol and fluids?

20 A. Yes. I have provided symptomatic treatment which usually includes fluids and analgesia.

Q. So in your medical opinion is it the case that that was not at all a serious illness with which she presented to you on that day?

25 A. No, it was a fairly mild viral illness.

Q. Was it a fairly normal childhood illness?

30 A. Yes, I would say so. It is fairly common for children to get these things.

Q. On 19 October 1998, was that Laura's next visit to you?

35 A. Yes.

Q. Did she come into your practice on that occasion with a burn on her left forearm and palm?

A. Yes.

40 Q. Did you treat her for that burn on that occasion and over the next eight days by dressing the wound?

A. Yes.

Q. Did it heal well?

45 A. I assume so. I'll just see how it ended up. Yeah, by - I can't actually read the date, I am assuming by 29 October the wound had healed to the point where she could have a couple of dressings at home, so I would say that it would have healed fairly much completely by
50 that stage.

Q. And did you then again see Laura on 19 January 1999 when she was brought in with a rash?

55 A. Yes.

Q. And at that stage she was 17 months old?

A. Yes.

Q. Did you also find on that occasion that she had no upper respiratory tract symptoms?

A. Yes, that's - oh, no, on that visit her throat was red also, yeah.

5

Q. Was there any sign of respiratory distress?

A. Sorry, yes. She had no respiratory symptoms but on examining her, her throat was red. I think that would include no signs of respiratory distress as well.

10

Q. And in fact was it your opinion that she was behaving quite normally on that occasion?

A. Yes. She appeared to be behaving normally.

15

Q. Was that rash a fairly common rash for children of her age?

A. I thought it was a case of hives, which can be fairly common, and I treated the rash by prescribing a dose of - a course of Phenergan, which is an antihistamine. It is a fairly common rash and I saw her shortly following that.

20

Q. Was that on 22 January 1999, some three days later?

A. Yes.

25

Q. Did you review the situation with her rash?

A. Yeah. She also had some fevers in the previous two days and I revised my diagnosis to a viral rash called pityriasis rosea, and her throat was also red on that occasion.

30

Q. Is that rash which you named also a fairly common childhood occurrence?

A. I don't know that it is a common childhood occurrence in fact, but rashes in kids with viruses are common so it is not an uncommon finding to see a child with evidence of a viral illness who also has a rash accompanying that.

35

Q. Was the viral illness at all serious or life threatening?

A. I'm quite sure it wasn't at that stage.

40

Q. Did it ever present as being serious?

A. Not to my knowledge.

45

Q. Did you again see Laura on 5 February 1999?

A. Yes.

50

Q. For her 18 month immunisation?

A. Yes.

Q. On that occasion was it your opinion that Laura was well?

A. Yes. I thought she was well. At that stage her throat was clear and her ears, and she proceeded to have her 18 month immunisations administered by our practice nurse.

55

Q. There was no evidence of any temperature in Laura, any fever?

5 A. It's not routine to check for a fever as part of that sort of checkup, so I really can't comment whether there was a fever at that time or not.

Q. She certainly didn't evidence any symptoms of a fever at that occasion, did she?

10 A. No.

Q. During the seven month period over which you examined Laura, is it the case that she appeared to you to be a normal and healthy child without any chronic illness?

15 A. Yes.

Q. And in fact is it your opinion that her death was totally unexpected to you as her family doctor?

20 A. Yes, that would be true, yes.

Q. Can I also just ask, in that period over which you did consult with Laura, did you see any sign of her not developing normally?

25 A. I really can't remember, so I really can't answer that question. I don't remember anything abnormal about her development, but I can't specifically say whether I thought she was developing normally or not.

Q. Certainly if there was a failure to thrive you would have noted that in your records?

30 A. I would like to think so, if there was a child that was looking sickly and small and skin and bones, that I would have noticed that.

35 Q. And over that period she didn't display any--

OBJECTION (ZAHRA)

40 Q. Are you able to say whether or not Laura had recurrent infection of an abnormal degree over that period?

45 A. The two infections we have got recorded over the time I was associated with her, I don't think either of those were abnormal. It's quite normal for children to have, I guess, up to about six viral infections a year without it being considered abnormal.

<CROSS-EXAMINATION

50 ZAHRA: Q. Doctor, do I understand from your evidence that you saw Laura from August 1998 to February 1999?

A. Yes, that's correct.

55 Q. About six months?

A. Yes.

Q. In fact you note that over that time you saw Laura

on approximately 13 occasions?

A. Yes.

5 Q. During this period of time did you notice anything about Laura that might have suggested that she was other than a well-cared for child?

A. No, not at all.

10 Q. You are trained to identify, when you are examining children, for any signs of abuse?

A. We are taught to be on the lookout and there was nothing that I can recall that would have alarmed me about her presentation. In fact, when you look at the two, four, six, eight visits relating to the burn, that shows that there was a concern to make sure that the child was getting the right treatment for that particular condition.

20 Q. Do you recall Laura and the mother, or are you relying essentially on your notes?

A. I'm sorry to say this but I can't actually picture Laura in my mind so I am completely reliant on my notes to remember the evidence that I am giving.

25 Q. What about a perception of the parenting skills of the mother? Are you able to make an observation about that?

A. Sorry, no, I don't have a recollection of that.

30 Q. So far as the burn that you treated was concerned in October, do you have a history that that was occasioned when the child in fact at a family barbecue went to grab a spit roast?

35 A. I didn't actually record the circumstance in which the burn was sustained, just the fact that there was a burn present and that it was a second degree burn and that it required daily dressings for treatment.

40 Q. Do you recall, does that assist your memory, do you recall whether that was a history that was given to you?

A. Sorry, not at all, no.

45 Q. Is the injury consistent with that type of action? In other words, a child going to grab a hot spit roast at a barbecue?

A. Yes, it would be, yes.

50 Q. Do you recall whether it was the mother who had brought the child in to see you?

A. I don't actually, I'm sorry.

55 Q. Do you have a copy of your statement?

A. Yes.

Q. At the top of the second page you talk about 19 January that Laura presented with her mum.

A. Okay, yes, I've got that paragraph. Okay, so yeah,

that would be correct. The statement was made in 1999, so I would be relying on that statement instead of my own recollections.

5 Q. You also make a note in your statement regarding 5 February, that also Laura's mum brought her in?
A. Yes, that would be right.

10 Q. You were asked a question about whether you had checked for any fever on 5 February 1999 as part of the child's immunisation?
A. That's right, yes.

15 Q. I think you indicated that it is not the current, or not the practice to take the temperature at that time?
A. No, not as a routine part of checking out children prior to an immunisation.

20 Q. Do you have any specific memory of seeing the child Laura on that day?
A. No.

25 Q. So you can't tell one way or the other whether there were symptoms?
A. About whether the child would have had symptoms of a fever?

30 Q. Yes.
A. No.

35 Q. You wouldn't know?
A. No, I wouldn't know. Sorry, could I just add to that? Usually I routinely ask the parent if the child is well or not at the time they bring the child for immunisation and I may have said has she had any fevers, so that may have been why I have written it in the notes.

40 Q. You can't recall?
A. No, I don't recollect asking that specific question.

45 <RE-EXAMINATION

CULVER: Q. Doctor, if Laura on that occasion had displayed any symptoms of fever, would you have checked?

50 A. If her mother had said that she had had a fever then I would have checked for a fever. But, having done that, I would normally write in the notes that the child was either afebrile or what the temperature was.

55 Q. And, indeed, if she had had any apparent symptoms to you of fever, would you have checked?

A. I guess in listening to her - in examining her throat and ears, if she felt hot then I would have proceeded to check her temperature. So I guess you can

say that she may not have felt hot when I touched her to examine her ears and throat.

5 Q. If you had tested her and found a fever, would you have noted that in your records?

A. I would of, yes.

10 Q. Is there any such note in your records?

A. No.

<WITNESS RETIRED AND EXCUSED

<MARGARET EILEEN TANNER(10.30AM)
SWORN AND EXAMINED

15 CROWN PROSECUTOR: Q. Ms Tanner, could you please tell the court your full name?

A. Margaret Eileen Tanner.

20 Q. Ms Tanner, from 1989 until 2001 were you employed at the Royal Alexandra Hospital for Children?

A. Yes, I was.

25 Q. During the time that you were employed at that hospital was your position known as clinical nurse consultant in SIDS and sleep apnoea?

A. Correct.

30 Q. And you are a registered nurse?

A. Yes.

35 Q. Do you tell the court that you, apart from being a registered nurse, are also a certified midwife, you also hold the graduate certificate in research health, graduate diploma in community nursing and a masters in education?

A. That's right.

40 Q. And whilst you were in that position as the clinical nurse consultant in SIDS and sleep apnoea, did you work under two doctors, Dr Chris Seton and Dr Karen Waters?

A. Yes.

45 Q. What was the name of the unit that you were working in?

A. The David Reed Sleep Unit.

50 Q. Was that a unit that was specifically given the task at the children's hospital of assessing and treating children with sleep disorders?

A. Correct.

55 Q. Including SIDS?

A. Yes. It is difficult with SIDS because you can't diagnose SIDS.

Q. We will come to that a little bit later. You were

working with children who were suspected to have a higher incidence or risk of SIDS; is that right?

A. Yes.

5 Q. Was one of your roles to educate parents in the use of apnoea monitors?

A. Correct.

10 Q. And was another of your roles to educate parents in cardiopulmonary resuscitation, also known as CPR?

A. Yes.

15 Q. Was another of your roles to receive periodic downloads through the telephone lines from some of the monitors that had that facility?

A. Yes.

20 Q. Were you also required to look at those downloads to work out whether or not the children who had been attached to those monitors were having any difficulties or warranted further investigations?

A. Yes.

25 Q. So your role was to read the downloads?

A. Correct.

30 Q. I would like to take you to the period of April 1997. In April of 1997, about four months before Laura Folbigg was born, did you meet her parents?

A. I don't believe so.

35 Q. I'm sorry, that's incorrect what I put to you. On 19 August 1997, about ten days or so after Laura was born, did you first meet Kathleen, Craig and Laura Folbigg?

A. Yes, I did.

40 Q. And did you meet them in the neonatal intensive care unit at the children's hospital at the Royal Alexandra Hospital for Children?

A. Yes, I did.

45 Q. And were they Dr Chris Seton's patients?

A. Correct.

Q. And did Dr Seton request that you be the person to attend to the monitoring needs of this family?

A. Yes.

50 Q. Did you know at the time that there had been three previous children in the family who had died?

A. Yes.

55 Q. On about 20 August 1997 did you teach both Kathleen and Craig Folbigg how to perform CPR on an infant?

A. On an infant doll, yes.

Q. Did you also, on that day, give them instruction on

how to operate the corometric home cardiorespiratory memory monitor?

A. Yes, I did.

5 Q. And that is a type of sleep apnoea monitor?

A. Yes.

Q. Is it generally known as a corometrics monitor?

10

Q. Is that a monitor where there are leads attached to the child?

15 A. Yes. There's two electrodes attached to the baby's body, one here, one here, and they are electrodes and there is a lead attached to both of those and that runs off to the monitor.

Q. Could you just briefly explain to the court how the monitor works?

20

A. Yes. It records the breathing and the heart beat on-goingly. If the monitor believes - it has prior settings so we set the particular settings. If the monitor believes that the baby has had a cessation of breathing within the limit set, or a drop of heart beat or excessive heart beat within the limit set it will alarm and then it records it one minute before that alarm and one minute after so we know what has gone on so we have got a prerecording of the event.

25

30 Q. So when you say there is a prerecording, is there only a recording before and after the alarm goes off?

A. It had many types of recordings. That was one of them. It recorded other things, such as periodic breathing, which is immature breathing which some babies, many babies have it. Premi babies have it a lot. It records when the monitor was turned on, when the monitor was turned off, how many hours in the day, total hours of periodic breathing in the day. I think that's about it.

40

Q. So it records when the monitor was switched on, when the monitor was switched off?

A. Yes.

45 Q. When there were alarms?

A. Yes.

Q. When there was any abnormal breathing of any kind?

50 A. It didn't alarm at that stage, it just recorded in the memory.

Q. And separately from that, the situation before and after alarms?

55

A. That's in with the alarm status.

Q. Did it record?

A. Yes, it did.

Q. Status a minute before and a minute after alarm?
A. Yes.

5 Q. Did you instruct Mr and Mrs Folbigg on how to use
this monitor?
A. Yes, I did.

10 Q. Did you also instruct them on what to do if the
alarm went off?
A. Yes, absolutely.

15 Q. You say that it had a sensitivity switch which
could be altered. Is that something which only the
hospital could alter, or could the parents alter it
also?
A. It was mainly done by myself.

20 Q. Could the parents alter the sensitivity of the
monitor under instruction?
A. Yes.

Q. By phone, for instance?
A. Yes.

25 Q. And did you give Mr and Mrs Folbigg instructions on
how to do a download?
A. Oh, yes.

30 Q. At around that same time in about 20 August 1997,
Laura having been born on 7 August, did Dr Seton
arrange for Laura's admission to the neonatal intensive
care unit at the hospital?
A. Yes.

35 Q. Was that due to her prior family history?
A. Yes.

40 Q. Were you made aware of what the results were of the
various testing that was done on Laura?
A. Not at that time.

Q. Did you later find out?
A. Yes.

45 Q. And did you find out that Laura was not suffering
from any health problems?
A. That's correct.

50 Q. And that she was a healthy little baby?
A. Yes, thank heavens.

55 Q. And was Laura in fact in the neonatal intensive
care unit for a couple of days whilst these tests were
being done?
A. Yes.

Q. Did they include sleep apnoea tests?
A. Yes.

Q. And other studies?

A. Yes.

5 Q. And did she then return to her home with her parents?

A. That's right.

10 Q. During the time that Laura was in the neonatal intensive care unit, were you aware of any health problems whatsoever that she showed?

A. Nothing.

15 Q. Ms Tanner, over the time that you worked in this hospital are you able to give us some sort of estimate of how many babies you came into contact with?

A. Oh, golly, hundreds. It would have been hundreds, maybe 400.

20 Q. Would you also have come into contact with the parents of those children?

A. Every single one.

Q. Every single one?

25 A. If not a foster parent.

Q. Were most of those babies admitted for the same sort of testing that Laura was admitted for?

30 A. Most of them, yes.

Q. And normally would that require the baby to be in the hospital for a number of days?

A. No. Usually they just came in overnight.

35 Q. Overnight, so over two separate days?

A. They would come in in the evening and leave the next morning.

40 Q. And would you generally have an opportunity to observe the ways in which the parents and the children interacted--

OBJECTION (ZAHRA)

45 ZAHRA: My friend needs to seek the specifics of his case.

50 CROWN PROSECUTOR: I need to clarify it as a person whose evidence would have some value in this particular area that I am heading towards.

HIS HONOUR: I don't know about that, Mr Crown.

55 This is something I will decide in your absence, ladies and gentlemen. Would you mind going to the jury room.

CROWN PROSECUTOR: Might I withdraw the question, go specifics and then come back again. It might be there

is no objection.

5 Q. In relation to Kathy and Craig Folbigg and their daughter, Laura, did you have an opportunity during the time that they were at the hospital to observe how Kathleen related to Laura and how Craig related to Laura?

A. Briefly.

10 Q. What opinion did you form as to the way in which Kathy related to Laura?

A. It was difficult. Kathy seemed detached, as if she didn't want to get close to Laura. [STRIKE OUT BEGINS]

15 [STRIKE OUT ENDS]

OBJECTION (ZAHRA)

20 HIS HONOUR: The last sentence of the answer will be struck out.

CROWN PROSECUTOR: Q. Just tell us about Kathy and Laura at this stage?

25 A. She seemed detached.

Q. What was there that you actually observed that led you to that view?

30 A. How can I say it? She wasn't overprotective as - going further - she wasn't overprotective, she wasn't always watching her, which a lot of--

OBJECTION (ZAHRA)

35 A. I knew you were going to say that. It is very hard. She wasn't watching her. She would go out and have a cigarette, or go out and have a break quite often.

40 CROWN PROSECUTOR: Q. What about Craig? What did you observe about Craig and Laura?

A. Craig was terrified. He also went out and had a lot of cigarettes. He was terrified, frightened, totally the opposite.

45 Q. Would you just pause before you answer this question?

A. Yes.

50 Q. Have you had an opportunity over the years that you have been working in the hospital to observe parents and how they relate to their children?

OBJECTION (ZAHRA)

55 CROWN PROSECUTOR: I withdraw the question.

QUESTION WITHDRAWN

Q. You have told us that you provided instruction to Kathy and Craig on the use of the corometrics monitor. Did you say anything to them about when the monitor should be used?

5 A. During all sleep periods.

Q. During all sleep periods?

A. Yes.

10 Q. Was that just at night?

A. No, all sleep periods.

Q. Was there any discussion with the parents about how long Laura should be monitored for?

15 A. It was a general consensus we would do it for about 12 months.

Q. Do you tell the court that the first download was received on 27 August 1997.

20 A. Yes.

Q. That was about a week after they had been in the hospital?

25 A. Correct.

Q. And thereafter were there further downloads made, usually on about a fortnightly basis?

A. Approximately, yes.

30 Q. Do you tell the court that in total there were 22 downloads?

A. That sounds like the right number.

Q. Do you have a statement in this matter?

35 A. I have.

Q. Would you like to refer to your statement?

A. It sounds correct.

40 Q. Paragraph 11?

A. Yes.

Q. So there were 22 downloads, the last of which was on 25 August 1998; is that right?

45 A. Correct.

Q. Each time there was a download did you look at the information that was contained in that download?

50 A. Yes, I did.

Q. And you had available to you on a disc all of the information contained in those 22 downloads?

A. Correct.

55 Q. Is this the case, that you are able to look at those results using a special programme on a monitor that you no longer have, but you no longer have the facility to print it out?

A. Correct.

Q. And that's because it is an American programme and you don't have the requisite printer working any more?

5 A. Yes. Can I add to that?

Q. Yes.

10 A. I left the hospital two years ago. When I left we were unable to print things out. Dr Seton has informed me that they are printing them out now, so they now have figured out how.

Q. Is this the case, that you have looked recently at those downloads?

15 A. Yes, I have.

Q. You told us that you looked at them at the time?

A. Yes.

20 Q. Firstly, what do you say you found out from those downloads about when the monitor was being used?

A. The monitor initially was used fairly well for the first two months and then it dwindled off, so it wasn't being used during the daytime.

25

Q. After two months?

A. The first one she used - it was used fairly well until about 10.00 or 12.00 in the morning and from about 8.00pm in the night. In the next fortnight it really dropped off during the day.

30

Q. Is this the second download?

A. Yes.

35 Q. The first download was just up to a week after discharge from hospital?

A. One week, yes.

Q. And the second download was weeks two and three?

40 A. Correct.

Q. What was the usage during weeks two and three?

A. Between 8.00pm and 7.00am fairly good, during the day very scant.

45

Q. And thereafter what was the usage of the monitor at night?

A. At night was good.

50 Q. What was the usage of the monitor during the day?

A. The next fortnight was even more scant and the fortnight after that was almost - no, it was a month after. We went a whole month and the only time it was used during the day was on one Sunday and on one Monday

55

Q. Thereafter for the remaining downloads are you able to summarise what the use of the monitor was?

A. Yeah. It picked up in December/January and then dropped off - during the day - and then dropped off again.

5 Q. Did that coincide with any holiday period?

A. [STRIKE OUT BEGINS] I am thinking it may have been Craig's holiday, but I don't know. [STRIKE OUT ENDS]

10 OBJECTION. STRUCK OUT AT HIS HONOUR'S DIRECTION

A. I can't remember.

CROWN PROSECUTOR: Q. Can't remember?

15 A. No.

Q. How long did it pick up for in that December/January period?

A. About six weeks.

20 Q. When you say picked up, do you mean during the day?

A. Yes.

Q. The daytime use of the machine?

25 A. Yes.

Q. When else was it used during the day?

A. I've got here until about - again it was intermittent until 9 February, then after that it was hardly ever used during the day except on a weekend.

30 Q. So when you say except on the weekend?

A. There was an occasional Sunday or Monday or something like that.

35 Q. Is this the case, that after the first few weeks, during the day it was only used on the occasional Sunday or Monday and in addition for about a six week period in December/January?

40 A. And a bit of February, yes.

Q. And a bit of February?

A. So it might have been about eight weeks.

45 Q. Other than that was it generally not used during the day?

A. Yeah, not used.

Q. What about at night?

50 A. Yes, it was used at night.

Q. During the time that you received downloads were there two episodes of curious alarm events that you noticed?

55 A. Yes, there were.

Q. And were they on 16 March '98 and 20 May '98?

A. Yes.

Q. And have you been able to form an opinion about what the possible cause of those curious alarm events was?

5 A. They were curious. They were about 9.00 o'clock, 9.15 in the morning. They were for approximately half an hour. There may have been seven alarms and they were totally different to any of the other tracings that we had. I have a hypothesis but I cannot prove it.

10

Q. Have you attended a conference in this area?

A. Yes, I have.

Q. Where was that conference?

15 A. It was an Apnoea of Infancy Conference in Palm Springs in America.

OBJECTION (ZAHRA)

20

Q. Sorry?

A. Apnoea of Infants Conference in Palm Springs, America.

25

HIS HONOUR: Is this body of evidence to be pressed, Mr Crown?

CROWN PROSECUTOR: Yes, your Honour.

30

IN THE ABSENCE OF THE JURY

CROWN PROSECUTOR: Perhaps I will lead her on the voir
5 dire.

HIS HONOUR: Well, there doesn't seem to be any mention
of this in the statement.

ZAHRA: We are blind to this, your Honour.

10 CROWN PROSECUTOR: I did open on it.

HIS HONOUR: Let's hear the evidence, Mr Crown.

15 EXAMINATION ON THE VOIR DIRE

CROWN PROSECUTOR: Q. What did you find out at this
conference about these possible curious alarm events?
20 A. There was somebody who presented a case using the
same monitor whereby the trace was absolutely
different, similar to this, and what they had
discovered was the monitor had been placed on an adult
to try and confuse people.

25 Q. Leaving out why it might have been placed on an
adult, did you form a view about what may have caused
these two curious episodes?

30 A. At the time I was just confused and I think it was
after I had been to the conference that this sort of
thought perhaps, it was a perhaps, that's all I can
say. I cannot say--

Q. Some adult had put it on themselves?

35 A. It's a perhaps.

Q. Were the two episodes of curious alarm events
consistent in any way with the leads having been
attached to Laura Folbigg?

40 A. The difference was the base heart rate of the
tracing. With her tracings, her base heart rate varied
from around 100 to 120. The base heart rate in this
case was around 80, and it was a totally different sort
of picture, different artefact.

45 Q. It was a totally different picture?

A. Of hers.

Q. That Laura had both before and after these events?

50 A. Yes.

CROWN PROSECUTOR: The opening is at page 41 line 12.

HIS HONOUR: Yes, I see that.

55 Q. Just to assist my understanding, Miss Tanner, would
you tell me precisely what information you received in
these downloads. You have spoken of tracings, for
example, and I gather from a recent answer you gave

that there was an indication of the heart rate?

A. Yes. I have one page of graphs here, if that's any help. It recorded the heart rate and the breathing rate for one minute before and one minute after.

5

Q. One minute before and one minute after?

A. After the alarm had sounded.

Q. I heard some reference to that before. How does it record for a minute before an alarm sounds.

10

A. Because it is an ongoing trace and it is not recorded unless the alarm sounds the memory is always there.

15

Q. I see. It retrieves a minute's worth of memory?

A. Correct.

Q. When the alarm sounds?

A. Yes.

20

Q. So it records heart rate, breathing rate. What else?

A. It records a graph of monitoring time, it records actual hours and minutes of monitoring time, it records the event programme. So if a child has an apnoea or a bradycardia or a tachycardia or a periodic breathing episode it is recorded in minute and second time, not in a graph. I'm just trying to remember what else. And the graph, so those four are the main things.

25

30

Q. And what was it that would cause the alarm to be registered?

A. If the monitor that had a computer base believed the breathing had ceased for what was set at 20 seconds, or if the heart rate had dropped below whatever the setting was, in this case it was 80 beats per minute, or if it went above 220 beats per minute it alarmed.

35

40

Q. So the thing that led you to believe that an adult might have put on the equipment was the heart rate and the breathing rate?

A. Yes. The heart rate baseline was at least 20 beats below what a baby's should be, and it was only during that period of a quarter past 9.00 to 20 to 10.00 in the morning, which was an unusual time because a child wasn't usually monitored then anyway. It was a curious thought, since I had been to that conference--

45

50

Q. I only asked you whether it was the heart rate or the breathing rate that led you to that opinion?

A. Yes.

55

HIS HONOUR: Mr Zahra, do you want to ask any questions?

ZAHRA: Not at this stage.

EXAMINATION ON VOIR DIRE CONCLUDED

5 CROWN PROSECUTOR: I can indicate, the reason why I am
seeking to lead this evidence is purely to eliminate it
as a possible apnoeic event or abnormal event of
Laura's, not to suggest that anybody has done anything
sinister. And what I would seek to ask her is whether
10 the tracing during these two strange events was
completely different from any other tracings that she
received for Laura and whether the pulse rate and
respiration rate were much more of what she would
expect of an adult than of a child.

15 HIS HONOUR: I wonder why it is necessary for you to
introduce evidence of an unusual event only to saddle
yourself with the job of adducing further evidence to
show that it is of no particular consequence.

20 CROWN PROSECUTOR: Because what I want to ask her is
apart from those two events, did you see any
abnormality in the traces for Laura, and I expect that
she will say no. So I suppose if there was some
agreement that we all ignore those unusual episodes,
pretend that they weren't there, then I could ask her
25 the question.

HIS HONOUR: Well, the jury have heard evidence now
that it is there.

30 CROWN PROSECUTOR: That's right.

HIS HONOUR: What do you say about this, Mr Zahra?

35 ZAHRA: Sometimes one has to remind oneself where one
is and this woman is facing four murder charges in the
Supreme Court. My friend wants to lead evidence from
this witness that somebody at a conference said
something or presented a paper, something of which we
have been given no notice of, apart from what my friend
40 says is a statement in his opening about this, and we
are expected to address this right at this moment.

45 HIS HONOUR: Well, I don't know that that's really a
problem, Mr Zahra. Please let me know if you think I
should ask Miss Tanner to wait outside, but her
evidence to me is that there were some unusual tracings
on two identifiable occasions. On each of those
occasions a heart rate was recorded that couldn't have
50 been a baby's heart.

ZAHRA: This evidence should not have been introduced,
but it may be that this line of questioning not be
persisted with and your Honour tell the jury that it
has been determined that these two results have no
55 relevance to the present matter and the matter should
be left on that basis.

HIS HONOUR: Is that the way you would prefer to deal

with it?

5 ZAHRA: It is not in the sense that we are certainly
concerned about the way the evidence has been led, but
in the circumstances it may be that there will be no
further questions about this of this witness, and your
Honour indicate to the jury that it has been determined
that these two test results have no relevance to this
matter whatsoever.

10 CROWN PROSECUTOR: Or to Laura.

ZAHRA: Or to Laura, yes.

15 HIS HONOUR: I think that's a suitable way of dealing
with it.

20 CROWN PROSECUTOR: I think that in order to do it
satisfactorily my learned friend would have to say from
the bar table in the presence of the jury that
agreement has been reached between the Crown and the
defence that these two episodes of curious alarm events
are agreed to have had nothing to do with this case or
with Laura. That will enable me to then ask Ms Tanner
25 on that basis, whether she ever saw any abnormal
tracings for Laura.

30 HIS HONOUR: Yes, I think that's a suitable way of
dealing with it. In fact, I will tell the jury that
myself, that counsel are agreed on it. I just have to
remind myself what the evidences was before the jury
comes in.

35 CROWN PROSECUTOR: Just that there were two curious
episodes of alarm.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Ladies and gentlemen, just before I asked
5 you to retire you heard evidence from Miss Tanner that
during her examination of the downloads from the
apparatus she noticed two instances of what she called
curious alarm events. She told you that each one
lasted about half an hour. It is agreed between
10 counsel that those matters have got nothing to do with
this case and nothing to do with Laura. You won't hear
any further mention of them and you may safely take out
of your minds the evidence that was given. It's really
all irrelevant.

15 CROWN PROSECUTOR: Q. Ms Tanner, during the downloads
did you see any abnormal traces in relation to Laura?
A. Nothing that was alarming, no.

20 Q. Did you see any abnormal breathing that caused you
any alarm?
A. No.

25 Q. Did you see any abnormal apnoea that caused you any
alarm?
A. No.

30 Q. Did you see any abnormal heart beat that caused you
any alarm?
A. There were occasions where the heart beat did drop,
which were within normal range.

35 Q. In fact, did the whole activity that was recorded
by this machine appear to be within normal, healthy
limits for a child of Laura's age?
A. Yes.

40 Q. In March of 1998 did you receive a letter from
Craig?
A. Yes, I did.

45 Q. Would you have a look, please, at exhibit E. Is
that the letter which you received from Craig?
A. Yes, it is.

50 Q. And what did you do as a result of receiving that
letter?
A. I spoke to Dr Seton and showed him the letter.

55 Q. You said that the original plan was to monitor
Laura for about 12 months?
A. Yes.

Q. Was it the original plan also to reassess the
situation then?
A. The reassessment was virtually done with the sleep
studies that were performed over times. If they were
to be normal we were not going to continue longer than
12 months unless there were anxiety levels that needed

to be soothed, which has happened in other cases.

Q. Were there further sleep studies done on Laura?

5 A. She had, I think, three in total - two or three, I can't remember.

Q. Were those sleep studies normal?

10 A. The first one showed mild to moderate apnoea, central sleep apnoea, so that was okay.

Q. Hold on, mild to moderate?

A. To moderate - conscious.

15 Q. Please just listen to my question. Mild to moderate central apnoea?

A. Can I check that?

Q. No. Can you just answer my question. What did the first sleep study show, do you recall?

20 A. Mild to moderate central sleep apnoea.

Q. Is that normal or abnormal for a child of that age?

25 A. It's more on the normal side than the abnormal side.

Q. Would you like to have a look at your results?

A. Thank you. I will just see if I can find Dr Seton's letter.

30 Q. Were you involved in these sleep studies?

A. Indirectly, indirectly. I wasn't there overnight.

ZAHRA: It may be appropriate that Dr Seton gives evidence.

35

CROWN PROSECUTOR: Dr Seton will be called.

WITNESS: Yes, he read the reports. He analysed them. It has got mild, 27 August--

40

OBJECTION (ZAHRA)

HIS HONOUR: Just wait for another question.

45 CROWN PROSECUTOR: Q. On 2 March 1999 did you receive a phone call from Craig?

A. Yes.

50 Q. And did he tell you that the day before that Laura had died?

A. Yes.

55 Q. Would you have a look, please, at mfi 2. Does that appear to be a register of the kind that is kept by parents who are using one of these monitors?

A. Yes, it is.

Q. Is the blank register given to parents when they

take home the monitor?

A. Yes, it is.

5 Q. And they are expected to fill it in every time they use the monitor?

A. Every time an alarm sounds.

<CROSS-EXAMINATION

10 ZAHRA: Q. Miss Tanner, you were asked a question by the Crown relating to your opportunity to observe how Kathleen related to the child, Laura. Do you recall that?

A. Yes.

15

Q. In fact the question that you were asked was to the effect of: Did you have the opportunity over time to observe how Kathleen related to Laura? And your word was "briefly"?

20

A. Yes.

Q. You chose that word particularly?

A. I only saw them for a brief time in the neonatal intensive care unit.

25

Q. And that was in a fairly clinical environment?

A. Yes.

30 Q. You don't stay with them during the course of the sleeping tests?

A. I don't do the overnight tests, no.

Q. You see, I put it to you that she never smoked?

35 A. I did say she went outside to smoke or something, didn't I? I don't remember. I can't remember. I know Craig smoked and when I said it I thought maybe, I don't think Kathleen did smoke. I know Craig did and we tried to get him to stop.

40

Q. Can I ask you questions about the alarm on the monitor.

A. Yes.

45 Q. It's not a remote alarm, is it, it is attached by leads to the receptors?

A. To the baby, yes.

Q. And how long is the lead?

50 A. It's quite long. A couple of metres, a metre.

Q. Between a metre and two metres?

A. Yes, something like that.

55 Q. The alarm is quite audible?

A. Oh, yes.

Q. Do I understand by your answer there that it is quite loud?

A. Yes.

Q. Is it designed to stir the child?

5 A. It is designed - no, not the child, but it does happen.

Q. Have you seen the journal entry before?

10 A. I haven't seen this, no, but I know I would ask her what have you got recorded for this event or that event, and she would tell me what she would have recorded.

Q. There are a number of entries in that journal that the alarm in fact woke the child?

15 A. It's possible.

Q. And is that your experience, that the alarm does wake the child?

20 A. Yes, it does, it can do that.

Q. Is it your understanding that the alarm in this case at times went off quite frequently?

25 A. No different - no more than usual, than other kiddies.

Q. The journal that you in fact have, that's a journal that was completed by the parents?

A. Yes, it looks like it. I haven't seen it.

30 Q. And the journal, in fact, that was sent to the hospital?

A. No. I have never seen it before.

Q. You haven't seen it before?

35 A. No. It was verbally sent. Can I explain how we did the downloads?

Q. Yes you can, to understand it, in the sense that there is a modem and it is transmitted to you, is that what you are saying?

40 A. Yes, but there is always a phone call, a human conversation before and after. So afterwards we discussed this with what I have on the screen in front of me.

45 Q. Those journal entries you have not seen before?
A. No.

Q. Do you know if they are part of the record of the hospital?

50 A. No, they are not that I know of.

Q. Not that you know of?

55 A. No.

Q. You have not seen that document before?

A. No.

Q. Do you have any recollection of any discussions about the concern of the frequency of the false alarms in this particular case?

5 A. No. Most parents have that same concern, so it wasn't of particular notice for myself.

CROWN PROSECUTOR: I don't have any re-examination, but I didn't get Miss Tanner to identify the bundle of records from the children's hospital. Perhaps I might
10 ask her to do that.

<FURTHER EXAMINATION-IN-CHIEF

CROWN PROSECUTOR: Q. (Folder of documents shown.)
15 A. I haven't seen these.

Q. Do they appear to be medical records from the children's hospital for Laura?

20 A. Yes. Yes, these look all familiar.

MFI #26 MEDICAL RECORDS FROM THE CHILDREN'S HOSPITAL OF LAURA FOLBIGG

HIS HONOUR: You don't need to ask anything about that, Mr Zahra?
25

ZAHRA: No, but bearing in mind the nature of the evidence it might be appropriate that the journal be
30 tendered.

HIS HONOUR: Mr Zahra has invited the tender of the document. Is it going to be tendered?

CROWN PROSECUTOR: I tender the record previously mfi
35 2.

HIS HONOUR: In case you have forgotten what that is, that is the record of the use of the sleep alarm
40 monitor.

EXHIBIT #AA RECORD OF USE OF SLEEP ALARM MONITOR, PREVIOUSLY MFI 2 TENDERED, ADMITTED WITHOUT OBJECTION

HIS HONOUR: Were they the records that you were
45 referring to, Mr Zahra?

ZAHRA: Yes.

<WITNESS RETIRED AND EXCUSED

50 <CHRISTOPHER DENNIS SETON(11.21AM)
SWORN AND EXAMINED

HIS HONOUR: Q. If you have notes and you would like
55 to look at them in order to answer questions, you may do so?

A. Thank you.

CROWN PROSECUTOR: Q. Would you please tell the court your full name and your place of work?

5 A. My name is Christopher Dennis Seton, I work at the Children's Hospital at Westmead in the sleep investigation unit.

Q. Were you formerly employed at the Royal Alexandra Hospital for Children?

10 A. That's correct.

Q. Do you tell the court that you hold the Bachelor of Medicine and Bachelor of Surgery degrees?

A. That's correct.

15 Q. And that you are a Fellow of the Royal College of Physicians?

A. Yes.

Q. What's the difference between a Member and a Fellow?

20 A. It's a traditional term. Some specialties in medicine have membership and some have fellowship.

Q. Are you a staff specialist in the Sleep Disorders Unit at the New Children's Hospital at Westmead?

25 A. That's correct.

Q. And what position did you have at the Royal Alexandra Hospital for Children?

30 A. It was the same position as a staff specialist.

Q. And in effect were you the head of the Sleep Disorders Unit?

35 A. We don't officially have a head because we are not a department or a unit, so--

Q. Were you the most senior person?

A. I'm the most senior person, yes.

40 Q. Did you see the accused, Kathleen Folbigg, and her husband, Craig, for the first time on 3 May 1996?

A. Yes, I did.

Q. Was that because they came to your private consulting rooms referred by a doctor in Singleton?

45 A. That's right.

Q. And did they want to speak to you about the potential risks of SIDS after having lost three of their previous children?

50 A. That's correct.

Q. Were you told anything by Mr and Mrs Folbigg about what had happened to their previous children?

55 A. Mr and Mrs Folbigg told me in quite detailed fashion what had happened to each of the three children.

Q. And did you discuss with them various measures that could be taken to prevent a child from succumbing to SIDS?

5 A. That's correct. I explained the work that we do and how that could potentially help a future baby.

Q. Did you also speak to them about the risks inherent for them in having another child?

10 A. I did.

Q. In January of 1997 were you notified by Mr Folbigg that his wife was expecting their fourth child?

A. That's correct.

15 Q. And did you write to them offering them, firstly, a full investigation of their new born baby at the Sleep Disorders Unit at the Royal Alexandra Hospital?

A. That's correct.

20 Q. And had you, either at that time or some other time, also offered them the use of an apnoea monitor?

A. That's correct.

25 Q. And on 19 August 1997 did you first see Laura Folbigg?

A. That's correct.

30 Q. And did you see her at the Sleep Disorders Unit? Perhaps you might tell us whether it was at Westmead or at the Children's Hospital at, the Royal Alexandra Hospital?

35 A. I'm sorry, it's confusing. That was at Westmead and by the time I interacted with the Folbiggs all our hospital had moved from Camperdown to Westmead.

Q. Did the whole unit move from Camperdown to Westmead?

40 A. That's correct, and in fact the whole hospital, and that move was November 1995.

Q. And did the previous witness, Margaret Tanner, also make that move?

A. She did, as part of our staff in the sleep unit.

45 Q. So on 19 August did you examine Laura at the Sleep Disorders Unit at Westmead?

A. I did. I actually examined her, I think from memory, in the Intensive Care Unit at Westmead.

50 Q. And did you admit her into the unit in order to conduct a sleep study?

A. That was part of the reason for admission. The sleep study was part of a number of investigations and monitoring for Laura.

55 Q. Did she also undergo full biochemical blood and metabolic investigations?

A. Yes, she did.

Q. Firstly, the biochemical, blood and metabolic investigations, what were they looking for?

5 A. They were looking for a range of diseases, both related and unrelated to sudden infant death. What we were trying to do was be as comprehensive as we could be, even looking for things which we had never seen before and which we didn't expect to find. Some of the tests, for example, were screening tests which means
10 they test, a urine test, for example, can test for well over 100 rare metabolic diseases.

Q. Did you find anything abnormal in the biochemical, blood or metabolic testing?

15 A. No. That testing was all normal.

Q. Now, the sleep study, did that demonstrate that Laura had mild central apnoea?

20 A. Yes, it did.

Q. Did she have any obstructive apnoea?

A. No.

25 Q. Would you explain to the court what the difference is between the two, and the significance of the difference?

A. There are really two types of apnoea. Central apnoea is where the controller of breathing, when you go to sleep, pauses and we see that commonly in
30 premature babies. So as you know when we go to sleep our conscious control of breathing ceases. The automatic controller takes over.

35 If the automatic controller in the brain fails for a few seconds there is a pause in breathing in sleep and that's called central apnoea because the brain, which is the controller, is deemed in medicine to be the central part of the body. That type of apnoea is perhaps not a huge risk factor in terms of sudden
40 infant death.

And the other type of apnoea, which we know as obstructive apnoea, can be best thought of in terms of
45 adults. So an adult who is a heavy snorer can block their airway when they go to sleep by sucking the airway closed with a heavy snore and the blocked airway means that oxygen doesn't get in for a number of seconds and then the brain aids in the recovery of that. Obstructive apnoea occurs in babies, but when it
50 occurs in babies there is no snoring and there is no external sign of a breathing disturbance.

55 So in an adult you can expect this type of apnoea by heavy snoring, in a baby you must test for it because in an apparently normal baby who is perfectly healthy can have that type of apnoea.

Q. You found only central apnoea, not obstructive

apnoea in Laura?

5 A. That's right. In the second sleep study she had a couple of breaths of airway obstruction which we mentioned in our report, but which did not constitute obstructive apnoea.

10 Q. The central apnoea that you found in her first sleep study, was that perfectly normal for a baby of her age?

15 A. No, it's not quite normal, it is abnormal. It is very common in premature babies and perhaps two to three per cent of non premature babies have central apnoea. We don't really understand the reason that a mature, otherwise healthy baby has central apnoea, but we do pick it up in otherwise very healthy babies.

20 Q. And was Laura discharged on 21 August 1997?

A. That's correct.

25 Q. And were her parents given a corometrics home monitor to take with them?

A. That's correct.

30 Q. And they were given instruction in its use by the previous witness, Margaret Tanner?

A. That's correct.

35 Q. Do you tell the court that Laura was monitored on the machine for about 12 months?

A. That's correct.

40 Q. Did you have any overall supervision of that monitoring process?

45 A. Sister Margaret Tanner would. Her role is to look at the downloaded information from the family home and to report to me anything that she was concerned with. If she saw data with which she is not concerned then she didn't bother me with that. So in that sense I supervised the monitoring at arm's length.

50 Q. What do you say about the monitoring of Laura when she was on this machine?

55 A. I think the monitoring was uncomplicated. By that I mean we did not see any serious breathing problems or apnoea. We also monitor the heart rate. We didn't see any problems with the rhythm of the heart or the heart rate. The potential single worry that we had was that it seemed to, on our data, that Laura wasn't always monitored during all her sleeps.

60 Q. And what about the mild central apnoea. Did that show any signs of improvement?

65 A. That showed improvement on subsequent sleep studies. The monitoring is not necessarily an indicator of improvement in that Laura, her monitoring was uncomplicated in the apnoea sense. The monitor does not alarm until the apnoea is 20 seconds long, so--

Q. So Laura had subsequent sleep studies?

A. She had two subsequent sleep studies.

5 Q. And what did they show?

A. The second sleep study showed improvement and the
10 third sleep study, which I think was around when Laura
was around six months of age, showed totally normal
breathing and all the other parameters which we
measured, of which there were many, were also normal.

Q. Did Laura at any time show any signs of suffering
from obstructive apnoea?

15 A. No, she did not.

Q. In March of 1998 did Margaret Tanner show you a
letter which she had received from Craig Folbigg?

A. She did.

20 Q. And did you see in that letter that he expressed
his concerns about the monitor not being utilised
during daytime sleeps?

A. That's correct.

25 Q. Did you write back to Mr Folbigg?

A. Yes, I did.

Q. And what did you say in your letter when you wrote
back to him?

30 A. I expressed the concern that Margaret Tanner and I
had, and I asked if I could see Laura and the family in
consultation in Sydney.

35 Q. And on 30 April 1998 did you see Mr and Mrs Folbigg
and Laura?

A. Yes, I did.

Q. What happened during that consultation?

40 A. Well, the consultation went very well. I think
it's often difficult in these circumstances to say on
the one hand that Laura is progressing very, very well
and that the download material was good and the sleep
studies have improved, but on the other hand say that
45 we need to be very careful and very precautionary. But
I explained that to the family and they seemed to take
that very well and they agreed to continue the
monitoring.

Q. And was the monitor used during the day after that?

50 A. Periodically it was. It wasn't used, as far as we
could tell, it wasn't used every day.

Q. In March of 1999 were you informed that Laura had
died at her home at Singleton?

55 A. Yes, I was.

Q. In your view, doctor, did Laura Folbigg fit the
profile of a high risk SIDS patient?

A. No, she did not.

Q. Why is that?

5 A. We assessed all the known risk factors and, as you know, some of those are reversible. So, for example, cigarette smoking is something that parents can choose and agree not to do. So we minimise the reversible risk factors. We excluded the risk factor that I was worried about, which was obstructive sleep apnoea, 10 which appeared to run in the family on Mr Folbigg's side of the family. We excluded that. We excluded other inheritable and non inheritable disorders. We were convinced as a group of doctors that Laura was very healthy and as an added precaution we monitored 15 her. So all those things, really, reduced her risk of SIDS hugely to a level well below average.

Q. What do you say about the age at which Laura died and SIDS?

20 A. SIDS is highly unusual at Laura's age, but in my view it does happen and I have seen it in the past. But to put it in perspective, most SIDS deaths occur between two and five months and a death at Laura's age is highly unusual. We have seen patients in the past 25 who continue to exhibit risk factors at that age on our testing and we know that those particular babies, though rare, remain at risk of SIDS well beyond their first birthday.

30 <CROSS-EXAMINATION

ZAHRA: Q. Doctor, you spoke about the original observation of the abnormal sleep apnoea in the early testing?

35 A. Yes.

Q. And you indicated that that may be expected if a child was premature?

40 A. That's correct.

Q. But it was abnormal, in the sense that only 2 to 3% of persons or children who are full term have this type of apnoea?

45 A. That's correct.

Q. In fact you indicate that, so far as medical research is concerned, that no-one knows the mechanism that leads to that particular--

50 A. Well, we know the mechanism. The mechanism is that the--

CROWN PROSECUTOR: My friend hasn't made clear whether he is asking about apnoea or about SIDS.

55 ZAHRA: Q. About apnoea?

A. The mechanism of central apnoea is well-known. That is, the controller of the breathing in a part of the brain stem fails for several seconds periodically

in sleep. That's well-known and well researched. I guess what we don't know is why an ordinarily healthy baby who is not premature has that type of apnoea.

5 Q. You spoke about meeting with the family at one stage?

A. Yes. I met with the family on more than one occasion.

10 Q. Do you have a copy of your statement that you made?

A. Yes, I do.

ZAHRA: Might the witness have access to that?

15 HIS HONOUR: Yes.

WITNESS: I have it, yes.

20 ZAHRA: Q. Can I take you to paragraph 11? You say on 30 April 1998 you saw Mr and Mrs Folbigg with Laura in Sydney?

A. Yes.

25 Q. Is that the meeting that you spoke about earlier?

A. Yes. It is one of the two meetings I mentioned.

Q. In fact you go on to say, "It became clear to me that the monitoring was becoming tedious for both Mr and Mrs Folbigg."?

30 A. That's correct.

Q. That is your recollection?

A. That's my recollection, yes.

35 Q. You had a recollection that it was becoming tedious for Mr Folbigg also?

A. Yes.

40 Q. And that related to the number of false alarms?

A. I think part of it was the number of false alarms, the technical difficulty of it, and, as I mentioned, the difficulty in presenting to parents that on the one hand the baby appears very healthy, but we were adopting a very precautionary approach in an apparently healthy baby. The value of this to us is that if something happens that we haven't predicted we have a memory in the monitor that records that data. If the baby is not monitored at the time we therefore don't have the data so the whole purpose of monitoring is
50 futile.

Q. Can you have a look at this document here. Is that a letter that you in fact had written?

A. Yes, it is.

55

Q. Dated 30 April?

A. Yes, it is.

Q. The same day in fact that you had this meeting with the parents?

A. Yes.

5 Q. And that's to a Dr Saunders?

A. That's to Dr Saunders in Singleton, yes.

Q. You indicate there also, don't you, that it was becoming tedious for the parents?

10 A. Yes.

Q. Indicating both parents?

A. That's correct.

15 Q. You spoke about the risk assessment for SIDS in this matter and you spoke about obviously the tests that you had undertaken, and one of those tests related to inheritable disorders?

20 A. Several of the tests related to that, yes.

Q. Is it to be understood that when you use the term "inheritable disorders" you are referring to potentially inherited breathing disorders?

25 A. Both breathing and non breathing disorders.

Q. Sorry?

A. It includes non breathing disorders as well as breathing disorders.

30 Q. What particular disorders are the inheriting testing done for, other than breathing disorders?

35 A. The best known is MCAD, which is an abbreviation for a long horrible medical term, which is a very rare enzyme deficiency in the liver which is inheritable and a number of these type of problems can be not manifest in the family because the parents may carry the gene and be quite healthy people. But it is what we know as a recessive disorder where you needed two recessive genes, one from each side of the parents for the baby to inherit the disorder.

40 Q. Is that the only other disorder, other than potentially inherited breathing disorders?

45 A. No. Some of the metabolic disorders we tested for in the urine test are potentially inheritable as well, but again these are very rare disorders and would be highly unlikely to occur. But in a family where there's more than one death suddenly in a baby we would routinely do that testing.

50 Q. Are you suggesting that the tests that you had undertaken were exhaustive of all possible inherited disorders and non breathing disorders?

55 A. No. For example, cystic fibrosis is an inheritable disorder that I didn't test for, but that was tested for in the new born screening test. But in terms of inheritable disorders that are known to cause sudden death in babies, I would think our testing was

exhaustive and I don't think that any other institution in the world would test for other disorders that we don't know about.

5 Q. The question of the inherited disorders is subject to continuing research?

A. Yes. All that we do is subject to continuing research, absolutely.

10 Q. And continuing research by significant institutions around the world?

A. That's correct.

Q. And this is a continuing area of research?

15 A. Yes. The whole SIDS area is highly research orientated.

<RE-EXAMINATION

20 CROWN PROSECUTOR: Q. You were asked some questions by my learned friend, Mr Zahra, about excluding inheritable disorders, and you mentioned MCAD. Having excluded MCAD in Laura's case and having excluded obstructive sleep apnoea in Laura's case, what do you
25 say her risks were in relation to, compared to other children, of dying from SIDS?

A. Laura's risk of dying from SIDS in my opinion was extremely low, infinitely, perhaps, less than the average, which is 1 in 1,000. The reason for that was
30 she was exhaustively investigated, she was monitored and she was well beyond her first birthday when she died.

<FURTHER CROSS-EXAMINATION

35 ZAHRA: Q. Could you have a look at this letter dated 7 October 1997. In the last paragraph there do you indicate that there needs to be extra precaution if the child were to develop upper respiratory tract
40 infection?

A. That's correct.

Q. Can you in fact read that last paragraph?

A. "Home apnoea monitoring should continue and
45 downloaded information from this monitor will be carefully observed by the New Children's Hospital. All other SIDS protective factors should continue to be undertaken diligently. Extra precaution including serious
50 consideration of hospitalisation should be undertaken if Laura develops an upper respiratory tract infection. A further sleep study will be organised for two months time."

55 Q. You were expressing preliminary concerns that there may be complications if there was an upper respiratory tract infection?

A. I did, and I include that recommendation in all

babies with central or obstructive apnoea.

5 Q. So much so that if there was a respiratory tract infection, upper respiratory tract infection, they would need to consider hospitalisation?

10 A. Yes. The reason for this is that a baby with normal breathing who gets a cold, a respiratory tract infection, the respiratory tract infection, apart from making their breathing a little bit faster, doesn't really cause a problem. About 10% of babies who have apnoea when they develop a respiratory tract infection which is usually a common cold or a virus, develop serious apnoea. That is, the virus makes the breathing much worse. This again is part of the reason why these
15 babies are monitored, so we can pick up the 5 or 10% who are getting into problems and based on the data from the monitor plus the condition of the baby we may hospitalise a baby in that context.

20 Q. That was your particular concern in relation to this child at this time?

25 A. It is my general concern. It is in all children with apnoea, that would be included in the report, and that's very important information for other carers and doctors and parents to know.

<FURTHER RE-EXAMINATION

30 CROWN PROSECUTOR: Q. Once Laura's mild central apnoea had gone away did you still hold those concerns about her developing an upper respiratory tract infection?

35 A. No, I didn't. So a baby with normal breathing, that is normal breathing to begin with, or a baby with apnoea who matures to normal breathing is at no risk of a dangerous breathing problem from a common cold.

<WITNESS RETIRED AND EXCUSED

40 SHORT ADJOURNMENT

RESUMPTION

45 CROWN PROSECUTOR: The next three witnesses are in relation to Laura.

<BRIAN WADSWORTH(12.20PM)
SWORN AND EXAMINED

50 CROWN PROSECUTOR: Q. Would you tell the court your full name and place of work?

A. Brian Wadsworth, Singleton Ambulance Station.

55 Q. On 1 March 1999 were you working at the Singleton Ambulance Station?

A. I was.

Q. And at about 12.12pm that day, that is just after midday, did you and ambulance officer Harold Picton

respond to a call of a child not breathing at 8 Millard Close, Singleton?

A. That is correct.

5 Q. Do you have a statement that you would like to refer to?

A. No, I haven't got one here.

10 Q. Would you like to have a look at a copy?

A. Yes, please.

15 Q. (Statement shown.) Did you arrive at that address about two minutes later at 12.14?

A. Yes, in accordance with the code sheet.

15 Q. Did you then go into the house and did you see a woman leaning over a small child who was lying down in the supine position on the breakfast bar?

A. Yes.

20 Q. And supine meaning?

A. On its back.

25 Q. And did the woman appear to you to be performing CPR on the child?

A. Yes, it appeared that way, yes.

30 Q. Was the woman crying?

A. Yes.

30 Q. And was there also another woman in the house?

35 A. According, as I say on the code sheet it does say there was another lady there. I can't recall now whether she came in after us or was there at this stage.

40 Q. On the ambulance report does it refer to another person being there? Where did you say it refers to another person?

40 A. I think - is it on my statement, does it say there was another lady there? There was another lady in attendance but I can't recall at this stage whether she was there at the time of my arrival or whether she was there whilst we were attending to the child.

45 Q. Did you go to the child and check the child for vital signs?

A. Yes, I did.

50 Q. Were you able to detect any pulse?

A. No.

Q. Was the child breathing?

A. No.

55 Q. Did you look inside the child's mouth?

A. Yes - not inside the mouth, no. Didn't look into it.

- Q. Can I direct you to your statement?
A. Yes.
- 5 Q. About six lines down, from the top of the page?
A. Oh sorry, yes. All right.
- Q. Did you look into the child's mouth?
A. According to my statement I did, but I can't recall
10 the true events at this stage.
- Q. Feel free to refer to your statement if you wish.
A. Okay, yes.
- 15 Q. When you looked into the child's mouth did you see any blood, vomit or foreign object?
A. No, I didn't.
- Q. Did you then yourself do CPR on the child and were you later assisted to do that by your workmate?
20 A. Yes, we were.
- Q. And did you attempt to render other assistance to the child, including the use of an intravenous line and an ECG monitor?
25 A. That's correct.
- Q. Did the ECG monitor show that the baby still had no pulse at this stage?
30 A. The ECG monitor doesn't show a pulse, it will show electrical activity of the heart. The pulse is actually a physical finding.
- Q. Did the ECG monitor show that the child was in bradycardia?
35 A. In bradycardia, yes.
- Q. What does that mean?
A. Basically bradycardia means a slow heart rate.
40 What I determined on the scene was large periods of asystole.
- Q. What is asystole?
A. No heartbeat at all, so it represents as a flat
45 line on the monitor with the occasional electrical activity from the heart.
- Q. So there was a lot of flat line and occasional blips, is that right?
50 A. Yes, which technically for us is still a pulse, bradycardia.
- Q. And for that reason did you continue attempting to resuscitate this child?
55 A. We did.
- Q. At around the time that you were attempting resuscitation, did you ask a woman who you now know is

the mother of the child, Kathleen Folbigg, what had happened?

A. Yes.

5 Q. And what did she say to you?

A. She indicated that she heard the baby coughing in the bedroom and checked her five minutes later and found her not breathing.

10 Q. Did she also tell you that the child had been suffering from a runny nose and coughing for a couple of days?

A. She did.

15 Q. And did you continue resuscitation and place the child in the ambulance vehicle?

A. Yes, we did and that--

Q. I'm sorry?

20 A. And that continued on route to hospital.

Q. Did you arrive at the hospital at 12.32?

A. That is correct.

25 Q. That being the Singleton Hospital?

A. Yes.

Q. And did you then hand over the child to hospital staff?

30 A. Yes, we did.

Q. And shortly after that did a doctor at the hospital pronounce life extinct?

A. Yes.

35 Q. During the time that you were treating the child what did you notice about her skin? Top of page 3.

40 A. Yes, the fact that she was warm to touch and there was cyanosis, which is blueness. Where we look for is inside the lips or ear lobes. It indicates central cyanosis.

45 Q. Please look at this. (Document shown.) Is that the ambulance report filled out by yourself and by Mr Picton, your work colleague?

A. It is.

Q. In relation to this call out?

A. Yes.

50

EXHIBIT #AB AMBULANCE REPORT TENDERED, ADMITTED WITHOUT OBJECTION

<CROSS-EXAMINATION.

55

ZAHRA: Q. The Crown asked you about a history that you had taken from a person you now know to be the mother of the child?

A. Yes, she identified herself as the mother there.

Q. Is that the same person that you describe as the person performing CPR on the child when you arrived?

5 A. Yes, it is.

Q. And the same person that you described as crying?

A. Yes.

10 Q. Was she quite distressed?

A. She appeared to be, yes.

Q. And you have a recollection of her performing or attempting to perform CPR?

15 A. I do.

Q. Now, do you still have a copy of the report there?

A. Yes.

20 Q. Do you have a copy of the ambulance report?

A. Yes, there's a copy on the back of this.

Q. You indicate in your statement that inside the child's mouth you did not see any blood, vomit or foreign object?

25 A. That's correct.

Q. And your statement was prepared on 15 September 1999?

30 A. Yes, that is correct.

Q. And this call out was 1 March 1999?

A. It was.

35 Q. However, the ambulance report would have been prepared at the time that you went to these premises?

A. That's correct.

Q. Or--

40 A. Immediately after the case, yes.

Q. Can I take you to the heading of "Assessment"?

A. Yes.

45 Q. You see airway, there's a clear and obstructed that appear after the word "airway"?

A. Yes.

Q. You have ticked a number of words throughout that area that is headed "Assessment"?

50 A. I have.

Q. In fact, have you ticked to the left-hand side of the word rather than the right-hand side of the word?

55 A. There should be a small circle on the original case sheet.

Q. Is that to be understood the tick that appears

before the word "obstructed" indicates that the airway was obstructed or clear?

5 A. Initially with doing CPR if you don't maintain the airway it will obstruct with the tongue falling back, so that was more what I was indicating there.

Q. Are you indicating there that it was obstructed at the time of your assessment?

10 A. At the time, if I hadn't maintained the airway by physically pushing the jaw forward to keep the tongue from falling back on to the airway, then yes, it would have been obstructed. So when I cleared the tongue away it cleared the obstruction of the tongue.

15 Q. So you have said that there was in fact no--

A. No vomit. No vomit, no foreign bodies.

Q. Or foreign body. What was your observation at the outset as to whether the airway was obstructed at all?

20 A. Just going on the clinical judgment of the tongue falling back and having to physically maintain the airways to be clear.

25 Q. Was that your observation at the time of the tongue falling back?

A. Without looking into the mouth I couldn't see, but that is what I've indicated, yes. The tongue would have been - with the child lying flat the tongue would have been occluding the airway.

30

<RE-EXAMINATION

CROWN PROSECUTOR: Q. Was that something that you observed or something that you just assumed?

35 A. It is something I had assumed, yes.

Q. Is that because when you came into the house you saw the baby lying on its back?

40 A. Yes, it was flat on its back.

Q. And the baby appeared to be unconscious?

A. Yes, it was.

45 Q. And unconscious children or adults sometimes have their tongue--

A. They have no capacity to clear the airway themselves, and as the tongue relaxes it falls back.

50 <WITNESS RETIRED AND EXCUSED

<ALLAN DAVID CALA (12.31PM)
SWORN AND EXAMINED

55 HIS HONOUR: Doctor, if you wish to refer to your notes in order to answer any question, you may do so.

WITNESS: Thank you.

CROWN PROSECUTOR: Q. Please tell the court your full name?

A. Allan David Cala, C-A-L-A.

5 Q. Are you the head of pathology of the Forensic Science Service for South Australia?

A. Yes.

10 Q. And were you formerly employed as a pathologist in the New South Wales Institute of Forensic Medicine at Glebe?

A. Yes.

15 Q. And do you hold the degrees of Bachelor of Medicine and Bachelor of Surgery?

A. Yes.

Q. Are you a qualified specialist in pathology?

20 A. Yes.

Q. Would you be able to tell the court approximately how many autopsies you have conducted in the course of your career as a pathologist?

25 A. I've conducted several thousand autopsies, both coronial autopsies and hospital autopsies, during my years of training.

Q. Have they included autopsies on both adults and children?

30 A. Yes.

Q. Have you done autopsies on children who have been suspected of having died from SIDS?

35 A. Yes.

Q. Have you done autopsies on children who have been suspected from dying of child abuse?

A. Yes.

40 Q. Have you done autopsies on children who have been suspected that they have been smothered?

A. Yes.

45 Q. Do you from time to time present papers at professional conferences of pathologists?

A. Yes.

50 Q. In fact quite recently have you presented a paper to a professional conference on the subject of asphyxia?

A. Yes.

Q. Where was that?

55 A. That was in Canberra in May last year.

Q. And what does asphyxia entail? What does it mean?

A. Asphyxia is a broad term which, which means any condition resulting in death whereby there is failure

terminally to either adequately oxygenate tissue or failure to take carbon dioxide away from tissue.

5 Q. Is it in fact death from a failure to breath?
A. Yes.

10 Q. Are you a squadron leader in the Royal Australian Air Force Reserves?
A. Yes.

15 Q. And are you a forensic expert accredited to the Australian defence forces?
A. Yes.

20 Q. And has that, from time to time, required you to do pathology on plane crash victims?
A. Yes.

25 Q. Have you also been required as part of your services with the Australian defence forces to go to East Timor?
A. Yes, in conjunction with the United Nations.

30 Q. Did you, as part of the United Nations team in East Timor, participate in the excavation of the remains of people suspected of having been murdered?
A. Yes.

35 Q. And an examination of their bodies after they had been exhumed?
A. Yes.

40 Q. On 1 March 1999 did you conduct a postmortem examination on the body of Laura Folbigg?
A. Yes.

45 Q. Did you know at the time that you conducted this postmortem examination that she had had three previous siblings who had died?
A. Yes.

50 Q. And did you know anything, you can answer this "Yes" or "No," did you know anything about the circumstances in which those three previous siblings had died?
A. I was given some very basic information and it was only later that I read through some medical records and I got more information.

55 Q. Could I take you to your postmortem report to the coroner?
A. Yes.

Q. Do you have a copy of it?
A. No, I don't.

Q. I will give you a copy of your report (Document shown.) Please look at that and identify that as your

report to the coroner?

A. Yes.

5 MFI#27 DOCTOR CALA'S REPORT TO THE CORONER, TOGETHER
WITH THE NEUROPATHOLOGY REPORT

Q. (Document shown) Please look at this copy of your
report to the coroner and may I take you please to p 3,
about halfway down the page?

10 A. Yes.

Q. In relation to Laura, were you given some
information about her medical history whilst she was
still alive?

15 A. Yes.

Q. Were you told that she had been monitored by staff
at the Westmead Children's Hospital and originally
diagnosed with central apnoea but no evidence of
obstructive apnoea?

20 A. Yes.

Q. And that this was essentially considered to be of
no medical significance?

25 A. Yes.

Q. Were you told that she had been monitored on an
apnoea monitor for a lengthy period of time?

30 A. Yes.

Q. During which at no stage were there any significant
sleep abnormalities?

A. That's right.

35 Q. Were you told that she had last been seen by a
doctor in early February for vaccinations?

A. Yes.

40 Q. Were you told that she had recently been unwell for
about a week or so with cold and flu type symptoms?

A. Yes.

Q. And had been given Demazin as treatment for those
symptoms?

45 A. Yes.

Q. Demazin being a decongestant?

A. Yes. It is an antihistamine and used for
symptomatic relief from colds.

50 Q. Were you told that on the day of her death that
Laura did not appear to be ill?

A. Yes.

55 Q. She had gone with her mother to a gym and visited
her father at work.

A. Yes?

Q. It was alleged that she had fallen asleep on the way home and had then been put into her own bed at home.

A. Yes.

5

Q. That she had been heard to cough at some stage after being placed in her bed, and that about five minutes or so after this the mother had gone into the room to check on her and that she was laying on her back?

10

A. Yes.

Q. Having been armed with this information, did you conduct a postmortem examination on the body of Laura?

15

A. Yes.

Q. Did you notice lividity on the body?

A. Yes.

20

Q. Being the pooling of blood?

A. Yes.

Q. Would you agree that that was of no particular significant?

25

A. That's right.

Q. When you conducted an examination of the external part of the body did you notice that there were minor bruises to her lower limbs?

30

A. Yes.

Q. When you say her lower limbs, do you mean her legs?

A. Yes.

35

Q. Can you indicate where for us on the leg she had these bruises?

A. Yes. There was a faint bruise on the inner side of her left knee and another bruise on the mid shin level of her right leg.

40

Q. Did you come to a conclusion about the age of these bruises?

A. Yes. I thought they were probably several days old at least.

45

Q. And did you find no injuries to the face or the mouth?

A. That's correct.

50

Q. Did you find any petechial hemorrhages on the face or the eyelids?

A. No.

55

Q. Was the next examination normal?

A. Yes.

Q. Did you then conduct an internal examination of Laura?

A. Yes.

Q. And did you come to this conclusion, that there were no significant abnormalities, apart from focally
5 haemorrhagic and collapsed lungs?

A. Yes.

Q. Would you explain to the court what focally
10 haemorrhagic and collapsed lungs are?

A. Yes. The focal haemorrhage is just small areas of
bleeding in the lungs that appeared visible to the
naked eye, and the collapse relates to areas of lung
again, focal areas, that is, small areas which instead
15 of being inflated with gas appeared to the naked eye at
least to be collapsed or their structure was not
maintained and they appeared slightly flattened.

Q. Do you tell the court that if a person suffers from
20 loss of oxygen, an adult or a child, there may be a
desperate attempt by the person to open up the lungs to
allow air to come in?

A. Yes.

Q. And is that what, in some people, causes petechial
25 hemorrhages on the lungs, or bleeding of the small
blood vessels of the lungs?

A. No. It is thought that the bleeding on the,
particularly on the outer surface of the lungs relates
to a rise in the pressure within the chest. I'm not
30 sure whether that is correct or not, but that is meant
to be the theory and it is only theoretical, it has not
been proven.

Q. And is the collapse of areas of the lung consistent
35 with asphyxiation?

A. No, it is quite non specific. It may be due to
asphyxiation but it may also be resuscitation related
as well. As I should point out, the haemorrhage within
the lungs, that is bleeding within the lungs, may also
40 have been due to attempts at resuscitation.

Q. Is it also consistent with asphyxiation?

A. Yes.

Q. Now, did you see petechial hemorrhages in the
45 lungs?

A. No, I didn't see them either on the surface of the
lungs, except at the back related to lividity.

Q. Now, the haemorrhaging and the collapse which you
50 did see, are you able to say whether or not they are
consistent with asphyxiation?

A. Consistent with, but there are other causes.

Q. In your opinion, doctor, if there is a bleeding in
55 the lungs but there are no petechial hemorrhages of the
eyes or any part of the face or in the mouth, is that
of any assistance in being able to distinguish between

SIDS on the one hand and smothering on the other hand?
A. No. Those findings are quite non specific and you wouldn't be able to differentiate SIDS over smothering, just based on those findings at postmortem.

5

Q. Are there any signs that a pathologist might find on a postmortem that would enable a pathologist to distinguish between SIDS and deliberate smothering?

A. No, it is very difficult to differentiate the two. With SIDS the finding of these tiny hemorrhages on the surface of the heart and the lungs and the thymus, which is a gland which sits in the top of the chest above the lungs underneath the sternum, that is not diagnostic of SIDS, it is a non specific finding although many kids who die of SIDS have that. But to not find it doesn't mean they haven't died of SIDS and if you find it is doesn't mean they have died of something else.

10

Q. What about children who have been smothered?

A. They may either have petechial hemorrhages or they may not.

Q. Is this the case, that petechial hemorrhages on the heart, lungs and thymus don't assist a pathologist to distinguish between SIDS and smothering?

15

A. I don't believe so.

Q. In your opinion if a child is smothered, would it inevitably leave some trace or sign around the head or mouth or anywhere else?

20

A. No, it may well not. There have been reports of children that had petechial hemorrhages on the eyelids and around the eyes as being suggestive of smothering, but their absence certainly does not exclude that possibility.

25

Q. And is there another case that you can tell us about that you have been involved in to illustrate that point?

30

A. Yes. I performed an autopsy on a child from a district in New South Wales who was, I think, approximately six months old, and the story that I'd been given initially was that she was just found dead in her cot in the morning.

35

OBJECTION (ZAHRA).

CROWN PROSECUTOR: This is to illustrate the point he has made about the non specific findings for smothering.

40

QUESTION ALLOWED

ZAHRA: Would your Honour hear me?

45

HIS HONOUR: So you can speak freely we will have the jury withdrawn. Would you mind going to the jury room?

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Could the doctor give the answer on the voir dire.

EXAMINATION ON THE VOIR DIRE

10 HIS HONOUR: Yes. Would you like to continue your answer.

15 WITNESS: Yes, it was only later that more accurate information came to light, and that information was given to me after I had done my postmortem examination on that child where I found nothing at all, and I was given the information that the child had been deliberately smothered.

CROWN PROSECUTOR: Q. Where did that information come from?

20 A. Via the police, and that was through a number of people. But in short one of the caregivers had confessed to another person that they had deliberately smothered the child.

25 Q. Were there any signs of smothering on that child?

A. None at all.

Q. Were there any petechiae?

30 A. No.

Q. Any petechiae in the lungs or thymus or heart?

A. No.

Q. Or face or eyes?

35 A. None whatsoever.

Q. Any bruises around the mouth or face?

40 A. No, there was nothing except for that admission to distinguish it at the time of my examination or later from between SIDS and deliberate smothering.

EXAMINATION ON VOIR DIRE CONCLUDED

45 HIS HONOUR: Before the evidence which is objected to was given, Dr Cala was asked this question:

"Q. In your opinion, if a child is smothered would it inevitably leave some trace or sign around the head or mouth or anywhere else?

50 A. No, it may well not. There have been reports of children that have petechial hemorrhages on their eyelids and around the eyes as being suggestive of smothering, but their absence does not, certainly does not
55 exclude that possibility."

Does that evidence go any further than to give an example of why the doctor is able to express that

opinion?

CROWN PROSECUTOR: No, it doesn't go any further than that.

5

HIS HONOUR: You have qualified him as a person who is well experienced in the field.

10

Mr Zahra, will you be suggesting to Dr Cala that he was wrong in that opinion that he expressed in the question and answer that I have just re-read?

15

ZAHRA: No. There have been a number of witnesses who have in fact given the same evidence and it has not been challenged. In certain cases the absence does not mean it is inconsistent with suffocation.

HIS HONOUR: Why do we need to go into this, Mr Crown?

20

CROWN PROSECUTOR: I don't press it, your Honour.

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: Q. The opinion that you have expressed that smothering can sometimes leave no signs at all, is that based upon your own experience?

A. Yes, and reading the medical literature on the subject.

10 Q. Thank you. What do you say as to whether or not it is easy for an adult to smother an infant or a small child with a hand, pillow, soft toy or other similar object?

15 A. It may be easy if the child is very young or very small, but as the child grows and matures, if that occurs it may be quite a difficult process that actually takes some time.

Q. Are you able to say approximately how long it would take to smother a child of 19 months of age?

20 A. I couldn't exactly say but it would certainly not be an instantaneous process. I would believe that it may well take at least 20 to 30 seconds or possibly even longer, depending on the amount of struggling that the child performed during the act.

25 Q. Is that to render the child unconscious or to cause death?

A. Both.

30 Q. Would unconsciousness occur before death?

A. Yes.

Q. And are you able to say how long after unconsciousness death would be caused?

35 A. It may well be very soon after. Unconsciousness being due, in that case, to lowered blood oxygen and insufficient oxygenation to the brain, that death may well follow very soon after unless that process is reversed with resuscitation and so on.

40 Q. Now, going back to your examination of Laura Folbigg, did you examine the area of her heart?

A. Yes.

45 Q. And when you looked at the heart itself, did you notice anything abnormal?

A. With the naked eye?

50 Q. With the naked eye.

A. No.

Q. Did you then conduct a microscopic examination of the heart?

55 A. Yes.

Q. And did you find what is called an inflammatory infiltrate of the heart?

A. Yes.

Q. Would you explain to the court what an inflammatory infiltrate is?

5 A. Yes. It's a condition where inflammatory cells which are part of the body's armamentarium used to combat infection for whatever reason and usually due to a virus or an organism, but it may be drug related, target a particular organ, and in this case the heart, and the heart becomes a focus of inflammation.

10 Q. Now, is that sort of finding, the finding that you found on Laura's heart of inflammatory infiltrate, consistent with the after effects of a cold or flu?

15 A. I believe so.

Q. In your opinion did it play any role in causing her death?

A. I don't believe so.

20 Q. Would you explain to the court why you have that opinion?

A. As I said, the heart was normal to the naked eye, but my microscopic examination did reveal inflammation of the heart. Having said that, the inflammation was quite patchy and rather mild in the sense that although the inflammation existed it was of a rather low amount as opposed to other cases that I've seen where the inflammation was much heavier in the heart and in other organs.

30 Q. Where the inflammation is much heavier, can it cause death?

A. Yes.

35 Q. And where it causes death is that a condition that is known as myocarditis?

A. Yes, it is.

40 Q. And if somebody had died from myocarditis of the kind that you have described, what would you expect to see in and around the heart?

A. I'd expect to see a number of things. The heart may, but not always, I have to say, it may be flabby and have a - when you cut through the pump of the heart, the left ventricle in particular, it may have a stripey appearance. In other words, areas of paleness against areas of more normal looking heart, and that is just the way that the inflammatory process is.

50 Q. Did you find any of those in Laura's case?

A. No. This is with the naked eye, looking at the heart with the naked eye. The left ventricle, that is the main pump of the heart, may be a bit flabby and the chamber itself may be a bit dilated. I didn't find those changes in this case.

55

Then there may be evidence of heart failure because a number of these people, both children and adults, may

5 have myocarditis and it presents clinically to doctors
as heart failure, so they may have fluid around the
lungs and they may have fluid in the abdomen and I
didn't find either of those things in this case.

10 Q. And in your experience as a pathologist have you
sometimes come across persons who have died from
totally unrelated causes like car accidents who have
been found to have these, this mild inflammatory
infiltrate of the heart?

A. Yes. I've seen them personally and they have been
written in the literature.

15 LUNCHEON ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: I am going to want to play exhibit K to the doctor and the jury. I understand the Sheriff's officer will set up the monitor. It would be sufficient to play it through that screen.

10 HIS HONOUR: Is this likely to be the subject of any objection?

ZAHRA: No, your Honour.

15 HIS HONOUR: I appreciate the playing of the tape would not, but there was a debate earlier on which was deferred about whether it was appropriate to carry out a process of diagnostic reasoning. Are we talking about the same tape?

20 ZAHRA: I thought we had heard the argument on that and your Honour had found that the tape was admissible.

25 CROWN PROSECUTOR: I think that's right, that your Honour allowed the evidence in.

ZAHRA: The tape has already been played once.

30 HIS HONOUR: I drew a distinction between the playing of the tape - perhaps I shouldn't look for problems where they don't exist.

ZAHRA: Certainly I made no objection previously.

35 HIS HONOUR: There was an objection to the Crown adducing evidence of a medical nature about the probable condition of the child as seen in that videotape. That was a matter that was broached before the Crown opened. I expressed doubts at the time
40 whether one could use the tape for that purpose.

ZAHRA: It is at page 20 of the transcript.

45 CROWN PROSECUTOR: Your Honour has ruled.

HIS HONOUR: Where is my judgment?

50 CROWN PROSECUTOR: We haven't received a written version of it.

HIS HONOUR: I don't want this to go off on a
misunderstanding. It seemed to me that two things
arose. The first was whether the jury should be
permitted to see the videotape. Now, I have let that
55 in and there is no doubt about that and the jury have
now seen it.

The second, and quite distinct, piece of evidence was

5 the Crown's intended evidence, through Dr Cala, or perhaps otherwise, that one could see as an expert by looking at the activities of the child as shown in the videotape that the child was unlikely at the time to be suffering from myocarditis. This was at a time, a day at the most, before she died. So the timing is significant.

10 CROWN PROSECUTOR: I think to be more precise he will give evidence that her degree of health is inconsistent with her having myocarditis to the extent where it would explain her subsequent death the day after.

15 HIS HONOUR: My recollection of that is that I expressed the view that the Crown ought not to open on that. And the circumstances, as I recall it, were that the report to that effect of Dr Cala had only recently been served on the defence. The defence were obtaining expert evidence by way of commentary on what Dr Cala
20 said he could infer from looking at the videotape and had received a preliminary expert indication that it was not legitimate to use the videotape in that way. That's why I said that it would be better for the Crown not to open on it.

25 Now, things have moved on. The videotape itself has been seen by the jury, it is an exhibit. But I don't recall ever dealing with the second question. Have I dealt with it?

30 ZAHRA: Certainly the argument that your Honour referred to, the points that I had taken, appear at pages 19 and 20. I certainly was of the understanding that your Honour's ultimate decision to allow the
35 playing of the tape had addressed that issue, but that was my understanding only. The judgment doesn't appear to have been published totally, but certainly I have taken this point. My understanding was that when the decision was made to allow the tape to be played that
40 your Honour had incorporated that part of the decision in the ultimate decision to allow the tape to be played. If your Honour is not yet decided on that issue, then it needs to be considered in the light of meeting this expert--

45 HIS HONOUR: Have I considered this question at any other time other than in the judgment to which I have just referred?

50 ZAHRA: No, I don't believe so.

HIS HONOUR: I don't remember now what I said, but it was not my intention to declare admissible the medical
55 opinion contended for by the Crown based upon a view of the videotape. That was a matter which I thought ought to wait until Mr Zahra had had a chance to get a considered, rather than a preliminary, opinion and to put some argument on it, if that's what he wanted to

do.

5 ZAHRA: I can't put the argument any higher than what
we have. I can indicate that that would still be our
case, that you can't in fact properly diagnose
myocarditis from merely looking at the child. That's
the objection we took. We can't put it any higher than
that. There is in fact a body of expert evidence that
10 we will be calling to show that it is of limited or no
utility.

CROWN PROSECUTOR: It appears that your Honour has not
specifically ruled on this point.

15 HIS HONOUR: I don't believe I have.

CROWN PROSECUTOR: But that my friend doesn't take the
objection. He will be calling some contrary evidence,
it would seem, but it does not appear that he has taken
20 the objection. We would submit that it doesn't require
a ruling from your Honour. Your Honour has made clear
your Honour's intention not to have made a ruling in
this area, we are aware of that now. But it would
appear that my friend doesn't object to the evidence.
25

ZAHRA: That's not entirely right. We have objected to
this at the outset on this point. We still maintain
that objection but we can't put it any higher than the
fact that there are competing views about the utility
30 of this process.

HIS HONOUR: I can deal with the objection now. Is it
required to ask any questions of Dr Cala?

35 ZAHRA: No, your Honour.

FOR JUDGMENT ON ADMISSIBILITY OF MEDICAL EVIDENCE OF
THE PROBABLE STATE OF HEALTH OF LAURA FOLBIGG SEE
SEPARATE TRANSCRIPT

40 ZAHRA: A police officer is intended to be called this
afternoon. There is an issue in relation to the
tendering of the record of interview. I can't complete
my cross-examination until that is argued on Thursday.
45 I will be shortly cross-examining him but not finishing
my cross-examination and I will be asking your Honour's
leave to stop after a few moments and reserve the rest
of my cross-examination, which I don't expect to be
lengthy either way.
50

CROWN PROSECUTOR: I have no objection to that.

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: Q. Dr Cala, you gave evidence before the lunch hour in relation to Laura Folbigg that in your opinion the inflammatory infiltrate in the heart which you said was consistent with being myocarditis was, in your view, not a cause of her death?

10 A. That's right.

CROWN PROSECUTOR: I would like to play to you a video taken of Laura the day before she died, exhibit K. Would you have a look at this, please?

15 EXHIBIT K PLAYED

20 Q. Doctor, if you accept that that tape was made of Laura the day before she died, does that assist you in any way in your opinion that inflammatory infiltrate of the heart or myocarditis did not cause her to die?

25 A. I think that Laura Folbigg appeared to me in quite normal health on that video, and that was about 23 hours roughly before she died. I think from that, given that she appears in quite good health, I think it is quite unlikely that she has died as a result of the effects of myocarditis.

30 Q. What do you say to the possibility that she died of myocarditis?

A. I think, it's known that myocarditis can cause sudden death, usually by a cardiac rhythm disturbance, and I can't say that didn't happen with Laura Folbigg but I think it's, in all likelihood, very unlikely.

35 Q. Is it a reasonable possibility in your opinion that she died from myocarditis?

A. I don't believe it is.

40 Q. Doctor, you've told us about the only abnormalities that you found in Laura's body.

A. Yes.

45 Q. Was it the case that you examined every single part of her body, both internally and externally?

A. I examined the major organs and the body cavities, but not the limbs in any great detail. I didn't do a dissection of the limbs.

50 Q. Did you examine the head and neck?

A. Yes.

Q. Cardiovascular system?

A. Yes.

55 Q. The respiratory system?

A. Yes.

Q. The gastrointestinal system?

A. Yes.

Q. The hepatobiliary system?

A. Yes.

5

Q. Which includes the liver, gall bladder and pancreas?

A. Yes.

10

Q. The geneto-urinary system?

A. Yes.

Q. The haemopoietic system?

A. Yes.

15

HIS HONOUR: Q. How do you pronounce that?

A. Haemopoietic, the blood system.

20

CROWN PROSECUTOR: Q. The endocrine system?

A. Yes.

Q. Part of the musculoskeletal system?

A. Yes.

25

Q. You did an entire body x-ray?

A. Yes.

Q. And you re-examined the body one day and then two days later?

30

A. Yes.

Q. You also conducted a microscopic examination of the liver?

A. Yes.

35

Q. The kidney?

A. Yes.

Q. The spleen?

40

A. Yes.

Q. The heart?

A. Yes.

45

Q. The lungs?

A. Yes.

Q. Stomach, oesophagus, adrenal glands, salivary glands, small and large intestine, thyroid, bone marrow, pancreas, diaphragm, ovaries and thymus?

50

A. Yes.

Q. You also obtained a toxicology report for poisons?

A. Yes.

55

Q. And you obtained a neuropathology report?

A. Yes.

Q. Incidentally, the poisons report told you that there were no poisons detected?

A. Yes.

5 Q. As a result of your complete autopsy and further investigations of the body of Laura Folbigg, were you able to come to any conclusion as to what had caused her death?

10 A. No. I gave the cause of death as undetermined.

Q. And does that mean that you were not able to determine the cause of death?

A. That's correct.

15 Q. Doctor, could you describe to the court what the difference is between a pathologist finding undetermined causes of death and SIDS?

20 A. Undetermined causes of death include natural causes of death that are unable to be found and other inflicted causes of death.

Q. Such as suffocation?

25 A. Such as suffocation, accidental causes of death and so on. So the spectrum of natural disease through to - incorporating various types of trauma. And as opposed to SIDS, which is quite different. SIDS is, I have to say, not a natural disease, it is an invented term. It stands for, of course, sudden infant death syndrome, and it was invented about 30 years ago to try to come to an understanding about cot death and who died and under what circumstances. Now, that's completely different. SIDS is thought to be due to some natural process. It is not known what it is. But after a post-mortem examination and examination of the scene, 30 that is where the child died, after microbiological testing and toxicological testing and so on, no cause of death is able to be established. It's felt then that the child has died of SIDS.

40 Q. So is this in essence what you are saying, that a determination that a person has died from unknown causes includes both natural disease and illness processes and unnatural causes?

45 A. Yes.

Q. Whereas SIDS, although it is an unknown process, is considered to be a natural process?

A. Yes.

50 Q. What do you say as to whether or not the death of Laura Folbigg can be regarded as just another SIDS case?

A. Well, I don't believe that's correct at all.

55 Q. And why is that?

A. Firstly, Laura Folbigg was about 20 months old when she died. Now, SIDS, as I said, is an invented term but nevertheless to classify a death as SIDS it

generally falls within the age of about three to six months of age. So she is clearly three times, over three times the age for that, and that by itself, and I think that's a very important thing to consider, in my opinion would categorically exclude this child's death as being due to SIDS, irrespective of any family history of other deaths and so on. In isolation this would not and should not be called SIDS.

There are other things as well with SIDS. The child has often been fed and is usually found the following--

OBJECTION (ZAHRA)

HIS HONOUR: Mr Zahra, why isn't this responsive to the question?

ZAHRA: This is a matter that I have raised previously. It relates to an issue as to whether the witness is now making findings of fact outside a medical diagnosis. In other words, the use of this witness's expertise in an assessment of a symptom as distinct from a factual piece of evidence.

HIS HONOUR: I will allow the answer.

CROWN PROSECUTOR: Q. Doctor, would you continue? Would you like me to read it to you?

A. I was referring to, I believe, the usual time when SIDS children are found.

Q. Yes.

A. The following morning after they have been fed, perhaps in the middle of the night, and following that resuscitation attempts are usually carried out, but they are of course unsuccessful. Now, following that a scene examination should be done, an autopsy should always be held, and other testing of tissues and fluids should be carried out. Now, at the end of that if the clinical history is appropriate and the testing is negative, the scene examination doesn't shed any light, you can exclude trauma, all forms of trauma as having played a role in the death.

Q. Trauma including deliberate acts and accidental?

A. And accidental, any form of trauma. Then, if the child fits the age parameters of about three to six months but certainly no more than 12 months, then you might be entitled to call that case SIDS.

Q. Doctor, are there accepted within the medical community world-wide certain criteria that must be met before a diagnosis of SIDS can be made?

A. Yes.

Q. Would you have a look at mfi 24 (mfi 24 shown.)

OBJECTION (ZAHRA)

5 ZAHRA: There is no issue that this was a SIDS death. It won't be contended that this was a SIDS death. It is not part of the way the accused's case will be run. There are matters that I have raised about this document previously. I wish to make further submissions about it.

10 HIS HONOUR: If the matter is to be taken further, Mr Crown, I shall need to hear from you both in the absence of the jury. But in view of what Mr Zahra has just said, namely that the defence will not be contending that Laura's death was a SIDS death, do you need this evidence?

15 CROWN PROSECUTOR: I do, your Honour, because I am also going to ask him questions which will rely upon this basis for an overview of the other deaths and, in particular, Sarah's death where Dr Hilton made a diagnosis of SIDS.

20

HIS HONOUR: Yes.

25

IN THE ABSENCE OF THE JURY

CROWN PROSECUTOR: Perhaps I should lead the evidence on the voir dire.

5

EXAMINATION ON THE VOIR DIRE

CROWN PROSECUTOR: Q. I think my question that was objected to was: "Would you have a look at mfi 24", and I was asking you if there are accepted criteria within the medical community world-wide that must be met before a diagnosis of SIDS can be made. Would you tell the court what that document is?

10

15

A. Yes. This is a policy statement from the American Academy of Paediatrics dated February 2001, volume 107 number 2, and it is called Distinguishing Sudden Infant Death Syndrome From Child Abuse Fatalities.

20

Q. What do you say about the contents of that article and any generally accepted views in the medical community world-wide about criteria that must be met before a medical diagnosis of SIDS can be made?

25

A. Well, I agree with this document, and this document does set out those criteria with which I do agree.

30

Q. And what do you say about the medical community in general world-wide and their attitude to what criteria must be met?

35

A. I would think that this document would be generally accepted by all people in paediatrics and in my area of forensic pathology. I would think there might, for example, be some people, a very small minority, who may argue with parts of it, but I think that in the main the entire medical community who looks at this area would be in agreement with this document.

40

Q. Was there a previous version of that same document that was issued, I think in 1994 or 1995?

A. Yes, it was.

45

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.

50

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?

55

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

55

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."

5

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

A. Yes.

10

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

A. Yes.

15

Q. What do you say in relation to those dot point notes and your view?

A. The dot points and my view coincide.

20

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.

25

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 -

30

"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,

35

- 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:

40

"Age of death older than six months.

45

- Previous unexpected or unexplained deaths of one or more siblings.

50

- Simultaneous or nearly simultaneous death of twins.

55

- 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.

5

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?

10

A. I wouldn't diagnose that as SIDS.

Q. Do you think that the diagnosis of SIDS is an available diagnosis in your view?

15

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?

20

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.

25

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

A. Yes.

30

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.

35

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.

40

Q. And, doctor, what is your view about the possible cause of death for the other Folbigg children, that is other than Laura?

45

A. It's my view that I suspect that they died in the same way that Laura Folbigg did.

50

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.

55

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?

5 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.

10 HIS HONOUR: Thank you, doctor. Now we know what the evidence is that the Crown proposes to adduce. Do you need to ask any questions on the voir dire?

ZAHRA: Just briefly on the last matter.

15 Q. Just in relation to the global view of all four deaths you have used this phrase, you suspect but can't prove medically. That's the highest you can put it?

A. Yes.

20 Q. And this is on no medical evidence, but just the mere fact of the number of deaths?

A. No, on medical evidence.

25 Q. Well, you would agree that in relation to each individual count that you can't prove that there is medical evidence to support suffocation?

30 HIS HONOUR: I may be able to save you time, Mr Zahra. Subject to what the Crown says, I have a view about that piece of evidence.

CROWN PROSECUTOR: Could I seek to ask a question about it, your Honour?

35 HIS HONOUR: Yes.

40 CROWN PROSECUTOR: 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."

45 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.

50 Q. And to what degree of suspicion would you attach your conclusion that they may have been deliberately smothered?

55 A. I have a high degree of suspicion that that's what happened, based on the circumstances surrounding each child's death, the essentially negative autopsy that followed each death, and therefore, in combination with the circumstances and the largely negative autopsy, albeit with some caveats about Patrick's underlying condition and Caleb, who may have had an underlying laryngeal problem, that it is my suspicion that that's

what happened to the four children.

5 Q. When you said that there was no other explanation for all four deaths, apart from deliberate suffocation, was that based upon a medical analysis or based upon being an amateur detective?

OBJECTION (ZAHRA)

10 ZAHRA: He has already answered that.

CROWN PROSECUTOR: I don't think he has. I press it.

QUESTION PRESSED

15 HIS HONOUR: Q. Well, is there anything medically to link the four, or even the five episodes, Dr Cala, of a medical nature? Or is the fact that there has been a previous episode merely a fact which shows the
20 improbability that the things occurred naturally? Is that what you are saying?

A. What I am saying is, if you are seeking from me one global explanation to account for all four deaths rather than a diagnosis for each one which may be
25 different from the other three, then I think that the diagnosis medically still remains, deliberate smothering.

30 CROWN PROSECUTOR: Q. In relation to Caleb's floppy larynx, have you ever heard of a child dying from a floppy larynx?

A. No.

35 Q. Have you ever seen any article in the medical literature of a child dying from a floppy larynx?

A. No.

40 Q. In your view was it appropriate for Dr Hilton to find that Sarah died from SIDS?

A. No.

45 Q. Have you been made aware that Dr Wilkinson has said that he would not now ascribe a cause of death for Patrick as an epileptic fit, or deriving from an epileptic fit?

A. Yes, I'm aware of that.

50 Q. In your view, what do you say to the possibility that all four deaths derived from the same cause?

A. I believe that that's the most likely explanation for the deaths of all four children.

Q. Is that based upon your medical knowledge?

55 HIS HONOUR: We have been through this before. You have already got an answer to that question.

CROWN PROSECUTOR: I have no further questions.

HIS HONOUR: I have.

5 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?

10 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?

15 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?

20 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?

25 A. Yes.

Q. If the only death you knew about was Caleb's, would you suspect smothering?

A. Yes.

30 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.

40

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.

45

HIS HONOUR: Does anything arise, Mr Zahra?

ZAHRA: Yes.

50 Q. You have been asked about what it is about your medical opinion that permits you to reach the conclusion that you suspect but can't prove medically that this is smothering?

A. Yes.

55

Q. You have indicated that, and to quote you, it is essentially the negative autopsies, that is the glue here?

A. It's partly it, but it is also circumstantial as well.

5 Q. Well, identify with precision what it is about medical aspects of the individual cases that you would link these matters together, other than a negative autopsy?

10 A. Well, that's going back on the history that I was given as to what happened to the children.

15 Q. Can I just ask this question in this way. Putting to one side essentially negative autopsy and factual matters that you have been told about the deaths of the other children, what is there, with some precision can you identify, what are the medical conditions that link these together to permit you that conclusion?

A. Are you asking me to exclude a negative autopsy with all four?

20 Q. I am asking you to identify, in case that's all we are left with, if there is any other medical condition, any other observable diagnosis in any of the children that you can link them to support the conclusion. Just make sure we haven't missed any?

25 A. Well, if I understand your question properly, it's the, largely the circumstances of how the children were found, their very sudden deaths, together with a negative scene examination by the police when it was done and then a negative autopsy.

30 Q. So your answer, in effect, is in the negative, that there is in fact no positive finding?

35 A. There's no positive finding because, as I have said all along, there are no positive features for smothering.

40 Q. So you have reached the conclusion that you suspect, but can't prove medically, that it is smothering on the fact that there has been, to quote you, essentially negative autopsies and what you know about the combination of deaths. In other words, the fact that there were other deaths?

45 A. I don't believe there is any other factors that I know of that medically would place it any higher than a suspicion.

50 Q. But you understand what I am putting to you. I am just trying to give you the opportunity to identify with precision anything other than what may be apparent, that you are connecting these cases together to reach this conclusion based on, to quote you, essentially negative autopsy and the mere fact that there's more than one death or incident?

55 A. Yes.

Q. I am asking you to identify with some precision if there is anything else that you rely on to connect these together to use to support that suspicion?

A. No. Beyond what I have - how I have answered and what I have said I don't believe there is any other connection.

5 CROWN PROSECUTOR: Perhaps I should identify what it is that I would seek to lead from him. What I would seek to lead from him is firstly in relation to Caleb, that he is not aware either himself or from the medical literature of any child ever dying from a floppy larynx, ever.
10

Secondly, in relation to Patrick, that in the light of the concession made by Dr Wilkinson and in the knowledge of the postmortem report that there was no cause of death found, perhaps in relation to Caleb also, no cause of death found, in his view. So Caleb, floppy larynx not a cause of death, no cause of death found. Patrick, in the light of Dr Wilkinson's concession, no cause of death found. Sarah, an inappropriate cause of death as said by Dr Wilkinson and the reasons for that. Finally, his own diagnosis of unknown causes for Laura.
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Then to say to him, is there any single natural cause that you can think of that would account for all of these death? I expect the answer "no". Firstly, is there any natural single cause in his view to account for these deaths; secondly, is there any unnatural cause in his view to account for all these deaths. I think that covers it.
25
30

I would wish to put to him that, in effect, he is of the view that each of these children died from an unexpected catastrophic asphyxiating event of unknown origin.
35

HIS HONOUR: That is eight matters you want to prove.

40 CROWN PROSECUTOR: I'm not sure about that last one, it might be I don't need the last one, but it certainly encapsulates everything I have in mind.

HIS HONOUR: Let's go to the fourth one, concerning the death of the child Sarah. Yesterday, you put certain propositions to Professor Hilton and asked him whether he agreed with them. You did that by reference to a document that you put in his hand, though it may not have been strictly necessary for you to do that, and you did not tender it, you withdrew your tender of the document. You have put the same document into Dr Cala's hand. Are you going to go through a process like the one you went through with Professor Hilton and ask him whether he agrees with particular propositions as generally held in the community?
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CROWN PROSECUTOR: I would seek to ask him the questions which I asked on the voir dire which are similar to the once I asked Dr Hilton. I think it

might be sufficient for my purposes to elicit the material I elicited on the voir dire.

5 HIS HONOUR: I think I understand what is now being offered. Mr Zahra, to which of these eight pieces of evidence do you object?

10 ZAHRA: Could I cut to the chase? It is the last question which we know the answer to on the basis of the voir dire, and that is this witness is going to say that the children were smothered. So despite my friend only referring to the question, we know what the answer is.

15 HIS HONOUR: You do not object to any of the others?

ZAHRA: I will go backwards, but this is a real concern and this is an issue that had been flagged.

20 HIS HONOUR: I need to know to which of these eight discrete pieces of evidence you take objection to.

ZAHRA: Can I run through them.

25 HIS HONOUR: I will read them to you so there is no misunderstanding between us. Caleb, no death from floppy larynx.

30 ZAHRA: There has already been evidence from the person who carried out the autopsy--

HIS HONOUR: Do you object to it?

ZAHRA: No.

35 HIS HONOUR: Caleb, no cause of death found.

ZAHRA: I accept that that is the weight of the evidence already.

40 HIS HONOUR: Patrick, no cause of death found.

ZAHRA: I accept that is the weight of the evidence found.

45 HIS HONOUR: Sarah, in the manner the Crown want to go about it by presenting propositions from a paper, without tendering the paper.

50 ZAHRA: I object to that.

HIS HONOUR: That was done yesterday to Dr Hilton, but what was done today was more extensive but no different in principle.

55 ZAHRA: My friend dresses this up in the protocol referring to things like death scene and examination of death scene, but there is in fact a kernel, and my

friend wants this for one statement, that is, this statement on p 3. That is the only purpose my friend wants this for. That is, in certain circumstances it should indicate the possibility of intentional suffocation. That is what my friend is seeking here.

My friend is doing it on the basis of here is the protocol. As I've indicated yesterday, and your Honour has now seen the protocol, 90 per cent of it is a protocol--

HIS HONOUR: I did not finish up reading it after all that.

ZAHRA: We don't cavil with the majority of it, but there is a little piece that the Crown wants and that is in certain circumstances should indicate the possibility of suffocation. In a sense, when we go to the dot point my friends want, is in fact the previous death of infants under the care of the same unrelated person. Well, the previous deaths, if I can simply put it, my friend wants this evidence to go to this issue and this is the concern. This is the issue that we flagged for argument on Thursday.

HIS HONOUR: Yes, but what the Crown wants to prove is that that is a respectable opinion within the professional community. Why can't the Crown prove that?

ZAHRA: This is something I flagged from the outset in the separate trial application. This is in fact a very difficult process of cross-examination. To get to the bottom of this we really need to go to the issue of the combination of the deaths. In other words, the foundation for this is just the mere fact of the number and we need to go through this process of cross-examination to eventually distil it down to this, as we have just done now. Really, when you look at it, even though it is dressed up in medical terminology and, as my friend indicated, this is based on your medical knowledge but this is dressed up in this way, but when we ask the specific questions we immediately come back down to the common denominator. The whole thing is based on essentially a negative autopsy and the fact that there are other deaths. That is the concern here. We have an expert witness shrouded in this aura of medical expertise. When we go through the chaff it is not there. It is not a medical opinion, it is an opinion based on an absence of any condition or any link and the mere facts of the number of deaths.

This is the argument that is flagged for this Thursday. In a sense the whole foundation of the area that my friend wants to go to now is get this witness to look at the global view, to say are there any other unnatural causes, and he will say smothering and we know why he says smothering. Essentially they are

negative autopsies and there are other deaths. We know the answer to my friend's ultimate question, and that is this witness wants to say he suspects but can't prove medically that these children were smothered.

The other concern is, your Honour, and this is something I flagged also on the separate trial application, this mantra that in a sense you are looking at the combination of deaths to conclude homicide is an inappropriate way or inappropriate reasoning to decide the matters before the court. We can get a little insight from something the witness said a moment ago, and in a sense he is working from a reverse onus situation.

HIS HONOUR: Just a moment. I have not stopped listening to you. I just want to go on to the next one. You have been speaking to the process and the ultimate question intended to establish that in fact Professor Hilton's opinion of a SIDS death it is said was inappropriate.

Let's go to the next one, Laura died of an unknown cause.

ZAHRA: That is a matter well within this witness's expertise, and obviously he carried out the autopsy.

HIS HONOUR: The sixth one was an intended question, was there any single natural cause Dr Cala could state which would account for the four deaths.

ZAHRA: That is a matter they have asked him, and that is admissible also in the sense that there is in fact no positive condition in relation to each, not collectively. But that is all he can say.

HIS HONOUR: That is the way it was put, any cause, that is, any one cause to account for all four deaths.

ZAHRA: Individually he can, but it is the collective approach that is impermissible.

HIS HONOUR: The collective approach would never be justified, I wouldn't think. Why logically would one cause, one natural cause have caused all deaths?

ZAHRA: Yes. So the question should not be asked.

HIS HONOUR: The other side of the coin, question 7, is there any single unnatural cause which would account for all four deaths. One may expect to get the answer smothering to that. So it really goes along with the eighth question.

ZAHRA: I think my friend already indicated he is not fixed in the view of the eighth. Clearly, as I've indicated, I infer my friend's main objective is the

answer smothering.

5 CROWN PROSECUTOR: Question 7 is calculated to bring out the answer which has been given, namely, that I suspect they were all smothered.

ZAHRA: Yes.

10 HIS HONOUR: I regret that I did not read the document marked 24 yesterday. The problem was solved another way and I handed it back.

DOCUMENT MFI 24 HANDED TO HIS HONOUR

15 HIS HONOUR: Do you have the page reference in the transcript of Professor Hilton's evidence where he was asked whether he agreed with the propositions which were listed from the policy statement marked 24 for identification?

20 ZAHRA: Page 630.

HIS HONOUR: I'm trying to get to the questions that were ultimately asked and answered before the jury.

25 ZAHRA: Page 632.

CROWN PROSECUTOR: Page 648.

30 HIS HONOUR: What is significantly different from what is required to be put to Dr Cala from the three propositions that were put to Professor Hilton at p 648, lines 18 to 44?

35 ZAHRA: Because the difference in his opinion with Professor Hilton is solely the fact that there were other deaths. In other words, relying on the dot points.

40 HIS HONOUR: What do you mean by the dots point?

ZAHRA: At p 3, the statement, and this is where the witness drew my friend's attention, that when my friend was taken to the dot point and he took him back to this paragraph. However certain circumstances should indicate the possibility of intentional suffocation. This is in fact the difference because this witness wants to, in a sense, visit an autopsy he did not carry out where the evidence sought to be led is that he has a different opinion, but when we distil the basis of his opinion it is on the basis that there are other deaths. In other words, that he would disagree with the diagnosis of Professor Hilton, and when we distil it the only different is that he would not dismiss the other deaths.

55 I'm not suggesting that Hilton has dismissed it, he has considered it. But this witness will say that the

5 diagnosis can't be made because by reference to this
protocol that one must consider the circumstances
should indicate the possibility. When it is all
distilled that is the kernel to this. When we distil
the difference, the difference of opinion is based,
because this witness wants to use the combination of
deaths, not anything specific about the autopsy of
Sarah, not anything specific to the autopsy of Sarah
but whether you would diagnose SIDS because there were
10 other deaths.

15 HIS HONOUR: I don't think I'm following this and it is
my fault. Let it be supposed that this statement is a
statement of respectable medical opinion, and that
where there are previous unexpected or unexplained
deaths of one or more siblings or a previous ALTE in
the care of the same person the possibility should be
indicated of intentional suffocation. Is that not what
Dr Cala is going to be asked? Is he not going to be
20 asked whether he agrees that that is a proper opinion?

ZAHRA: When one reads this report it is not a research
paper. In fact it is establishing a protocol for
investigators of the things one should be wary of when
25 one is trying to distinguish between SIDS and child
abuse. That is what this article is. There is a
danger by the reference to it in the way that my friend
is wishing to refer to it, and it is very much a
research paper that concludes if there was a previous
30 death then that would inevitably lead to the conclusion
based on this report that certain circumstances should
indicate the possibility of intentional suffocation.

35 What we are elevating here is a statement of concern
and a statement of enquiry that any person
investigating a death should, in other words, the red
light should flash. Not that this is a statement that
because you have had one death before that it would
indicate the possibility of intentional suffocation but
40 as a guide to the type of issues that investigators or
pathologists, persons given the responsibility of
making a determination, would be wary of these things.
The danger is that the jury will elevate this as in
fact a statement by the American Academy of Paediatrics
45 that if there is a previous death, that that should
indicate the possibility of intentional suffocation.
That is the danger here.

50 HIS HONOUR: It should indicate the possibility.

ZAHRA: As I've indicated yesterday, I have no
objection to general questions being asked, but it is
the use of this particular document to support a
conclusion that in fact the mere fact of a previous
55 death should indicate the possibility of intentional
suffocation.

HIS HONOUR: But if the mere fact that there is a

previous death should, in the general professional community's opinion, indicate that possibility, why can't the doctor be asked about that?

5 ZAHRA: Because once we know of the process of reasoning that in fact it is an impermissible process of reasoning, because in a sense it is a mixture of negative diagnosis, a mixture of the reversal of the onus of proof. These are not processes and mechanisms
10 the jury should be asked to follow. In other words, work on a presumption, in effect, that because there is a prior death the second should indicate the possibility of intentional suffocation.

15 That is the danger here. One would never direct a jury that if there is no other findings at autopsy you must proceed on the basis that this is suffocation unless it can be proved otherwise. One would never direct the jury that because there is one death you can then
20 proceed to the second because the presence of the first death should indicate the possibility of intentional suffocation. That is the problem here.

HIS HONOUR: I don't follow the analogy of the jury at
25 all. The better analogy is the one you mentioned a few moments ago, the flashing red light. This is a circumstance which, if it exists in a case, should alert you to the possibility of.

30 ZAHRA: Yes, that's right.

HIS HONOUR: And you should bear that in mind before you come to your conclusion.

35 ZAHRA: Yes, that is right. That is the highest it can be put.

HIS HONOUR: That is all the Crown is trying to do.

40 ZAHRA: At the ends of the day we know what this last question is and we know the answer, that this witness is going to say smothering.

45 HIS HONOUR: It sounds as if you wouldn't be objecting to the question if you knew the answer was going to favour you.

ZAHRA: Well, your Honour--

50 HIS HONOUR: That is what happened with Professor Hilton. He agreed that this was a genuinely, generally held medical opinion.

ZAHRA: On the basis that should alert one.
55

HIS HONOUR: On the basis that should alert one, and he said yes, and I'm paraphrasing now what he said, he said and it did alert me and I came to the view that

this was a SIDS death.

5 ZAHRA: But from that foundation we know now laterally we are going to be faced with an opinion of an expert witness whose qualifications would no doubt impress the jury who would be giving an expert opinion that these are smothering cases because there is a negative autopsy and you start on the premise that they are suffocation.

10 HIS HONOUR: We haven't got to smothering cases yet, we are a long way from that. We are dealing with the basis of putting to Dr Cala what are said to be generally held opinions by experts in the professional community about what possibilities should be indicated by certain circumstances associated with the case under consideration.

20 ZAHRA: The prejudicial effect of that is that it is outweighing the probative value of what might otherwise be a mere process of enquiry. The danger is that it would be elevated to a statement by these organisations that you can start on this premise, you can start on this foundation. That is the danger, that the jury will elevate it. I can understand what your Honour is saying. A simple question, if there has been a previous death you would be alerted obviously to the possibility of suffocation. But the danger is that it is dressed up in expert opinion, it is dressed up in obviously a statement made by what appears to be a reputable organisation, and that it then is very easily elevated to propositions or a starting point in order to determine the guilt or innocence of the accused.

30 HIS HONOUR: I have not followed that last submission, I'm sorry.

35 ZAHRA: Your Honour, what my friend will inevitably say to the jury, I suspect, would be that taking into account what this organisation has said that the jury could adopt the same logic and they are safe to adopt the same logic because this organisation and this witness has adopted that logic. I suspect that that is what he will ultimately want to put to the jury.

40 What I submit is that when one looks at this we know that it is no higher than the fact that this is an organisation telling investigators that these are red flashing lights, but we know in fact it is a very small step from that to what I believe would be ultimately what the Crown wants to tell the jury, that you can also follow this process of reasoning. You could follow the process of reasoning of this witness, you could follow the process of reasoning. But the process of reasoning, when we look at it, is in fact based on the mere circumstances of one prior death and the conclusion that that should indicate the possibility of intentional suffocation, and again--

5 HIS HONOUR: I have tried to confine the debate to individual pieces of evidence and I've intended to confine this one to what the Crown intends to put to Dr Cala about the conclusion of a SIDS death for Sarah. I have not come to consider whether Dr Cala should be permitted to be asked whether, in his opinion, there is any single unnatural cause that might account for the four deaths. That seems to me to be a horse of a very different colour.

10
15 Have you said all you want to say about asking the questions based upon the document MFI 24 in order to establish that there is an opinion in the relevant professional community to the effect that the relevant circumstances should indicate the relevant possibility?

20 ZAHRA: I have made my submissions in that regard, yes. And crystallised, it is that last phrase that concerns us most, that what we are doing is in fact elevating this particular protocol to a statement or a rule and it is not. It is an indication of caution, not a rule, and that is the danger in a nutshell. It is being elevated to a rule.

25 HIS HONOUR: I understand that. Mr Crown--

30 CROWN PROSECUTOR: Might I make some submissions in reply?

35 HIS HONOUR: Only about number 7, please. That is, whether you should be allowed to ask Dr Cala whether in his opinion there is any single unnatural cause that might account for the deaths of the four children.

40 CROWN PROSECUTOR: Your Honour, the best way I can illustrate that is an analogy I used with Justice Wood on the separate trial application. The analogy is this: A man walks into a hospital complaining of respiratory distress. He is admitted to the hospital, he deteriorates, he has a high fever. He obviously has, they think he has some infective condition but they are not sure what, and he dies. A doctor who looks at his case is not able to say what he died of.

45
50 Then investigation is made and it is found out that that particular patient had in fact been in a particular shopping centre the day before his admission to hospital and there are ten other people who were at the same shopping centre who have all been admitted to other hospitals with the same symptoms, same fever and have all died. A medical expert, looking at just one of those cases, would not be able to say what that patient died of. But a medical expert, looking at all of them--

55 HIS HONOUR: This is not Dr Cala's evidence. Dr Cala suspects foul play for each death and for Patrick's

ALTE looking at the facts of that alone, and not knowing about any of the other four incidents. That is his evidence. An opinion, I might say, that surprises me.

5

CROWN PROSECUTOR: Your Honour, we have to exclude six possibilities. Possibilities number 1 to 5 is each of the five events occurred from different causes.

10

Possibility number 6 is that each of those five events happened for one and the same cause. Now, I have to exclude each of those so I ought to be entitled, in our submission, to ask the doctor whether he can think of a single cause, natural or unnatural, which may account for all of those five events. That just excludes possibility number 6 and it leaves possibilities 1 to 5, and he would be entitled to express his suspicions in relation to 1 to 5.

15

20

But in relation to number 6, in our submission he ought to be allowed to express his view that there is only one cause that he can think of and that is an unnatural cause. Just like a medical expert can be asked about a wound. Say a victim has a half a dozen different wounds. If you look at one wound it might be consistent with a big knife or a small knife. If you look at the other wounds it might be consistent with a screwdriver and a knife. But a medical expert should be able to be asked: Is there any weapon you can think of which is consistent with having caused all of those injuries. There is no reason why an expert can't give evidence like that and we would submit it is the same for Dr Cala.

25

30

35

I'm reminded by my learned junior that in this case there is the possibility, it has not yet happened, but the possibility that the defence are going to rely upon some genetic cause for all of the children. Now, if that is the case, then the evidence of one single cause becomes extremely natural or otherwise, and we ought to be able to elicit the evidence to meet that possibility.

40

45

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, the matter with
which I am dealing has taken longer than I expected and
has not finished. We are not going to get back to
evidence before you, the jury, this afternoon. I
thought it better to call you in and tell you that and
let you go now so we don't waste any more of your time.

10 Mr Crown and Mr Zahra, I'm wondering whether I should
ask the jury to come at 10 o'clock tomorrow morning?

ZAHRA: There is a possibility of that.

15 CROWN PROSECUTOR: I have completed my submissions,
your Honour.

20 HIS HONOUR: I will ask you to come for half past 10
tomorrow.

JURY DISMISSED UNTIL 10.30AM WEDNESDAY, 16 APRIL

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Does anyone want to ask Dr Cala anything else? Does anybody want him to remain for any reason?

ZAHRA: No.

CROWN PROSECUTOR: No.

10 HIS HONOUR: Q. Cala, I'm sorry to keep you waiting like this. You see how we are going, you are free to leave now if you wish and we will see you tomorrow morning?

15 A. Thank you.

<WITNESS STOOD DOWN

HIS HONOUR: Are there to be any more submissions now?

20 ZAHRA: If I could flag, I will try and find the reference but Justice Wood rejected my friend's analogy. Your Honour, some time needs to be taken to read the decision of Clark but I notice there are some excerpts that might touch upon this particular
25 argument, particularly paragraph 15 where the court indicated that they could fail to see how realistically that certain of these factual matters would be any significant indication of murder.

30 I don't know how helpful the decision will be, but the court did turn its mind to the use of, for example, the question of who found the child. In fact this paragraph refers to the particular matter.

35 "The suggestion of the coincidence of the fact that Mr Clarke was out at night he died, the fact he was going away the day after..."

40 so the use of some of the factual matters have been touched upon in this particular decision.

HIS HONOUR: Thank you.

45 CROWN PROSECUTOR: My recollection is his Honour Justice Wood in his judgment adopted my analogy with approval.

HIS HONOUR: Do you have the paragraph number?

50 CROWN PROSECUTOR: We are just trying to find it. Paragraph 57. I can just read to your Honour his conclusion about the analogy if your Honour wishes.

55 HIS HONOUR: I have a note of the paragraph number and I have a copy of the judgment.

ZAHRA: Following paragraph 60, your Honour.

HIS HONOUR: I have the paragraph.

ZAHRA: But the last sentence:

5

"Moreover the suggested analogy does have an additional feature in the presence of an established possible cause...Legionnaire's Disease."

10

So that is ultimately what I was indicating.

HIS HONOUR: I will have a think about this.

15

ADJOURNED TO WEDNESDAY 16 APRIL 2003

oOo

RMC:PM:RT:8

D11

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION5 BARR J
AND A JURY OF TWELVE

ELEVENTH DAY: WEDNESDAY 16 APRIL 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

FOR JUDGMENT ON ADMISSIBILITY OF EVIDENCE OF
DR ALLAN CALA, SEE SEPARATE TRANSCRIPT20 ZAHRA: I think those page references are on the voir
dire, not before the jury. That wasn't evidence before
the jury, but I understand the point your Honour is
making.25 HIS HONOUR: I thought I had corrected myself. Thank
you.30 CROWN PROSECUTOR: One issue I wish to clarify before
your Honour, we thank your Honour for that ruling, your
Honour has excluded questions four and seven. If I
understand your Honour correctly, your Honour is
allowing me to ask Dr Cala his view about the diagnosis
of Sarah's death. Now, the difficulty that I have, in
order to be consistent with your Honour's ruling, is
35 that I would say to him, or ask him: What do you say
about the diagnosis of Dr Hilton that Sarah died from
SIDS, and I anticipate that he would say: In my view
it was not an appropriate diagnosis. I would then ask
him why, and I expect he would say because of the other
40 deaths. So in a sense his answer is inconsistent with
your Honour's ruling.45 HIS HONOUR: It would be and it should not be adduced
if that is what the evidence is going to be. In any
event, he said in answer to my questions - I will
invite you to the questions and answers - you see, that
may be a reason, but if you look at the question and
answer on p 729 beginning at line 12 there is no
reliance there on any other death or event. Of course,
I cannot construct evidence for you but I simply say
50 that you should not adduce evidence if you think it is
likely to produce the evidence before the jury that a
SIDS death is an inappropriate assignment based on the
existence of any other event.55 CROWN PROSECUTOR: I understand that, your Honour. It
makes it very difficult.

HIS HONOUR: I know that, Mr Crown, and if you need an

adjournment to speak to Dr Cala about the matter you can have one.

5 CROWN PROSECUTOR: I may need a short adjournment just to formulate my questions.

HIS HONOUR: I will leave the bench now. Please let me know when you are ready.

10 SHORT ADJOURNMENT

15 CROWN PROSECUTOR: We think we have resolved a way of asking questions without infringing your Honour's ruling.

HIS HONOUR: Thank you. Are we ready for the jury now.

IN THE PRESENCE OF THE JURY

<ALLAN DAVID CALA(11.10 AM)
ON FORMER OATH, EXAMINATION-IN-CHIEF CONTINUED

5

CROWN PROSECUTOR: Q. Yesterday you gave evidence about your postmortem examination of Laura.

A. Yes.

10

Q. And then I began asking you questions in relation to your overview of the other three children's deaths?

A. Yes.

15

Q. And you gave evidence about the other documents that you had read through in relation to the deaths of the other three children?

A. Yes.

20

Q. Could we start with the first child to die, Caleb Folbigg?

A. Yes.

25

Q. You were aware from your reading of the documents that at some stage of his life Caleb is alleged to have had a floppy larynx?

A. Yes.

30

Q. Have you, in your own experience, ever had a child who has died of a floppy larynx?

A. No.

35

Q. Have you, in all of your reading of the medical literature, ever read of a child who has died of a floppy larynx?

A. No.

40

Q. From your discussions with colleagues, both here in New South Wales and outside of New South Wales, have you ever heard of a child that has died from a floppy larynx?

A. No.

45

Q. If you, yourself, had conducted the postmortem examination for Caleb, without any knowledge of what happened to the other children subsequently, if you had conducted his postmortem, what would your diagnosis have been as the cause of death?

A. Undetermined.

50

Q. And in your view were the findings on Caleb's postmortem examination consistent with him having been deliberately suffocated?

A. Yes.

55

Q. Are you able to say whether or not Caleb died from a catastrophic asphyxiating event of unknown causes?

A. I believe that is likely.

Q. Thank you. I would now like to proceed to Patrick. If you were examining Patrick's ALTE on its own, without looking at any of the other children, are you able to say whether or not his ALTE was consistent with him having been deliberately smothered?

5 A. Yes.

Q. Was it?

10 A. That is a possibility.

Q. And are you able to say whether or not Patrick's ALTE was a result of an acute catastrophic asphyxiating event?

15 A. That is a possibility.

Q. Looking now at Patrick's death, again if you are looking only at Patrick on his own without any knowledge of what had happened to the other children, if you had conducted the postmortem examination on Patrick what would your diagnosis have been?

20 A. Undetermined.

Q. And are you able to say whether Patrick's death was consistent with having been caused by deliberate smothering?

25 A. Yes, that is a possibility.

Q. What are you able to say about whether Patrick's death was the result of an acute catastrophic asphyxiating event of unknown causes?

30 A. I believe that's a possibility.

Q. Moving now to Sarah. If you had conducted the postmortem examination of Sarah, again without any knowledge of what had happened to the other children, what in your view would have been the diagnosis of her cause of death?

35 A. Undetermined.

Q. In your view are the findings, as reported by Professor Hilton in relation to the postmortem examination of Sarah, consistent with her having been deliberately smothered?

40 A. Yes.

Q. Doctor, as a pathologist is one of the roles that a pathologist performs during the course of a postmortem examination to exclude death from unnatural causes?

45 A. Yes.

Q. Unnatural causes including both deliberate and accidental trauma?

50 A. Yes.

Q. In your view did Professor Hilton, during his postmortem examination of Sarah, exclude deliberate or accidental trauma?

55 A. No, I don't believe he did.

Q. In your view what was the most likely cause of Sarah's death, again looking at her death on its own?

5 A. I think the cause of death is undetermined.

Q. And looking at her death on its own, in your view was it appropriate to find her cause of death as being from SIDS?

10 A. No.

Q. And again, looking at her case on its own, why was it not appropriate to find SIDS as her cause of death?

15 A. One reason was her age. SIDS deaths are generally around three to six months of age, and much older than that I think you should be looking seriously at other diagnoses rather than SIDS. And certainly beyond 12 months old I would say categorically exclude it. So Sarah was, she was approaching 12 months of age, so that alone would make me hesitant to call this case
20 SIDS.

The other finding noted at postmortem, I gather, were several abrasions under the lip, under the lower lip, I'm sorry, and around the chin region, which would make
25 me cautious about calling this case SIDS.

Q. If you had been conducting Sarah's postmortem examination and you had seen two punctate abrasions under her lower lip, would you have taken photographs of them?

30 A. Yes.

Q. And are there facilities in New South Wales that you are aware of for the taking of photographs during postmortem examinations?

35 A. Yes.

Q. Are those facilities that are only available to police officers or are they also available to the pathologists?

40 A. To the - they are available to the pathologists. The pathologist has ready access to cameras, or they can direct other people, not police but other staff working at the institute, to take photographs for them
45 if they so direct.

Q. Why do you think it was of any importance to take photographs of these punctate abrasions?

50 A. I think any injury on the face of a child whose death you are asked to examine and obviously perform a postmortem examination should make one cautious, and therefore I think that for purposes of collecting good evidence to use later in formulating a cause of death, and as a record of what happened at the postmortem,
55 that it is good practice to take photographic pictures of injuries. Particularly, as I say, around the face of a child.

Q. What do you say about whether or not Sarah, the third child, died of an acute and catastrophic asphyxiating event?

5 A. I believe that's a possibility.

Q. In relation to Laura, you have already told us that your diagnosis was that her cause of death was undetermined?

10 A. Yes.

Q. That it was consistent with smothering?

A. Yes.

Q. Including deliberate smothering?

15 A. Yes.

Q. And that she probably died from an acute catastrophic asphyxiating event of unknown causes?

20 A. Yes.

Q. Now, putting those four individual children together is this correct, that they all died from what in your view should have been diagnosed as undetermined causes?

25 A. Yes.

Q. That they all died in circumstances consistent with deliberate smothering?

30 A. Yes.

Q. And that they all possibly died from an acute and catastrophic asphyxiating event of unknown causes?

A. Yes.

Q. Is there any natural cause of death that could account for all those four deaths and the ALTE?

35 A. No.

<CROSS-EXAMINATION

40

ZAHRA: Q. Can I first take you to your own findings in relation to Laura?

A. Yes.

Q. You have indicated that you had observed some bruising on the child's leg?

45

A. Yes.

Q. You have described those bruises as faint bruises on the inner side of the left knee?

50

A. Yes.

Q. And another bruise on the mid shin level of her right leg?

55

A. Yes.

Q. And you indicated that they were probably several days old?

A. Yes.

Q. Now, those bruises on a child of this age are unremarkable?

5 A. Unremarkable?

Q. Yes.

A. They are unremarkable.

10 Q. You did not indicate that in your evidence, did you?

A. I don't recall that I did.

15 Q. They are unremarkable because a child of this age, as we saw on the video just starting to walk, you would expect that on any child of that age that we would see bruises like this?

20 A. Yes. Studies have been done on living children and they have counted bruises on the shins.

Q. Of every child?

A. Of children, and most children have at least three bruises on their shins.

25 Q. There is nothing about any of these bruises that would cause you any concern?

A. No.

30 Q. They are completely attributable to the fact that this child was at that time becoming mobile and these type of injuries are very common?

A. Yes.

35 Q. You found no injuries to the face or the mouth?

A. That's right.

Q. This was a particular area of specific investigation by you?

40 A. Yes.

Q. You had knowledge of the previous deaths?

A. Yes.

45 Q. And were looking for some evidence of manual asphyxiation?

A. Yes.

50 Q. And you were quite thorough in your search for any evidence of manual asphyxiation?

A. Yes.

Q. And you found no evidence of manual asphyxiation?

A. No.

55 Q. You were so thorough in fact that you had three separate examinations of this child in the face area?

A. I further examined the face the day after the postmortem internally, and the day after that I had a

look externally at the child again, at the whole body as well as the face.

5 Q. There were three investigations, three times that you examined this body?

A. Yes.

Q. In this area?

10

A. Yes.

Q. To look for any evidence of manual asphyxiation?

A. Yes.

Q. And you found nothing?

15

A. I found nothing positive.

Q. You were particularly looking for evidence of manual asphyxiation because, in a child of this age, that you might have expected there to be some struggle if the child died of manual asphyxiation?

20

A. There might be a struggle, yes.

Q. And that was your state of mind in thoroughly investigating this area, that with a child this age that you would expect there to be a struggle and in though circumstances it is likely that there would be some bruising?

25

A. I don't know about my state of mind. I was looking hard for any evidence of any facial injuries or any subtle changes on the face, the presence of petechial haemorrhage which may not have been present at the time of my postmortem but which might have developed subsequently, and hence my review of the body.

30

Q. Because of the age of the child, that it is more likely that the child would have given some resistance?

35

A. Yes.

Q. And because of the age of Laura at this time, that that was a very significant process of enquiry?

40

A. Yes.

Q. You examined the child over a number of days because the bruising may not have been apparent if it was fresh at the time of death?

45

A. Yes.

Q. And may become apparent later on?

50

A. Yes.

Q. So you are not only examining the changes to the area of face to see whether the bruising appears at a later stage, is that right?

55

A. Yes.

Q. But you also performed a facial dissection of this area?

A. Yes.

Q. In other words, to determine whether, if there were no apparent bruises to the exterior of the face, that there could have been some injury apparent from a facial dissection?

5 A. Yes.

Q. In other words, that you were looking for even the most minor of bruising or injury that in fact is obviously below the skin surface?

10 A. Yes.

Q. And again this is a very detailed process?

15 A. Yes.

Q. And you found nothing?

A. I didn't find anything.

Q. Again when you returned the following day to again examine the face on the outside, again you saw nothing?

20 A. That's correct.

Q. You can point to nothing, so far as your findings overall of Laura are concerned, that can specifically be attributed to suffocation?

25 A. Because there are no positive findings for suffocation, and my finding of no positive findings doesn't exclude suffocation.

Q. Yes. Do I understand the essence of what you are saying is that because there was nothing, you can't exclude it?

30 A. Because there was nothing to be found still does not exclude suffocation.

35 Q. Because it doesn't necessarily follow that if there was suffocation that there could be signs?

A. That's correct.

Q. So your process of reasoning in this case that you can't exclude suffocation or that it is consistent with suffocation is always based on that foundation, that there are no symptoms, therefore you can't rule it out?

40 A. Yes. There are generally no positive signs of suffocation, so in essence you can almost never rule it out.

Q. And that is what you have done in relation to the evidence you have just given in relation to each of the children. That when you say can't exclude suffocation or consistent with suffocation, you are doing no more than saying that in those cases, because there is nothing to be able to conclude positively that it was suffocation, you can't rule it out?

50 A. That's correct.

Q. So this process that you have just been taken through, the Crown has taken you through each

individually, that you can't point to any evidence of manual asphyxiation?

A. No, there is usually no positive evidence for asphyxiation.

5

Q. However, you can get some signs of manual asphyxiation?

A. They are not diagnostic for it but there are some signs which can raise the possibility of asphyxiation.

10

Q. Yes. And again, in relation to Laura, you found none?

A. That's correct.

15

Q. Again a detailed examination of the child?

A. Yes.

Q. And you found no petechial haemorrhages on the eyelids?

20

A. No.

Q. Nothing in the lungs?

A. There were no petechial haemorrhages on the surface of the lungs. There were non specific changes within the lungs.

25

Q. I think you indicated that those may be attributable to resuscitation?

A. Yes.

30

Q. In a sense that we must always keep that in mind, that if there are attempts at resuscitation, that they may explain certain injuries?

A. They may.

35

Q. And similarly in relation to Sarah, we need to understand that in the area where the punctate marks appear, the injuries to the face appear to be consistent with there being attempts to resuscitate that child?

40

A. Well, to answer that I think I would like to know exactly, as far as would be possible, what resuscitation occurred, how it occurred, who gave it, what they did, before I accepted that the abrasions on her face were due to resuscitation. Because I have to say I have seen a lot of children who have been resuscitated, successfully and unsuccessfully, and most don't have marks on their face.

45

Q. But it is common to have marks if there has been an attempted resuscitation?

50

A. No, it is not common to have marks.

Q. We have to take into account, don't we, that there may have been experienced and unexperienced persons carrying out resuscitation or attempting resuscitation?

55

A. Yes. That is why I say you would need to know as almost as exactly as you could and as accurately as you

could what they precisely did during the attempt at resuscitation.

5 Q. Particularly if an unexperienced person is performing CPR, in fact they may mark the child in that process, holding the face, performing manual CPR?

10 A. It remains a theoretical possibility that those marks may have come about in that way, but I'd like to know precisely what those people did.

Q. But you just don't know, do you?

A. No, I don't know.

15 Q. Similarly with a face mask, an oxygen mask, those type of apparatus can cause marks?

20 A. No, they can't, because they are very soft, the edges are very soft. They are meant to be soft to apply over the nostrils and mouth. They might leave a bit of a suction mark or pressure mark over the face, but they don't cause abrasions.

Q. You don't know whether the marks on the children could have been that type, you don't know what these were from?

25 A. I would say they would not be due to any mask placed over the child.

Q. But you don't know whether they could be caused by a manual attempt at CPR?

30 A. No, I don't know that.

Q. You don't know?

35 A. I don't know because I don't know precisely what was done.

SHORT ADJOURNMENT

40 ZAHRA: Q. Doctor, can I take you to the issue of myocarditis?

A. Yes.

45 Q. Would you agree that as a general principle it is recognised in paediatrics and paediatric forensic pathology that children with myocarditis may die suddenly and unexpectedly with no symptoms or signs?

A. The answer is yes, but in a minority of cases.

Q. There are numerous reports in the literature confirming this?

50 A. There are some. I wouldn't say they are numerous, but that is a well recognised entity that they may, that a small percentage may die suddenly and unexpectedly from myocarditis.

55 Q. Without there being any signs externally?

A. Yes.

Q. So when you make the assessment, as you have from

observing the video of Laura the day before, that you would need to take into account that children with myocarditis may die suddenly and unexpectedly with no symptoms or signs?

5 A. Yes.

Q. Are you aware of some of the studies, for example, of DESA?

10 A. Yes.

Q. And in that study was it the case that 17 out of 24 cases of isolated myocarditis presented as sudden death or with a clinical history of under 24 hours, that 13 of whom had no preceding symptoms?

15 A. Yes. I would need to have that paper in front of me before I definitely agreed with that, but I seem to recall that that's correct.

Q. Are you aware of a research paper by Grady and Costanzo Nordin?

20 A. I don't remember the authors' names. Perhaps if you read out the title of the report.

Q. Myocarditis, Review of Clinical Enigma?

25 A. Which journal was that in?

Q. Can I just show you this (documents handed to witness.)?

30 A. No, I wasn't aware of this.

Q. Were you handed a bundle of reports yesterday by me?

A. Yes, I was.

Q. And they are the bundle?

35 A. Yes. When you gave me these many of them I was aware of. This particular article, up until yesterday, I wasn't aware of. That's why the names were unfamiliar to me. And I have to say, without being
40 disparaging, that it is from a nursing journal so that is not something I would typically look at.

Q. What about as a general proposition that patients with myocarditis may present with highly variable clinical pictures, ranging from no clinical
45 manifestations to overt clinical congestive heart failure or sudden death?

A. Yes.

Q. And that's the proposition in that particular paper?

50 A. Yes, by its very name, Review of Clinical Enigma.

Q. Despite what you say about their status, the proposition you would agree with that the clinical pictures of myocarditis represent a highly variable
55 clinical picture?

A. Yes, I do agree with that.

Q. And the range is from no manifestation to overt manifestations?

5 A. Certainly overt manifestations or some
manifestations is the norm. But I think I would have
to say on careful review of, certainly of a death from
myocarditis, I think it would be very unusual to have
10 absolutely no symptoms or signs of some abnormality
prior to the death by way of a fever or constitutional
symptoms of being unwell, aches and pains in the
joints, maybe a bit of shortness of breath, a bit of
chest pain and so on.

15 Q. Are you aware of a study by Professor Byard, also
in relation to a review of 16 children who died of
myocarditis at the Adelaide Children's Hospital over a
35 year period?

A. Yes.

20 Q. And in that particular study that sudden death
occurred in five of those 16?

A. Yes.

25 Q. Professor Byard is a colleague in your institution?

A. Yes.

Q. And he is published widely?

A. Yes.

30 Q. And quite respected in his opinions?

A. Yes.

Q. Can I take you to the macroscopic examination?

35 A. Yes.

Q. In other words, the observation through the naked
eye?

A. Yes.

40 Q. Do I understand your evidence is that you say that
you would expect to see certain features of the
macroscopic observation of the heart if this child died
of myocarditis?

45 A. Yes, that's what I would expect to see.

Q. The first was in relation to flabbiness of the
heart, particularly the left ventricle?

A. Yes.

50 Q. When you gave evidence yesterday you however
qualified it in this way. You said the heart may, but
not always, you would have to say, be flabby, and then
particularly the left ventricle?

55 A. Yes.

Q. So in other words it is a non specific finding?

A. It is non specific, but generally speaking if those
people who die of myocarditis have this form of

examination, most, I believe, will have an abnormal looking heart when you examine it with the naked eye.

5 Q. The absence, however, does not exclude it?
A. No, it doesn't exclude it.

10 Q. Similarly, that the second you referred to was the stripey appearance?
A. Yes.

Q. Again to quote you in evidence, "It may have a stripey appearance"?
A. Yes.

15 Q. Again in the same way that, if it were not there, it would not exclude myocarditis?
A. No.

20 Q. And I think the third macroscopic feature that you spoke about that you were looking for to see whether there was support for myocarditis was fluid around the lungs?
A. Yes.

25 Q. Again you used the word "may" in that description?
A. Yes.

30 Q. So again that is a finding that in its absence you can't exclude myocarditis?
A. No.

35 Q. Can I take you to the microscopic examination of the heart? You took samples of the heart and put them on slides?
A. Yes.

40 Q. Do you have your records there in relation to that part of the process?
A. No, I don't.

45 Q. Do you keep a record of how many slides that you prepared from the heart?
A. I don't keep a record, but a record is kept in the histology section of the institute.

50 Q. Do you recall how many you have taken in this particular case?
A. Well, I recall that it would have been at least eight. Four blocks, as I recall, were taken routinely anyway, and then, once I had looked at the heart and found an abnormality, I took more sections to see in fact how florid or otherwise this condition was.

55 Q. Did you make notes about your observations of these individual slides?
A. Not each individual slide, but collectively I made some notes.

Q. And that's the evidence that you have given?

A. Yes.

5 Q. I can't cross-examine you on the specific number of slides at this stage?

A. I have to say I don't know specifically how many slides there were.

10 Q. Or what you recall specifically about each particular slide?

15 A. No. The heart, even with multiple sections, and multiple sections are taken of other organs as well like the lungs and kidneys and so on, you would not normally report on each slide. You look at the whole organ or organs and then make a collective report based on what you see.

20 Q. When you took the samples from the heart did you document where the samples were taken from?

A. I did diagrammatically, just by sketching where in the left ventricle and the right ventricle these sections were taken from.

25 Q. Did you take a representative sample of the parts of the heart?

30 A. Yes. The left ventricle is a muscle with a hole in it, which is the chamber where blood fills and the muscle is around the outside and I sectioned circumferentially around the left ventricle and sectioned the right ventricle.

35 Q. Some parts of the heart are more important than others when one is considering the effect of myocarditis?

A. Well, specifically the conduction system of the heart, which refers to the electrical pathways which naturally exist in the heart.

40 Q. What you are saying there is, obviously, if there is myocarditis within those parts of the heart that are part of the conductive system, then they may have a greater relevance to the question whether myocarditis could have caused the death?

45 A. They may, but I have to say it remains speculative as to what, if any, effect that inflammation in that conduction system might have.

Q. But it is--

50 A. If I could finish. The finding of inflammation in the conduction system of itself doesn't necessarily indicate exactly what mode of death that person may have suffered, whether it was due to heart failure or a rhythm disturbance and so on.

55 Q. If the myocarditis was in the conductive system of the heart, that that would be a significant feature?

A. Yes, it would.

Q. Additionally there is a process that is available to you to in fact test the conductive system?

5 A. Well, no. I can't, if you mean test it by stimulating it, I can't do that. The heart is dead, so it doesn't respond to any testing.

Q. Is there any test that you can undertake in relation to testing the conductive system?

10 A. The only testing that I could do and any other pathologist could do is to take sections through those important areas, the pacemaker centres and through the conduction system of the heart, to look for abnormalities.

15 Q. Have you done that?

A. No, I didn't.

Q. Why didn't you do that?

20 A. That's not part of the normal examination of the heart. The normal examination of the heart would be confined to a number of sections and it's variable as to how many, of the right and left ventricle and it would not be routine to examine the conduction system.

25 Q. But this is a test that is available to you, a test that you could have carried out?

A. Yes.

30 Q. In order to test the conductive system of this heart?

A. Yes.

35 Q. And test the conductive system to see whether the myocarditis had impacted on this child's conductive system?

A. Yes, in theory that exists for me to do.

Q. And you didn't do it?

40 A. No. But I have to say that in the face of any other pathologist diagnosing myocarditis it would not be standard to take a hystological section through the conduction system, either.

45 Q. Was it the case that within the myocardium that there was a moderately dense infiltration of lymphocytes?

50 A. Yes, it was - I have described it as being moderately dense, in other words not heavy but not light, somewhere in between.

Q. Can you again explain what the myocardium is?

55 A. The myocardium is the heart and it consists of a whole population of cells which act like a syncytium. The pacemaker sends electrical messages through the atrium and into the ventricles of the heart to make the heart pump. And those individual muscle cells in the heart respond to that nervous activity by contracting and shortening the overall length of the cells, and by

doing that in a syncytial type fashion, that results in the pumping of the heart.

5 Now, in myocarditis there is inflammation in those
cells, that is the muscular cells of the heart, which
really constitutes the whole bulk of the heart. There
is some blood vessels but virtually the entire heart
consists of pump. So in myocarditis there is
10 inflammation surrounding and within those muscle cells,
and it is variable as to what extent that can be in a
case of myocarditis. It could be patchy, in other
words, here and there, not in every part of the heart,
or it could be a very heavy population of inflammatory
15 cells right down to barely present at all.

Q. Was it the case that these lymphocytes had however
aggregated in certain areas of the heart?

A. Yes.

20 Q. Particularly subendocardial?

A. Yes.

Q. Can you explain what "subendocardial" is to the
jury?

25 A. Yes. That's the area of the heart just beneath the
chamber of the left ventricle, so on the inner side of
the heart where the left ventricular chamber sits
collecting blood from the atrium.

30 Q. Is there any significance in your mind of that
particular aggregation?

A. I don't think there is any particular significance,
it's just what I saw. But I wouldn't draw any
particular conclusions from that.

35 Q. Were there also aggregates on the surface of the
myocardium or the heart?

A. Yes.

40 Q. Were there large aggregates in the central area of
the left ventricle?

A. Yes.

Q. Did you find any significance with that?

45 A. They were - that is to say, the lymphocytes, which
are inflammatory cells, were surrounding degenerate
looking muscle cells.

50 Q. I was about to take you to that. Were there also
large clusters of lymphocytes surrounding degenerate
myocytes?

A. Yes.

Q. Again, that's a significant finding?

55 A. Yes, it is.

Q. Would you conclude that myocytolysis was therefore
present?

A. Yes. Myocytolysis is actual destruction and death of muscle cells which happens in this condition.

Q. And you observed that here?

5 A. Yes.

Q. Is it the case that all the slides, all the samples of heart, showed the presence of myocarditis?

10 A. I don't think all, but I think most, and I would need to look at the slides again to be sure of that, but most do. But that's not to say that the amount of inflammation was florid and heavy in those sections. It was actually - I've described it as moderate, and it is true, it was neither heavy nor light, but it was
15 fairly patchy in the area that I have described.

Q. Looking at this case in isolation, the autopsy you carried out, can you exclude myocarditis as the cause of death?

20 A. I can't exclude it as a cause of death.

Q. Might you have given the cause of death as myocarditis looked at individually?

25 A. I don't think I would because, although it was present, the amount of inflammation was not particularly heavy. There wasn't any evidence of heart failure, the heart to the naked eye looked pretty normal, so - and not only that, there was evidence in other organs, the lungs and spleen in particular, of
30 lymphocytes being in there as well. In other words, indicative of some viral infection that Laura Folbigg was suffering from around the time of her death.

Q. Did you write to a Detective Ryan on 19 June 2001?

35 A. Yes.

Q. And did you answer a number of questions?

A. Yes.

40 Q. And did you say this on the second page of that letter:

45 "If I examined the body of Laura Folbigg in isolation, I might give the cause of death as myocarditis."

A. Yes.

Q. Is that your view today?

50 A. Well, I said in the letter I might, and if I was pushed I would take it no further than I might, but I have to - for the reasons that I have given, that the amount of inflammation and so on was not particularly heavy and there weren't any overt signs of heart
55 failure, and so on. But I have to say, as I have said, I can't exclude the possibility that this child did not die of myocarditis.

Q. Particularly in the absence of any other pathology that you can't exclude myocarditis?

5 A. There really was no other significant pathology that I found, either with the naked eye or looking down the microscope to account for the child's death.

Q. Just in relation to the evidence you gave about the floppy larynx, you say that you have not come across a situation where a child has died with a floppy larynx?

10 A. That's right.

Q. And you have referred to colleagues and researchers?

15 A. Yes.

Q. However, it is the case that children die of upper airway obstruction?

20 A. Yes, from a whole lot of other causes, but not floppy larynx.

Q. It's possible that the larynx may in fact collapse because it hasn't got the strength to stay open and may obstruct the airways?

25 A. No, I don't agree with that.

Q. You don't agree?

A. No is.

30 HIS HONOUR: Before you re-examine, Mr Crown.

Q. Dr Cala, you used a word "syncytial". First of all, will you spell it for us?

A. S-Y-N-C-Y-T-I-A-L.

35 Q. Would you mind telling us what it is?

A. It is a descriptive term applied to, in this case the heart, where the cells act in synchrony because the heart is a pump. If those cells acted out of synchrony, a bit like an orchestra, they all have to play together, if I can use that analogy. So they all have to play to the same tune. So it is that enmeshment of those cells acting in synchrony due to the conductor of the orchestra, which is the pacemaker sending electrical signals down the heart getting them to play in tune if I can use it that way, use that analogy.

40
45

<RE-EXAMINATION

50 CROWN PROSECUTOR: Q. You were asked a question by my learned friend, Mr Zahra, about a letter that you sent to Detective Ryan on 19 June 2001.

A. Yes.

55 Q. In which you said that if you had examined the body of Laura Folbigg in isolation, that you might have given the cause of death as myocarditis?

A. Yes.

Q. Would you have a look at this letter. (Letter shown.) Is that the letter that you were referring to?
A. Yes.

5

Q. Can I take you to page 2? Towards the bottom of the page, about three or four lines from the bottom, is there contained that sentence that was read out to you by Mr Zahra?

10

A. Yes.

Q. Is that part of a much longer answer?

A. Yes.

15

Q. And prior to saying that which Mr Zahra read out, did you say this in your letter, and I start at about a third of the way down page 2:

20

"The inflammatory infiltrate in the sections of heart which I examined in the case of Laura Folbigg was light in amount and patchy in distribution."

A. Yes.

25

Q. "There is evidence in the medical literature that this amount of inflammation could be considered of no relevance in the deaths of some children who have died as a result of, for example, choking on a foreign body or who died from motor vehicle trauma"?

30

A. Yes.

Q. "My opinion that the inflammatory infiltrate in the heart represents an incidental finding is not based on the family history but, rather, after consideration of the history provided of Laura's very sudden and most unexpected death, the post-mortem findings of Laura and the histological assessment of the heart together with my own knowledge and experience of the condition of myocarditis?"

35

40

A. Yes.

45

Q. "In other cases I have seen where the death of a child or adult has been due to myocarditis the inflammatory infiltrate has been much heavier in number and more diffuse in distribution throughout the heart, although the amount of inflammation is variable from case to case. There are often observable naked eye changes when examining the heart. These changes may consist of dilation, flabbiness and pallor of the heart and a striped appearance of the heart on cut section. There may be features at post-mortem examination suggestive of heart failure. This

50

55

may take the form of plural effusions, straw coloured fluid in each plural cavity and"

ascites, is it?

5 A. Ascites.

10 Q. "Fluid in the abdominal cavity. I should point out that these findings are not seen in every case and there are other causes for these findings. These changes were not present with Laura Folbigg whose heart looked normal on naked eye inspection."

15 A. Yes.

Q. Are those all things that you said just prior to the sentence that was read out by Mr Zahra?

A. Yes.

20 Q. Doctor, you were asked about the fact that you chose, or that you did not conduct any dissection of the conductive system of the heart?

A. Yes.

25 Q. And you said that that may have enabled you to see if any myocarditis had affected the conductive system of the heart?

A. Yes.

30 Q. And why was it that you did not conduct that sort of further investigation in this case?

35 A. There was no real indication to do that, even though I found myocarditis. The finding of inflammation in the conduction system or, indeed, its absence doesn't take me diagnostically any further at all. If there was no inflammation in the conduction system it doesn't rule out the possibility that this child suffered a fatal cardiac arrhythmia, which is an abnormality of rhythm disturbance. And also if there was inflammation in the conduction system I couldn't say that the child had suffered an abnormality of the rhythm disturbance. So examining the conduction system really wouldn't allow me to take the matter any further than I was able to take it.

45 And I have to say also that examining the conduction system meant retention of the heart, and I am fairly sensitive about retaining whole organs, in this case the brain was retained, and it was a minor
50 consideration, but nevertheless, overall, I weighed up whether it was worthwhile in fact retaining the whole heart when I have already retained the whole brain, given the sensitive nature of that sort of thing and given in any event, even if I had found an abnormality,
55 what in fact it represented to the overall case.

CROWN PROSECUTOR: There is one further area that does not arise out of cross-examination. It is an area that

should have been covered in chief and I would seek your Honour's leave.

5 HIS HONOUR: You may have that leave, Mr Crown.

<FURTHER EXAMINATION-IN-CHIEF

10 CROWN PROSECUTOR: Q. Evidence has been given by an ambulance officer that when he arrived at Laura's home and Laura was placed on a heart monitor, that although the heart monitor showed mainly asystole, which is a flat line, that there were occasional positive blips of electrical activity. Is there any significance in that to you in terms of when it was that she had died?

15 A. Probably not long before that, very soon before that, most likely within five to ten minutes, perhaps. I can't be any more accurate than that really, but certainly not half an hour before. Probably within several minutes, up to about ten minutes.

20 HIS HONOUR: Mr Zahra, does anything arise?

25 ZAHRA: Not that I was aware of this. We have to rely on others to assist us and that is something of which I have had no notice. I can't cross-examine on this at this stage. If it is an issue of inquiry then I would ask the witness to be recalled, but at this stage I can't take that any further.

30 HIS HONOUR: You don't want to ask any further questions now and the appropriate thing is for me to excuse Dr Cala and if that has to be reconsidered--

35 ZAHRA: Yes, I will notify my friend.

<WITNESS RETIRED AND EXCUSED

40 HIS HONOUR: I will thank the juror who has sent me the note. What I would like the juror to do is send me a further note stating just briefly what the nature of the problem is and whether it is likely to affect the juror for the whole of the day concerned or only part of it and, if so, which part. Please put the letter in an envelope and address it to me. I will make sure that nobody else reads the contents.

MFI #28 NOTE FROM JURY

50 HIS HONOUR: I would be grateful if the juror would write to me and send a note to me by 2.00 o'clock today.

55 CROWN PROSECUTOR: That completes the evidence that specifically relates to Laura, subject to one matter. We are now moving into areas that I suppose could be categorised as civilian witnesses in relation to general matters.

<LEA BOWN(12.33PM)
SWORN AND EXAMINED

5 CROWN PROSECUTOR: Q. Mrs Bown, would you please tell
the court your full name?

A. Lea Bown.

10 Q. You are related to the accused, Kathleen Folbigg?

A. Yes.

Q. Would you explain to the court how you are related?

A. She is my sister.

15 Q. Is she your full sister?

A. No.

Q. Was she adopted by your natural parents?

A. No.

20 Q. Sorry, would you explain to the court what your
relationship is?

A. She is my foster.

25 Q. Your foster sister. She is your foster sister?

A. Yes.

Q. And your parents are Neville and Deidre
Marlborough?

30 A. Yes.

Q. And they fostered Kathleen?

A. Yes.

35 Q. How old was Kathleen when you first got to know
her?

A. Three.

Q. Is she considerably younger than you are?

40 A. Yes.

Q. And when she first came to your parents' household,
were you living in that household?

A. No.

45 Q. Were you already living somewhere else?

A. Yes.

Q. Over the years of her childhood did you have much
contact with her?

50 A. Yes.

Q. When she grew up did you become aware that she
married Craig Folbigg?

55 A. Yes.

Q. Did you have much contact with her at around that
time?

A. More after she got married.

Q. After she got married you had more contact with her?

A. Yes.

5

Q. Whereabouts were you living at that time?

A. Melbourne.

Q. And whereabouts was she living?

10

A. Newcastle.

Q. Did your contact take the form of telephone conversations?

A. Yes.

15

Q. And sometimes would the two families meet?

A. Yes.

Q. At some stage you went overseas; is that right?

20

A. Yes.

Q. Where did you go to?

A. We went to Malaysia.

25

Q. How long did you go to Malaysia for?

A. From '74 to '75.

Q. After 1975 did you come back to Australia?

A. Yes.

30

Q. And where did you live?

A. Newcastle.

Q. How long did you live in Newcastle for?

35

A. Till '81.

Q. Over that time when you were living in Newcastle did you have much contact with Kathy?

A. Yes.

40

Q. After that, where did you go and live?

A. Melbourne.

Q. How long did you live in Melbourne for on that occasion?

45

A. We have been there since '81.

Q. Since '81 you have been living in Melbourne?

A. Yes.

50

Q. Over that period of time, since '81 until now, have you had a lot of contact with Kathy?

A. Yes.

Q. Has that included a lot of phone contact?

55

A. Yes.

Q. Has it included personal face-to-face contact as

well?

A. Yes.

5 Q. Has she and Craig come down to Melbourne sometimes?
A. Yes.

10 Q. Have you been up here to New South Wales sometimes
with your family?
A. Yes.

Q. So has there been a lot of contact between the two
families?
A. Yes.

15 Q. Just to try and summarise this, but after each of
her children's deaths did you have contact with her in
an attempt to help to console her and try and give her
support?
A. Yes, I did.

20 Q. Was there one of her children that you had more
contact with than the others?
A. Yes.

25 Q. And which child was that?
A. Laura.

30 Q. Why was it you had more contact with Laura than the
others?
A. Kathy and I were very close and Laura was, just,
very special.

35 Q. Did you, in fact, become very attached to Laura?
A. Very.

Q. How did you regard Laura?
A. Laura was the granddaughter I had always wanted and
that's how I looked at her.

40 Q. You looked at her like a granddaughter?
A. Yes.

45 Q. I would like to ask you about Christmas of 1998.
At that time was Laura about 17 months old?
A. Yes.

50 Q. And that Christmas did you and your family have
contact with Kathleen and her family?
A. Yes.

Q. Why was that?
A. They came down and had Christmas with us in
Melbourne.

55 Q. So did Kathy, Craig and Laura come down and stay at
your place?
A. Yes, they did.

Q. In Melbourne?

A. Yes.

Q. How long did they stay in your place for?

5 A. Between a week to 10 days.

Q. What, if anything, did you notice about Kathy and Laura when they came to visit you in Christmas 1998?

10 A. Laura was a very happy little girl. Kathy was quite tired and more tired the longer she stayed with us because of the sleeping arrangements.

Q. What were the sleeping arrangements?

15 A. We had a pull-out bed in the spare room, which had a bar going across, it wasn't very comfortable and we had a cot for Laura. Laura would toss around a bit so she wasn't sleeping too good so Kathy and Craig would then put Laura in bed with them so they would end up putting the mattress down on the floor to allow them to
20 get some sleep and Kathy wasn't getting much sleep at all.

Q. What did you notice about the interrelationship between Kathy and Laura?

25 A. Sometimes it was good and sometimes Kathy wasn't, you know, in a very good mood.

Q. Did you notice any specific events regarding Kathy and Laura?

30 A. Yes.

Q. Would you tell us about that?

35 A. Kathy lost her temper with Laura when she was trying to feed her in the high chair.

Q. What did she do, what happened?

40 A. Laura didn't really want to eat her meal and Kathy got angry with her and put the food down on, because the high chair was close to the table so she put the food down on the dining room table and got Laura out, pulled Laura out by the arm.

Q. Can you describe to us how she pulled her out?

45 A. She has got her by the arm that way and yanked her out.

Q. Just by a single arm?

A. Yes.

50 Q. Did she say anything, or did you notice anything else about Kathy?

A. Just angry because Laura wouldn't eat, she didn't want to.

55 Q. Was that at a time when she was getting little sleep?

A. Yes.

Q. During the same stay when they were in Melbourne did you go shopping to Myers on one occasion?

A. Yes, we did.

5 OBJECTION (COOK - PARAGRAPH 17)

CROWN PROSECUTOR: I don't pursue that.

10 Q. Did you see any other instances of anger from Kathy towards Laura?

A. Yes.

Q. Would you tell us about them?

15 A. We went out for the day and Kathy was - Craig had been given a bonus and he was unable to - they were going into get \$300 worth--

OBJECTION (COOK)

20 COOK: I suggest there is some misunderstanding by the witness as to the question.

CROWN PROSECUTOR: I will ask the question again.

25 Q. Was there any other instance when you saw anger from Kathy towards Laura?

A. Yes.

Q. And was that during that holiday?

30 A. Yes.

Q. And would you tell us about that?

A. That was on Christmas Eve.

35 Q. Yes. What happened on Christmas Eve?

A. Laura didn't want to go to bed because there was a lot of excitement going around in the house with people coming to see us for Christmas and that and Laura didn't want to go down to sleep and when Kathy tried to
40 put her down she still didn't want to get down and Kathy got angry.

Q. Could you describe Kathy's anger?

45 A. She wanted Laura to go down when she wanted her to go down and she got angry because Laura wouldn't go down.

Q. How would you categorise her anger?

50 A. Just over the top.

Q. Why do you say that? What was it that you observed that led you to that?

A. I just didn't feel it was necessary to have been so angry with her, considering Laura's age and it is
55 typical of a little girl of that age or any child of that age. There's a lot of excitement going on.

Q. What about the anger that she showed when she was

trying to feed Laura. How would you categorise that anger?

A. That was uncalled for.

5 Q. Why do you say that? What was it that you saw that led you to that view?

10 A. Because Laura didn't want to eat, which is normal of a child of that age, and instead of forcing - if Laura had of just been left and allowed to eat when she was ready to eat she would have been okay, but Kathy just insisted that she was to eat when she said that she had to eat and Kathy just lost it with her.

15 Q. I would now like to take you to the time of Sarah's death.

A. Yes.

Q. Do you recall being told that Sarah had died?

20 A. Yes.

Q. Did you speak to Craig on the telephone?

A. Yes.

25 Q. Some hours after you had found out about Sarah dying did you speak to Kathy on the telephone?

A. Yes.

Q. And did Kathy tell you what had happened when Sarah had died?

30 A. Yes.

Q. Have you made a statement in relation to this matter?

35 A. Yes, I have.

Q. And would you like to refer to your statement in giving this evidence?

A. Yes.

40 OBJECTION (COOK)

Q. When did you make the statement?

45 COOK: I object to the refreshment of memory from the statement, if that's what is sought.

CROWN PROSECUTOR: I think my friend is probably right, that it is not an entitlement if it is objected to.

50 HIS HONOUR: Yes, that's right.

CROWN PROSECUTOR: Q. Would you please do the best you can, just from your memory, what it was that Kathy said to you about the circumstances of Sarah's death?

55 A. Kathy told me that Sarah, that she had woken, that Sarah had been put into a single bed next to her because it was easier for her to just find the dummy and put it into Sarah's mouth during the night instead

of having to get up and go into the other bedroom. She said she got up that night, went to the toilet, and either put the hall light on or the toilet light, I am not 100% on which light it was, and from seeing from
5 the toilet she could see that there was something wrong with Laura.

Q. Sorry, from seeing from the--

10 A. From the toilet she could see that there was something that Laura wasn't looking right, there was something wrong with her and she said she looked a greyish colour. She said from the toilet that she sang out to Craig, Craig didn't answer, she sang out again, Craig didn't answer and she screamed a third time and
15 ran in and Craig woke up and found Laura and tried to do what he could with CPR, which he didn't know very much of at that time.

20 HIS HONOUR: This is Laura.

CROWN PROSECUTOR: Sorry?

25 HIS HONOUR: The question was about Sarah. I think the question was about Sarah, wasn't it, and there was a reference to Laura late in the answer.

30 CROWN PROSECUTOR: Q. The end part of your answer was "she sang out again, Craig didn't answer, she screamed a third time and ran in and Craig woke up and found Laura"?

A. Sorry, Sarah.

35 Q. I think you said that from the toilet she could see something that Laura wasn't looking right?

A. Sarah wasn't looking right, sorry.

40 Q. This is in relation to Sarah's death?

A. Yes. That Sarah was a greyish colour and she screamed three times.

45 Q. At some stage were you interviewed by a police officer in relation to this matter?

A. Yes, I was.

50 Q. Was that a Detective Firth?

A. Yes.

55 Q. After you had been interviewed by the police did Kathy speak to you?

A. Yes.

Q. And did she ask you what information you had given to the police?

A. Yes.

Q. Did you tell Kathy that you had told the police--

OBJECTION (COOK - LEADING)

- Q. What did you tell Kathy that you had told the police?
A. I told Kathy, how Sarah had died.
- 5
- Q. And what was Kathy's reaction when you told her that?
A. She was very angry.
- 10
- Q. And what did she say to you?
A. She said "That is not how Sarah died."
- Q. Did you tell her exactly what you had told the police?
A. Told her exactly what I had told the police, which was exactly what was told to me.
- 15
- Q. She said to you that that was not how Sarah died?
A. She said, "That is not how Sarah died" and she said "Anyway, there was no light on."
- 20
- Q. Did she say anything about the toilet?
A. She said that you couldn't see the bed from the toilet.
- 25
- Q. And was this conversation a phone conversation or in person?
A. A phone conversation.
- 30
- Q. I would like to ask you about a time in January 1997.
A. Yes.
- Q. Did you and your husband and your son and his then girlfriend, now wife, come to New South Wales?
A. Yes, we did.
- 35
- Q. Was that for a memorial service for your father?
A. Yes, it was.
- 40
- Q. And did you stay with Kathy and Craig at Singleton when you came for that memorial service?
A. Yes, we did.
- 45
- Q. How long were you in Singleton for?
A. About five days.
- Q. On the day that you arrived in Singleton did you have some medical complaint?
A. Yes, I had a really, really bad migraine.
- 50
- Q. Because you had a migraine did you go and lie down in a bedroom?
A. Yes, I asked her if I could go in and lie down.
- 55
- Q. In January 1997 Laura was alive?
A. Yes.

Q. How old was Laura?

A. She was four, four and a half months old.

Q. Sorry, January 1998?

5 A. Five months old.

Q. She was five months old at that time?

A. Yes.

10 Q. Whatever the date was, was Laura about five months old?

A. Yes.

Q. Do you know where Laura was when you went and laid down because of your migraine?

15 A. Yes, Laura was in bed asleep.

Q. Where was her bedroom compared to where you were lying down?

20 A. Straight across on an angle, just off an angle.

Q. What time of the day or night was it that you went and had this lie down?

25 A. It was in the afternoon.

Q. And who was home at that time?

A. Kathy and Craig and my husband and my son.

Q. Whilst you were lying down did you hear anything?

30 A. Yes. I had only just started to drift off when there was a loud pitching, screaming noise, high pitched noise.

Q. What did you think that it sounded like when you first heard it?

35 A. It was like the fire detectors in the house.

Q. Like smoke detectors?

40 A. Yes.

Q. How many times did you hear it?

A. Twice.

Q. For how long each time?

45 A. A couple of seconds each time.

Q. When this noise sounded, did you hear anybody coming towards Laura's room?

50 A. No.

Q. Do you know where the others were?

A. The others were all out in the barbecue area, out near the pool.

55 Q. Was Kathy out near the pool?

A. Yes, they all were.

Q. Was Craig out there?

A. Yes.

5 Q. At some stage about an hour and a half later did you hear people who had been out at the pool come inside?

A. Yes, I did.

10 Q. Did you then get up and go into the lounge room where the others were?

A. Yes, I did.

Q. And did you speak to Kathy about this noise that you had heard?

15 A. Yes, I did. I told Kathy I heard a loud screaming pitched noise twice.

Q. What did she say?

20 A. Kathy told me it was probably the baby monitor, it was the baby monitor.

Q. Did she say whether or not she had heard it?

A. No, nobody heard it.

Q. Did she say whether she had heard it?

25 A. No, she said that she didn't hear it, she just shrugged her shoulders, she said "Oh well".

Q. After Laura died did you ever speak to Kathy about what had happened on the day that Laura died?

30 A. Yes.

Q. And when was that?

A. That was when my daughter and I went up there.

35 Q. And how long after Laura died did you go up there?

A. We went up there straight away, the next day.

Q. So would it have been within a few days of Laura's death that you had this conversation with Kathy?

40 A. Yes.

Q. And would you tell the court what Kathy told you about how Laura had died?

45 A. Kathy had told me that she got up that day to go to the gym and that Laura had not been very well, she had a slight cold, the sniffles from the day before as well, and that she wanted to go to the gym but because Laura wasn't feeling very well she decided not to go. And they had had some breakfast and that and then she
50 seen that, like she said that Laura had picked up a little bit and she asked Laura if she wanted to go to the gym to play with her friends and that. Laura went into her bedroom to pick up a little bag that she used to take with her and off they went, and they went to
55 the gym and Laura used to go into the creche there and play with her friends in there while Kathy did her gym work. And then they came out and they went to have morning tea with Craig.

Q. At his work?

5 A. At his works, yes, because Laura used to love to do that. And then it started to rain and Kathy decided to go home and it started to rain and Laura ran out into the rain and Kathy got her back to put her into the car and by the time she got home Laura was asleep in her car seat. So she took her out of the car seat, put her into her bed in her bedroom and then went to go and get the washing in off the line and she said she heard
10 Laura make like a little gurgley, little "he he" noise, like little kids do when they are going off to sleep and she thought oh, I will go back in and check on her. No I'll go and get the washing off the line. She went
15 and got the washing off the line, brought it back in, I am not 100% sure whether she said she folded it up or whether she put it in the laundry, then she went in to check on Laura and found Laura not breathing.

20 Q. Did she then tell you that--

A. She said she picked Laura up, took her into the kitchen, they had a bench in the kitchen, put her on to the bench and tried to do CPR while she rang Craig to get help.

25 Q. Did she tell you anything about what happened when the ambulance arrived?

30 A. Just that the ambulance tried to do - they worked for a little while on Laura and they had asked her how long had it been that Laura had not been - that she had been from the time she had gone to get the washing to when she had come in and found Laura and she said 5 to 10 minutes, no more than five minutes.

35 CROWN PROSECUTOR: There is one further area but it is an area in which we may need to get a ruling from your Honour.

40 HIS HONOUR: Very well then.

IN THE ABSENCE OF THE JURY

CROWN PROSECUTOR: Perhaps I might indicate what the evidence is.

5

IN THE ABSENCE OF THE WITNESS

HIS HONOUR: I have a statement of July '99.

10 CROWN PROSECUTOR: It is not in any of the statements. I have just informed my learned friend this morning because I was only told myself.

15 Your Honour, she is in a position to give evidence that after the death of Laura and very shortly after Kathleen had left Craig, that Craig admitted to her that he had told lies to the police. She urged him to go back to the police to correct it and he said that he didn't feel able to do that.

20 The significance of the evidence in the Crown case is this. It was elicited in cross-examination from Craig that he had given an earlier version, that's I suppose loosely could be described as his first statement that was made on 19 and 23 May '99.

25

HIS HONOUR: Can you put, can Mrs Bown put a date on this conversation with Craig?

30 CROWN PROSECUTOR: She can't put an exact date on it, but it is after his visit to the police, but not long after. It was shortly after Kathy left for the final time, as I understand it, which would have been maybe a couple of months after that.

35

Craig Folbigg has given evidence that he didn't tell the truth to the police until his ERISP interview, at which time he was under arrest and threatened with being charged.

40

HIS HONOUR: Can you just remind me of the dates? The first visit was 19 May, during which he said he told the truth.

45 CROWN PROSECUTOR: The very first visit was on 14 May to his home.

HIS HONOUR: He told the truth on that day but no record was made.

50

CROWN PROSECUTOR: That's correct.

HIS HONOUR: He went to the police station on 19 May and told the truth and a record was made but not completed.

55

CROWN PROSECUTOR: Yes.

HIS HONOUR: He went back on 23 May, changed the story and, he says, mixed lies with the truth.

CROWN PROSECUTOR: Yes.

5

HIS HONOUR: And the record was completed on that basis.

CROWN PROSECUTOR: Yes.

10

HIS HONOUR: And that's the basis of his statement dated 19 or 23 May.

CROWN PROSECUTOR: Yes.

15

HIS HONOUR: There is a substantial amount of time then until the ERISP, isn't there?

CROWN PROSECUTOR: Yes, the ERISP was in April 2001. He said he told the truth there, but he was under arrest and the threat of being charged.

20

The defence, of course, challenge certain aspects of what Mr Folbigg says is the truthful version.

25

HIS HONOUR: Wait a minute. Let's know what the evidence is that you want to get in first.

CROWN PROSECUTOR: The evidence would be that at some time in 1999, after the completion of the statement in May and shortly after Kathleen had finally left Craig, that he admitted to her that he had told untruths to the police.

30

The reason for the Crown seeking to lead this evidence is that otherwise my friend would have open a submission to the jury that he only told his supposedly truthful version in 2001 because he was under arrest and under threat of being charged. Here he is not under such a threat back in 1999, much closer to the time when he is being interviewed by the police, admitting to a relative of his then estranged wife that he told lies to the police.

35

40

45

HIS HONOUR: But did he do anything more than that, admit that he told lies?

CROWN PROSECUTOR: No.

50

HIS HONOUR: He didn't give a version?

CROWN PROSECUTOR: No, he didn't.

HIS HONOUR: I think I see the problem. Mr Cook, you would say that this is evidence that goes only to credit.

55

COOK: Yes. Could I take your Honour to page 321 of

5 the transcript, which in my submission indicates the problem the Crown has. It was put to Craig Folbigg that he had said to Lea Bown that he had been down to the police station to retract some things as he was angry and told a few lies, that's the thrust of it.

HIS HONOUR: Where do I find this?

10 COOK: Page 321 at line 22. He agreed that he said that and also that that was a lie in itself. In other words, he was lying about lying. The simple point I make is this--

15 HIS HONOUR: Which visit to the police station was he telling Mrs Bown about then?

COOK: That's almost impossible of clarification, I submit.

20 CROWN PROSECUTOR: Perhaps if I get some further instructions over the luncheon adjournment and I can tell your Honour.

25 COOK: My submission is this. This is a matter that requires leave. In considering leave your Honour will take into account whether this has any actual utility in actually restoring Craig Folbigg's credit or assisting to restore it. The reason I bring page 321 to your Honour's attention is that it makes it plain, I submit, that the position is almost beyond salvage.

30 CROWN PROSECUTOR: I would like to make some more submissions, but perhaps if I could after the luncheon adjournment.

35 HIS HONOUR: We will leave it at that. Have I got all of the facts that I need to know?

CROWN PROSECUTOR: I think so.

40 HIS HONOUR: We will deal with it at 2.00 o'clock then.

45 Let me just tell you about this note from the juror. I hope in response to my request I will have more information about it at 2.00 o'clock, but the juror concerned has a difficulty of a highly personal nature, I am told, on Thursday 24 April. That's one of our two sitting days next week. The matter is highly confidential and that was why I responded in the way I did. I am not likely to disclose what the difficulty is, I think in the circumstances. More to the point what I need to do is to assess the size of the problem and decide whether what the juror tells me will affect our sitting time at all next Thursday. We will all find out later on today.

55

LUNCHEON ADJOURNMENT

RESUMPTION

5 HIS HONOUR: Yes, Mr Crown. Do you need to tell me anything in addition about evidence?

10 CROWN PROSECUTOR: Just this, that it would appear from her statement that shortly after the time when Craig Folbigg told lies to the police, perhaps a couple of months after, that he told this witness, Lea Bown, that he had been to the police to retract some of the things that he had seen because he was angry at the time and that he had told a few lies and that he had been able to change them. And that it was after that, shortly after the final separation between Kathleen and Craig Folbigg, that Craig had admitted to her that his retraction was in fact lies to the police.

20 So, it is in accordance with what he has given in evidence that when he went to retract what he told the police, that he told the police lies, and when he retracted he told the police that his original version was lies, but that was a lie in itself, and then he eventually admitted to the police in his ERISP interview what the truth was. So the significance of her evidence is that here he is, well before his ERISP interview, admitting to having told the police lies.

25 HIS HONOUR: And you want to adduce this evidence in order to reestablish credit and to head off a submission, I suppose, that what?

30 CROWN PROSECUTOR: It is, in our submission, not just on credit, although it does come under s 108, which is reestablishing credibility.

35 HIS HONOUR: I thought it was under s 108(3).

40 CROWN PROSECUTOR: It is because it certainly is a credibility issue. The fact in issue is this. Is Craig telling the truth when he says things like that Sarah was out of the room just before she was discovered deceased and other items of evidence that have been challenged. Now he has given a prior inconsistent statement about that.

45 The defence has highlighted that prior inconsistent statement and without making an allegation of recent fabrication, they have suggested that the version that he is now giving is a false one or is an incorrect one. They have not actually accused him of lying, as I understand it, but it must be implicit in their allegation that he is lying.

50 We would submit that we ought to be allowed to reestablish his credibility by showing a prior consistent statement when he spoke to Ms Bown, although, as I submitted, it doesn't just relate to his credibility.

HIS HONOUR: Yes, Mr Cook?

5 COOK: Your Honour, in my submission your Honour would
not allow the evidence because it does not in any
material sense revive the credibility of Craig Folbigg
on any relevant matter. It is, as I understand it, a
10 second recanting to Ms Bown of what he said to the
police. So, in effect, he is saying his earlier recant
was a lie.

In my submission the picture is so muddied, with
respect, that it goes nowhere in actually restoring his
15 credit, given what the witness Mr Folbigg said at the
part of the evidence that I have taken your Honour to,
that he had lied when he spoke to Bown.

That is the submission that I put, that your Honour
20 would not grant leave which is required because of the
essential lack of utility of it.

HIS HONOUR: The Crown concedes that it goes to the
25 credibility of Mr Folbigg, but not apparently that it
goes only to the credibility of Mr Folbigg.

COOK: In my submission it does go only to credibility.
He is describing earlier versions given to various
30 people, at some stage as a lie, as some stages
retracting what he had earlier said was a lie, by
describing the retraction as a lie. In my submission
that is pure credit.

CROWN PROSECUTOR: We would submit that your Honour
35 should take s 192 into consideration.

HIS HONOUR: This is a matter, in this case there have
40 been frequent and substantial interruptions to the flow
of evidence in the presence of the jury. I do not say
that in any criticism at all of counsel. They are
doing efficiently what they are obliged to do.
However, it does make me wish to deal with this matter
very shortly indeed. I will give reasons, extensive
reasons later on if the occasion arises.

45 I have decided not to allow this evidence, principally
because I doubt whether it is capable of any real
understanding by the jury and of reestablishing the
credit of Mr Folbigg. The evidence will be rejected.

50

IN THE PRESENCE OF THE JURY

WITNESS RETURNED TO THE WITNESS BOX

5 HIS HONOUR: I thank the juror for the note.

MFI#29 NOTE FROM JUROR.

10 HIS HONOUR: I direct that it be put with the note MFI
28 in an envelope to be sealed and marked
"Confidential - not to be opened or inspected without
the approval of a judge."

15 I can announce to counsel and the jury together that
the contents of the note lead me to the view that it is
not desirable for the court to sit next Thursday, that
is to say tomorrow week, 24 April.

20 The consequence of that will be that we, sit for only
one day next week, that will be the Wednesday. Are you
all clear on that now? At the conclusion of today's
proceedings I am going to adjourn the trial so far as
the jury is concerned, to next Wednesday, 23 April.
25 The case will be listed, of course, and counsel and I
will be working here tomorrow in the case, but that
will not involve the jury's attendance.

CROWN PROSECUTOR: Q. Ms Bown, just one further area I
would like to ask you about. Do you remember the day
30 of Laura's funeral?

A. Yes.

Q. What was Kathleen like at Laura's funeral?

35 A. Very upset.

Q. Do you remember where you went after the funeral?

40 A. We came out of the church, spoke to a few people
and then we got into my daughter's car and went back to
Craig and Kathy's place.

Q. When did you next see Kathleen?

A. In my daughter's car.

45 Q. And what did you notice about Kathy in your
daughter's car?

A. The comment that Kathy made and the sudden total
change from crying to just being totally a different
person.

50 Q. What did you notice about her after the change?

A. She was happy, laughing and enjoying the party up
at the - the wake up at Kathy and Craig's house.

Q. What was she like at the wake?

55 A. Centre of attention, laughing with all the friends
and having a really good time.

Q. And what was it that she said when you saw her in

your daughter's car?

A. Kathy was sitting next to me in the back seat of my daughter's car and she sat down and sat next to me and said, "Phew, that's such a weight off my shoulders", and from that moment she was like a different person.

<CROSS-EXAMINATION

10 COOK: Q. You had contact with Kathleen and Craig Folbigg after the child Caleb was born, didn't you?
A. Yes.

Q. And you were able to observe something about Kathleen's response to his birth, is that right?
15 A. I never saw Kathy when Caleb was born.

Q. You spoke to her over the phone?
A. Yes.

20 Q. Is that right?
A. Yes.

Q. She told you that Caleb was a very good sleeper?
25 A. Very good sleeper and feeder.

Q. And a good baby?
A. Yes.

30 Q. He was a good baby?
A. Yes.

Q. And did it appear to you that she was very happy as a result of the birth of Caleb?
35 A. Yes, she was.

Q. And did it appear to you, after you heard of his death, that she was devastated by it?
A. Yes.

40 Q. Now, can we turn to Patrick? You had contact with her after Patrick was born?
A. Yes.

45 Q. And were you able to observe something of Kathleen's response to the arrival of Patrick?
A. Yes, I saw her in hospital.

Q. And afterwards?
A. No.

50 Q. Did you have contact with her afterwards over the telephone?
A. Yes.

55 Q. In which the subject of Patrick was referred to sometimes?
A. Yes.

Q. Was it your opinion that Kathleen was very pleased and very happy to have Patrick?

A. Yes.

5 Q. Now, did you make some observations about Kathleen's response to the death of Patrick?

A. I didn't - no, I don't think I saw Kathy when Pat died.

10 Q. In the months afterwards did you have contact with her?

A. Yes.

Q. And did it seem to you that she was really down?

15 A. Sometimes.

Q. And finding it difficult to handle?

A. Not really.

20 Q. Did she tell you that she had difficulty in seeing a neighbour's little baby?

A. Yes.

Q. After the death of Patrick?

25 A. Yes.

Q. Because it upset her?

A. Yes.

30 Q. Did she also tell you that during the lifetime of Patrick that he had been a happy and a placid child?

A. Yes.

Q. And that he was a good sleeper?

35 A. Yes.

Q. And that he was a good feeder?

A. Yes.

40 Q. And she didn't tell you on any occasion that she had any problems with him before the occasion when he went into hospital?

A. No.

45 Q. Is that right?

A. That's right.

Q. Again can we turn to the third child, Sarah. You had contact with Kathleen after the birth of Sarah?

50 A. I'm sorry, am I allowed to say something for a moment or not?

Q. I beg your pardon?

55 A. Can I say something about Patrick there?

Q. No, respond to the questions, please. You had contact with Kathleen after the birth of Sarah, is that right?

A. Yes.

Q. And you are in a position to have formed a response about her response to the arrival of Sarah?

5 A. Yes.

Q. She was absolutely thrilled, wasn't she?

A. Yes.

10 Q. She thought that Sarah was a gorgeous little girl?

A. Yes.

Q. She told you that Sarah was a good feeder.

A. Yes?

15

Q. And a good sleeper.

A. Yes.

Q. Did she tell you that Sarah was no trouble?

20 A. Yes.

Q. And again was she devastated by the death of Sarah?

A. Yes.

25 Q. Now, you said that there was a conversation that you had with Kathleen relating to the night that Sarah died?

A. Yes.

30 Q. When do you say that conversation was?

A. Not long after Sarah had died.

Q. Was it in the same year that Sarah died?

A. Yes.

35

Q. And did you tell the police about that conversation?

A. Yes.

40 Q. When?

A. When I was interviewed.

Q. In 1999?

A. '97.

45

Q. You were interviewed after the death--

A. Sorry 1999, yes.

50 Q. So getting on for six years after the conversation with Kathleen about the death of Sarah, you told that police officer about it, is that correct?

A. That's right.

55 Q. Is that the first time you had ever created a written record of that conversation?

A. No, I had told other people word for word.

Q. Is it the first time you had ever created a written

record, is that right?

A. Yes.

5 Q. And you don't claim to have a good memory of the conversation?

A. Yes, I do.

10 Q. Do you agree with this. When you were reciting the conversation in this Court before lunch you got it wrong?

A. I got the names wrong.

15 Q. Do you agree with that - I beg your pardon?

A. I got the names wrong.

Q. You had Kathleen Folbigg talking about Laura?

A. I just got the names mixed up, but I am not wrong with what I said about how Sarah died.

20 Q. You see, Mrs Folbigg never told you that she turned the light on, did she?

A. Yes, she did.

25 Q. She never told that a light had been on?

A. Yes, she did.

Q. And are you sure about that?

A. I am one hundred per cent positive.

30 Q. Do you think you might have got it wrong?

A. No.

35 Q. And you told the police about that conversation, substantially, when you spoke to them in 1999, did you?

A. Yes.

Q. Because you thought that it was relevant?

A. Yes.

40 Q. And you thought it might be of use to them in their investigation which you understood was then going on?

A. Yes.

45 Q. Now, you had dealings with Kathleen again after the birth of Laura?

A. Yes.

50 Q. In fact is this correct, you had more dealing with her in the lifetime of that child than in any of the others?

A. Yes.

55 Q. And did you observe that Kathleen in her response to the arrival of Laura was absolutely beaming?

A. Yes.

Q. Overjoyed?

A. No, just very happy.

Q. Would it be a fair description to say that she was absolutely beaming?

5 A. No, very happy. It's two different things.

Q. Would that be an exaggeration that she was absolutely beaming?

A. Yes.

10 Q. You see, the statement that you made to the police in 1999 describes Kathleen's reaction to the birth of Laura, doesn't it?

A. Yes.

15 Q. And is it a true description or a false one?

A. It's true.

Q. You said this, paragraph 24:

20 "I remember when Craig and Kathy's fourth child, Laura, was born on 7 August 1997. I spoke with Craig and Kathy on the telephone after the birth and up to January 1998 when we visited them. Kathy was absolutely
25 beaming."

You said that in that statement, didn't you?

A. Yes.

30 Q. Was that true?

A. Yes.

Q. So that wasn't an exaggeration about her response?

35 A. No, she was very happy.

Q. Beaming is how you described it to the police?

A. Yes.

40 Q. And that was true?

A. Yes.

Q. And you also said to the police, "It was the happiest I had known Kathy to be for a long time"?

45 A. Yes.

Q. Was that true?

A. Yes.

50 Q. But you also report about the progress of Laura?

A. Yes.

Q. Did she tell you that she was a good baby?

A. Yes.

55 Q. By "good baby" did you understand her to mean not a great deal of trouble?

A. That's right.

Q. Well behaved?

A. Yes.

5 Q. Did Kathleen tell you that Laura was a good sleeper?

A. Yes.

Q. And a good eater?

10

A. Yes.

Q. Did you also have some discussion with Kathleen about the alarm, the sleep alarm monitor?

A. Yes.

15 Q. And did Kathleen tell you that it scared her sometimes?

A. Yes.

Q. Made her a bit nervous sometimes?

20

A. Going off all the time.

Q. You made observations yourself in the times you were with Laura that she was a happy child?

25

A. Yes.

Q. And very healthy?

A. Yes.

30 Q. In fact you thought she always seemed to be laughing?

A. She was a very happy little girl.

Q. And you would see her regularly in her mother's company?

35

A. Yes, and father.

Q. I beg your pardon?

A. And father.

40 Q. And she would appear happy in the company of her mother?

A. Yes.

45 Q. Now, again, did you observe or have dealings with Kathleen in the time after Laura died?

A. Yes.

Q. And it appeared to you that she was taking it pretty hard, didn't it?

50

A. Yes.

Q. You had a conversation with her over the telephone in the period very soon after the death of Laura, is that right?

55

A. That's right.

Q. And she sounded pretty bad?

A. Very upset.

- Q. So upset that you didn't want to go into details about what had happened?
- 5 A. No, because she had been sedated.
- Q. That was your impression, was it?
- A. That was what I was told.
- Q. Because she was so distressed by the death of her daughter?
- 10 A. Because she had been sedated and was very sleepy.
- Q. Because of the distress?
- A. Yes.
- 15 Q. That is why she was sedated?
- A. Yes.
- Q. Now, you gave evidence here about observing two occasions when you saw Kathleen Folbigg lose her temper with Laura?
- 20 A. Yes.
- Q. And those occasions were in Melbourne, were they?
- 25 A. Yes.
- Q. And in the Christmas period, '98 to '99?
- A. Yes, '98, yep, not '99. They left before New Year.
- 30 Q. And Laura was about 17 months old?
- A. Yes.
- Q. How long did Kathleen and Laura stay at your home on that visit?
- 35 A. About five - between five and 10 days. Five, six, seven, eight. Between five and 10 days, and Craig--
- Q. So they were down there for Christmas. When was the next time you saw Kathleen after that, after that visit?
- 40 A. When, after Laura had died.
- Q. So you didn't see her again until March?
- A. Yes.
- 45 Q. Of 1999?
- A. That's right.
- Q. And this visit that they made for Christmas '98/'99, was that the first time you had seen them for quite a while?
- 50 A. Yes.
- Q. For about how long?
- 55 A. It was from just after Christmas until 1 March.
- Q. But before that, before they came down for this visit to you in Melbourne?

A. Yes.

Q. When had you last seen them before that?

5

A. At my father's memorial.

Q. In the early part of 1998?

A. When Laura was about five months old.

10 Q. And these are the only two occasions you referred to on which you observed Kathleen losing her temper with Laura, is that right?

A. That's right.

15 Q. In all the years that you observed her as a parent, these were the only occasions you saw her lose her temper with Laura, is that right?

A. That's right.

20 Q. Or any child?

A. With Laura, that's right.

Q. Or any child?

25 A. I only saw the two, Sarah and Laura. I only saw Patrick when he was in hospital when he was first born.

Q. These are the only two occasions of bad temper towards her two children of Kathleen Folbigg?

A. Yes.

30 Q. I suggest to you in your evidence you exaggerated gravely about how bad those incidents were?

A. I did not.

35 Q. Really you saw nothing in her behaviour towards Laura that was ever out of the ordinary?

A. No, I did not. I saw Kathy's temper which quite surprised me because I had not seen that side of Kathy before.

40 Q. Are you sure you are not making that up?

A. No, I am not.

Q. Would it be true to say that Kathleen just got a bit angry?

45 A. No, Kathy got angry.

Q. How angry, do you say?

50 A. To grab a child out of a highchair by the arm because a child didn't want to eat was a little bit over the top.

Q. Would this be an untruthful description if you gave it: "Kathy got a bit angry." Would that be untrue?

55 A. That's correct.

Q. Because you say the truth is that she got very angry, is that right?

A. Kathy got angry. She grabbed Laura by the arm and

pulled her straight out of the highchair. I turned and gave her a filthy look, and Kathy turned around and calmed right down. That is exactly how it happened. Kathy got very angry.

5

Q. Did you ever tell the police about that?

A. Yes.

Q. When?

10 A. When I had the interview.

Q. Is that right, you first dealt with the police in relation to this matter in 1999?

15

A. Yes.

Q. Did you refer to Kathleen pulling the child out of the highchair when you spoke to the police in 1999?

20

A. I think so. I'd have to look at my - but I'm not exaggerating on what happened.

Q. Have you got your statement that you made to the police in 1999 with you?

A. Yes.

25

Q. Would you mind getting it out, please? (Witness complied) I will take you to the last page?

A. Yep.

30

Q. Now, at paragraph 34 you refer to Kathy becoming angry with Laura, do you see that?

A. Yes.

35

Q. And were you referring there to this occasion in Melbourne, Christmas '98?

A. Yes.

40

Q. Do you refer there to Kathy being so angry that she pulled Laura out of the highchair?

A. Yes.

Q. And in what terms do you describe that in the statement?

A. Would you explain that a little better, please?

45

Q. I will read the relevant part to you, do you understand?

A. Yes.

50

Q. I also have seen Kathy become angry with Laura. On one occasion Laura wouldn't go to sleep and another time when she was feeding her Kathy got a bit angry and short-tempered with Laura. It probably was because she was tired herself."

55

That is what the statement says?

A. Yes.

Q. Do you say there that you were describing these two episodes that you gave evidence about that happened down in Melbourne Christmas '98?

A. Yes.

5

Q. Because there is nothing in your statement about Kathleen yanking or pulling the child out of the highchair, is there?

A. No, I didn't say that.

10

Q. You didn't tell the police in 1999, did you?

A. No, because I thought it was a witchhunt.

Q. Did you tell the police the truth in 1999?

15

A. Not everything, because I went in there with the impression that they were after - it was a total witchhunt and I was very angry at them even thinking that of Kathy.

20

Q. Did you lie to the police, is that correct, what you are telling us?

A. No, I did not lie. I just did not say everything.

25

Q. Can we take it the descriptions that I read to you about the incidents in Melbourne is true?

A. Yes. I just didn't put exactly how it happened.

Q. So is it true that Kathy got a bit angry?

30

A. Yes, more. I put it that way because I really thought it was a witchhunt after my sister.

Q. Is it true or not that she just got a bit angry?

A. No, she got really angry.

35

Q. So that was a lie to the police when you said she got a bit angry?

A. No, it wasn't. I really thought it was a total witchhunt after my sister.

40

Q. What is the truth? She got angry enough to pull a child out of a highchair?

A. She got angry and pulled Laura off the chair.

45

Q. Was it true that you said to the police she was a bit angry?

A. Yes. As I said, I thought it was a witchhunt and I went in there even stating that this was a witchhunt after Kathy.

50

Q. It could be that you exaggerated this account?

A. No, I haven't.

Q. When did you first tell the police about the highchair incident?

55

A. In the first, in the next, in the second.

Q. Well, the second statement you made this year?

A. Yes.

Q. Is that right? Which would make it, what, four years after the event?

A. Yes.

5

Q. Four years after the highchair event?

A. I have not lied in any of my statements. The first statement was I went in there thinking it was a total witchhunt and I will not go back on what I just said.

10

Q. Do you agree with the proposition the first time you told anyone about this highchair episode, police, that is, was four years afterwards?

15

A. Yes.

Q. Did you deliberately not tell the police when they spoke to you in 1999?

20

A. Yes.

Q. Or had you forgotten in 1999?

A. I deliberately didn't tell them because, I keep on telling you, I thought it was a total witchhunt after my sister.

25

Q. Why did you tell the police in 1999 about the conversation you say you had had with Kathleen Folbigg about what she had done on the night Sarah died? Why did you tell them that in 1999 if you thought they were engaged in a witchhunt?

30

A. Because you have to tell the truth and that is exactly what was said.

Q. So you told them some things but left out others; is that what you now say?

35

A. Yes, I did, and I did it on purpose.

Q. Would you say that you were playing games with the police in 1999?

40

A. No. That was my sister that they were after, when I stated that.

Q. Now, you said that when the Crown Prosecutor asked you about what Kathy had said about the circumstances of Sarah's death, you said this:

45

"Kathy told me that Sarah, that she had woken. Sarah had been put into a single bed next to her because it was easier for her to just find the dummy and put it into Sarah's mouth."

50

A. That's right, and pat her off.

55

Q. Is that something that you say Kathleen told you after Sarah had died?

A. No, that is what Kathy told me, as to why Sarah went into a single bed in the first place.

Q. So that wasn't part of the conversation you were talking about between you and Kathy where Kathy described what had happened?

5 A. No, that was said before. I asked Kathy why Sarah was put into a single bed and that is what Kathy told me as to why she was put into a single bed.

10 Q. Now, you gave evidence about an event when you were lying on a bed suffering a migraine headache and heard a loud high pitched noise?

A. That's right.

15 Q. Had you ever heard that noise before?

A. Only when our fire - smoke detector had gone off.

Q. The particular noise in this house, had you heard that before?

20 A. No.

Q. How old do you say Laura was on this occasion when you heard this high pitched noise?

A. She was around five months old.

25 Q. You were aware as at then that there was a sleep monitor alarm being used for Laura?

A. I had no idea that that was on Laura, because there was no crying coming from the bedroom.

30 Q. You were generally aware that the parents were using such a device in relation to Laura?

A. Yes.

35 Q. Did you make any connection when you heard the noise coming from Laura's bedroom and the information about the monitor and the noise?

A. No, I had no idea what the monitor would even sound like.

40 Q. So these are the only occasions when you heard that sound go off?

A. Yes.

45 Q. And it only lasted for what, a few seconds?

A. Few seconds, very, very loud.

Q. And how long between the two? You heard it twice, did you?

50 A. Yes, I heard it twice.

Q. How long between the two occasions?

A. Within a couple of minutes, in between.

55 Q. Did somebody come down and switch it off?

A. No, because my bedroom door was open.

Q. Are you sure about this?

A. I am positive because it wasn't fully closed.

Q. You see--

A. With a migraine you don't go out cold with a sleep because it is just about killing your head.

5

Q. Did someone else in the household come down and switch it off?

A. No.

10

Q. It turned off spontaneously, on your description of it?

A. Yes.

15

Q. Twice?

A. Yes. Laura never even - there was no noise from her bedroom so I had no idea what the noise was. You would think she would have woke up and made a noise, it was such a loud noise.

20

Q. Are you sure your memory is correct about this?

A. I am positive.

Q. Did you tell the police about this in 1999?

A. Yes.

25

Q. Sure about that?

A. Oh, look, I have to read it. Is that all right with you?

30

Q. Yes. Have a look at your first statement and I might assist you if I can by directing you to the area of time referred to in the statement where this might have occurred. If you would go to paragraph please in your first statement.

35

A. Okay.

Q. Now, you describe there, among other things, a visit that you made to the Folbiggs in January 1998. Do you see that?

40

A. Yes.

Q. And is that a reference to the occasion when you came down, or came up for the memorial for your father?

45

A. Yes.

Q. And you said there that Kathy was absolutely beaming and so on?

A. Yes, she was.

50

Q. Very happy?

A. Yes, she was.

Q. Laura at this stage was about five months old?

55

A. That's right.

Q. Now just go to about halfway into the paragraph. You say this:

"Kathy said that a machine was connected to Laura when she was asleep to monitor her."

5 A. That's right.

Q. "That machine had an alarm and it often went off which scared Kathy."

A. That's right.

10 Q. "The only problems Kathy said she had with the machine was the machine going off and Laura getting the flu. Kathy took her to the doctor over flu, and I think she was put into hospital with the flu overnight on one
15 occasion."

A. Yes, she was.

20 Q. Now, that is the only description of your observation of this household referable to the period of this visit in January 1998. Do you agree with that?

A. That's right.

25 Q. And there is nothing there about the monitor or a loud sound going off and any apparent neglect of that by Kathleen. Do you agree with that?

A. That's right.

30 Q. And in fact, that part of the statement describing that time reads as though there were no problems at all?

A. That's right.

35 Q. And certainly none that you observed about Kathleen apparently neglecting to respond to alarm calls?

A. Nobody came in when the alarm went off.

40 Q. Is that something you made up after making this statement to the police?

A. Nobody came in when the alarm went off.

Q. Why didn't you tell the police about it when you made the statement in 1999?

45 A. As I said before, it was a witchhunt in my first impression of what they were doing with Kathy.

Q. Why didn't you tell the police that nobody in the household had responded to an alarm call that was apparently Laura's sleep alarm going off?

50 A. Because I didn't even know it was Laura's sleep alarm, so how can I tell anybody else.

Q. You didn't know it was Laura's sleep alarm?

55 A. I had no idea that that was Laura's monitor going off. You would think if the noise was so loud that Laura would have woken up, but there was no baby crying or anything with that loud noise going off. Nobody came in.

Q. Was Laura in the bedroom?

A. Yes.

5 Q. How do you know that?

A. Because when we got there Kathy and Craig told us that Laura was in bed asleep.

10 Q. You see, you gave evidence that after that went off Kathleen told you, in effect, that that was the baby monitor?

A. That's when everybody came back in and I got up and went out and told them that the noise had gone off and what was it, and Kathy told us it was the monitor.

15 Q. What did you think had happened that no-one had heard it?

A. I thought it was unusual that Kathy didn't have her little baby walkie-talkie out there with her because it was in the house and they didn't take it out with them.

20 Q. So in other words the picture you are painting is one of neglect on this occasion?

A. That is not what I'm saying. I'm saying it should have been taken out, I was surprised it hadn't been. If I heard the noise somebody should have heard outside, and Kathy was blasé when I told her.

30 Q. What reason do you give for not telling the police that in 1999?

A. Because of what I said before, it was a witchhunt.

Q. What was to stop you from telling the police?

A. Because I couldn't believe what they were saying and what they wanted to have me for.

40 Q. You had in your mind, if it was true, relevant information that could shed light on the relationship between Kathleen Folbigg and her children, or her child?

A. Yes.

45 Q. And did you think the police might be concerned to get that information?

A. I could not believe--

Q. Please answer the question. Did you believe they might be concerned to get the information from you?

A. Yes.

50

Q. But you say you held it back?

A. Yes, I did.

55 Q. You see, that is not true, is it?

A. Yes, it is. Because that was - that is my sister and I had - no way was I going to believe that Kathy could do anything, that it was a total witchhunt after my sister then and I'm not going to change what I just

said then or any other time.

5 Q. Now, you also gave some evidence about Kathleen's behaviour following the death of Laura where her mood suddenly changed. Do you recall giving that evidence?
A. Yes, I do.

10 Q. And how long after the death of Laura was that, can you tell us?
A. What do you exactly mean? Can you redo what you are talking about, please?

15 Q. Laura died on 1 March 1999.
A. Yes, my husband's birthday.

20 Q. When was that occasion when you say that she said "it's a load off my mind" and so forth?
A. When my daughter and I went up the next day and when we went to the funeral, we went into the church, the service and all that was done, we all came out, saw everybody. We got into my daughter's car, Craig was driving, my daughter was in the front, Craig's brother was sitting on the other side, Kathy was right next to me. Kathy was in the middle of the back seat.

25 Q. About how long was it after 1 March? The next day, a week later?
A. It was at the funeral.

30 Q. Can you tell us how long after the death that was?
A. Oh, a week.

35 Q. And in that week had you come up to the Folbiggs' house?
A. Yes, I did.

Q. Were you staying with them?
A. Yes, I was.

40 Q. And in that period did Kathleen tell you that she felt guilty because she thought she should have gone and checked Laura earlier?
A. Yes, she did.

45 Q. Was she upset when she said that?
A. No. She just said that she felt very guilty, she should have done it.

50 Q. And in that period you stayed with Kathleen along with your daughter Tanya, is that right?
A. That's right.

55 Q. And you stayed with her most of the time while you were staying, that is, stayed in her company most of the time during that visit. Is that right?
A. Yes, I did.

Q. Was that to try and keep her spirits up?

A. Yes.

Q. Because she seemed so distressed; is that right?

5 A. She would have her really down moments and have her up times as well before the funeral.

Q. You were trying to keep her spirits up?

A. Yes, she wanted me there.

10 Q. Did you notice this sometimes when you were in her company, that if she saw a baby, that is, a baby in the street or around about--

A. Yes.

15 Q. --she would look away because it was hard for her to see a baby at this time?

A. Yes, she did.

Q. And she became upset on such occasions?

20 A. She just would look away.

Q. Because it was hard for her?

A. Yes.

25 CROWN PROSECUTOR: I ask that the last question and answer be deleted from the evidence. I did not object to it in time, but it is inadmissible. It's a comment.

30 HIS HONOUR: I don't think it is a comment, it is an observation of how things seemed. It can stand.

COOK: Q. Did you tell the police when you saw them in 1999 about Kathleen's unusual behaviour at the wake?

35 A. I told them after the second. To my recollection it was the second time.

Q. Do you agree with me that you didn't tell them about that when you spoke to them in 1999?

40 A. That's right.

Q. And of course you made your statement to them on 24 July 1999?

A. That's right.

45 Q. Only a few months after Laura's funeral?

A. Yes.

Q. If you had made this observation about Kathleen's behaviour you would have remembered it in July 1999, wouldn't you?

50 A. I purposely held it back.

Q. I'm sorry?

55 A. I held it back. I was not going to, as I said before, I really thought it was a total witchhunt after my sister.

Q. So is the answer to the question this: Yes, you

didn't tell them?

A. Yes, that's right.

Q. Intentionally?

5 A. Yes.

Q. Were you trying to mislead them?

A. No.

10 Q. See, you paint a picture to the police that in the period you stayed with Kathleen following the death of Laura that she was grieving. Isn't that the effect of the picture you painted to them in 1999?

15 A. That's right. I could not and would not have anybody saying things about my sister, there was just no way.

Q. Do you say now the picture you painted to the police was an inaccurate one about her behaviour after the death of Laura?

20 A. Yes.

Q. Was it a deliberate lie?

25 A. No.

Q. Was it false?

A. No, it was protecting. It's my sister.

30 Q. You see, you have made up this change in demeanour that you say you observed in her?

A. No, I have not made up. I was, I was and still am very protective of Kathy.

35 Q. You said that you had a good recollection of that conversation with Kathleen Folbigg about the death of Sarah?

A. Yes.

40 Q. Did you indicate to anybody before you came into court today that you might have some trouble recounting that conversation word for word in evidence?

A. No.

45 Q. I beg your pardon?

A. No. Are you talking about how Sarah died?

Q. Yes?

A. No, that is a hundred per cent correct, it is what was told to me.

50 Q. Did you tell anyone from the Prosecutor's side that you might have a little difficulty in the witness box recounting the conversation?

A. No.

55 Q. Can you explain why you put in Laura, that is the word "Laura" twice in that conversation that you had with Kathleen about Sarah?

A. Because I honestly was so focussed with the name Laura the whole time. That was definitely Sarah and I will not change on that.

5 Q. You agree that you did not tell the police about this dramatic change in Kathleen's behaviour after the death of Laura until January this year?

A. That's right.

10 Q. Which was the better part of four years after it happened?

A. That's right.

Q. Do you have contact with Craig Folbigg?

15 A. No, I do not.

Q. When was the last time you spoke to him?

A. It would be over two years.

20 Q. Have you ever had any discussion with him about Kathleen's behaviour after the death of Laura?

A. Yes.

Q. And was that before you went to see the police or spoke to the police about this matter this year?

25 A. Yes.

Q. And after you spoke to the police in 1999?

30 A. I think so.

Q. And did you and he discuss what you were going to say?

A. No.

35 Q. In your statements to the police?

A. No way, no way.

Q. Did you tell him why you hadn't told the police about that observation when you first spoke to the police in July 1999?

40 A. No, I did not.

CROWN PROSECUTOR: There is nothing that arises in cross-examination but there is one matter I wish to clarify from her evidence-in-chief.

45

HIS HONOUR: You may do that.

<FURTHER EVIDENCE-IN-CHIEF

50

CROWN PROSECUTOR: Q. You gave evidence about when you had the migraine?

A. Yes.

55 Q. You heard the alarm going off twice?

A. Yes.

Q. Some people came inside from the swimming pool

area?

A. Yes.

5 Q. You got up and went to the loungeroom?

A. Yes.

10 Q. There was a discussion you gave evidence about?
A. I went straight out, when everybody came in I got up and went out and I told Kathy there was a very loud noise came and it went off twice.

Q. At the time that you told her that, where was Laura?

15 A. Laura was in the bedroom.

Q. Had you heard or seen whether Laura had woken up yet?

A. No, Laura was still in the bedroom.

20 Q. Did anybody go running into Laura's room?

A. No.

Q. Did anybody go to see if Laura was all right?

25 A. No, they didn't hear it.

<FURTHER CROSS-EXAMINATION

COOK: Q. Craig was one of the people present then, is that right?

30 A. That's right, everyone was there, came back in.

Q. You said nobody went back into the child's room?

A. No, nobody did.

35 <WITNESS RETIRED AND EXCUSED

<DEBORAH ANN GRACE(3.02PM)
SWORN AND EXAMINED

40 CROWN PROSECUTOR: Q. Mrs Grace, would you please tell the court your full name?

A. Deborah Ann Grace.

45 Q. And did you live with your husband and four children at 9 Millard Close, Singleton?

A. Yes, I did.

Q. And over what period of time?

50 A. Two years.

Q. Did that include 1999?

A. Yes, it did.

55 Q. When you were living there did you come to know the accused, Kathleen, and her husband, Craig Folbigg?

A. Yes, I did.

Q. They, of course, lived across the road at number 8?

- A. Right next door.
- Q. Next door, was it?
A. (Witness nods.)
- 5 Q. Did you come to know them fairly well?
A. Yes, I did.
- 10 Q. Did your children go to their place?
A. Only on probably about two or three occasions.
- Q. And did you come to know their daughter, Laura?
A. Yes, I did.
- 15 Q. Now, I would like to ask you some questions about the third week of February 1999 on a day when Kathy came over to your house late in the afternoon with Laura. Do you know what I am talking about?
A. Yes, I do.
- 20 Q. Do you know that on 1 March 1999 that Laura died?
A. Yes, I do.
- 25 Q. How long before Laura's death was this day in February that Kathy came over to your place with Laura?
A. Sorry?
- Q. How long before Laura died was this day that I am going to ask you about?
30 A. Oh, approximately four to six weeks.
- Q. Well, if Laura died on 1 March 1999 and I think you have agreed that this occurred on the third week of February 1999?
35 A. Mm.
- Q. Does that help you to be more precise as to when it was before Laura's death this happened? Do you understand my question?
40 A. No, I'm sorry, I don't.
- Q. Laura died on 1 March?
A. Yes.
- 45 Q. You have agreed that this visit was in the third week of February?
A. Right. Okay, oh, okay.
- 50 Q. Can you be more precise when it was in relation to Laura's death?
A. Approximately eight days.
- Q. About eight days before Laura died?
A. Yes.
- 55 Q. What sort of a mood was Laura in when Kath came over to your place?
A. Laura was fine. Laura - it was late in the

afternoon, which is when Kath normally came to visit me, late in the afternoons, and Laura was fine. There was a few times there that she did get a little bit grizzly but nothing to concern.

5

Q. Nothing out of the ordinary?

A. Not at all, not for a little 18 month old girl.

10

Q. What happened? What did Kath say to Laura? What did Kath do?

A. Pretty much Kath just said, "You're being silly. There's no nonsense like that, we are going home." And pretty much they just walked straight out the door.

15

Q. In your view was Laura being silly or naughty?

A. Not at all, no.

Q. What view did you form about what had happened?

20

OBJECTION (COOK - QUESTION WITHDRAWN)

Q. Would you pause before you answer this question? In your view was what Kathleen did an appropriate reaction for a parent to what Laura had been like?

25

OBJECTION (COOK - LEADING, IRRELEVANT)

COOK: This witness's opinion as to the appropriateness of a type of questioning.

30

HIS HONOUR: I will allow the question.

CROWN PROSECUTOR: On reflection, I withdraw the question.

35

Q. On the day after Laura died did you go over to Kath and Craig's house?

A. Yes, I did.

40

Q. And did you speak to Kathleen?

A. Yes.

45

Q. What did Kathleen say to you?

A. It was actually a phone call to start off with on the Tuesday morning and Kath had just said to me, "I've got some sad news to tell you, Laura has died." And over the phone I just said "How?" And she said "She died in her sleep." And then later on during that day, because I said, you know, "I will come over and see you shortly" and then later on that day I went over and both Kathy and Craig were sitting out the front.

50

Q. Did you see Craig?

A. Yes, I did.

55

Q. What was Craig doing?

A. He was devastated. He was just crying, uncontrollably.

Q. What about Kathleen?

A. Nothing at all.

5 Q. What did she look like?

A. Straight faced. There were no tears in her eyes, there was nothing, no emotion whatsoever.

Q. Did you ask her anything?

10 A. Yes. Once again I did ask her how this could have happened and Kath's response was, "Just like the rest of them."

<CROSS-EXAMINATION

15

COOK: Q. Do you think she might have been in shock when you saw her?

A. Possible.

20 Q. You were only there for a few minutes on this occasion, is that right?

A. Approximately 10 to 15 minutes, yes.

25 Q. Just going back a little bit, Ms Grace, you observed in the months following the birth of Laura the Folbiggs as a family unit?

A. That's correct.

30 Q. And did you make observations which led you to think that Kathleen appeared to be a good mother?

A. Yes, I did.

Q. And that she appeared to love her family?

35 A. Yes, she did.

Q. And they seemed like a pretty happy family?

A. Yes.

40 Q. Did you also observe that the house, the Folbigg house was always, when you went to see it, very clean and tidy?

A. Yes.

Q. And a lovely home?

45 A. Yes.

Q. And the child, Laura, was always well cared for?

A. Yes.

50 Q. Now, this event that you are describing about, I think you said, eight days before Laura died, how would you describe Laura's behaviour on this occasion before her mother took her home?

55 A. Like I said before, she was fine. Typical 18 month old daughter - girl.

Q. You were asked by the Crown Prosecutor whether she was being silly or naughty and you said "Not at all?"

A. No.

Q. So behaving perfectly well?

A. Yes.

5

Q. Are you sure about that?

A. Yes.

10 Q. In other words, you are saying that the response by Kathleen was in relation to behaviour by her child which was good behaviour?

A. Yes.

15 Q. Would it be true to say that Laura was a little bit moody on this occasion? Would that be true?

A. Probably wouldn't call it moody, no.

Q. Would it be true to say that she was whingeing a little bit?

20 A. A little bit.

Q. So not behaving that well really; is that right?

A. I wouldn't say she was out of character, no.

25 Q. Was she playing up a bit?

A. I've got five children. For what my children do and what I saw Laura do, no, she wasn't playing up a bit.

30 Q. Would it be fair to say that she wasn't playing up that bad, but she was playing up a little bit. Would that be fair to say?

A. No, I wouldn't say she was playing up a little bit.

35 Q. What, not playing up at all?

A. No.

Q. See, you gave a description to the police about this episode, didn't you?

40 A. Yes, I did.

Q. Was it a truthful and accurate description?

A. Yes, it was.

45 Q. You said to the police this:

"Laura was a little moody and was whingeing a little bit."

50 A. Yes, whingeing is different to being naughty a little bit.

Q. "Kath said to Laura, you are being silly we are going home."?

55 A. Yes.

Q. You thought this behaviour was strange because "Laura was not playing up that bad"?

A. That's correct.

Q. In other words, playing up a little bit but it wasn't too bad. Is that fair?

5 A. Yes.

Q. In other words, it wouldn't be really quite accurate to say that she was not at all being silly or naughty, would it?

10 A. Sorry, could you repeat that?

Q. Well, the Crown Prosecutor asked you whether she was being silly or naughty and you said not at all. That's not quite accurate, is it?

15 A. I wouldn't say that it was playing up, honestly. I mean, you are talking about something that happened six years ago. If I could honestly remember what had happened and what was said then I would, but what's in my statement is that she was whingeing and a little bit moody. I honestly cannot say right now what Laura had said or done at that stage on that day now.

Q. Well, she was being moody, wasn't she?

25 A. Yes.

Q. And that's what you told the police?

A. Yes.

Q. Does that mean that she was being a bit difficult?

30 A. A little bit difficult.

Q. And some parents are stricter than others, aren't they?

35 A. Yes, of course they are.

Q. You might tolerate behaviour in one of your children that Kathleen Folbigg might not tolerate in Laura?

40 A. That's right.

Q. The truth is this, is it, Laura was being moody; is that right?

A. Yes.

45 Q. Whingeing; is that right?

A. A little bit.

Q. And playing up a little bit?

50 A. Yes.

Q. So it wouldn't be quite the truth to say that she was presenting no problem at all, would it? That wouldn't be true?

55 A. No.

Q. Her mother's response was simply to say, "You are being silly. We are going home."

A. That's correct.

Q. And she just said that?

A. Yes.

5 Q. You see, a little while ago I asked you this question:

10 "Would it be true to say that Laura was a little bit moody on this occasion? Would that be true?" You said, "Probably wouldn't call it moody, no."

Now, is that a true answer when you gave it?

15 A. Trying to think back it probably - I would have assumed it would have been a true story but the way you are now explaining the situation, I will change it as if to say, yes, she was a little bit moody.

20 Q. You see, you said in your statement she was moody, a little, a little moody; correct?

A. Yes.

25 Q. You said in evidence that it wouldn't be true to say that she was a little bit moody; right?

A. Mm.

Q. They are two different things, aren't they?

A. Yes.

30 Q. Which is true?

A. A little bit moody.

<NO RE-EXAMINATION

35 <WITNESS RETIRED AND EXCUSED

<BARBARA PATRICIA UNICOMB(3.16PM)
SWORN AND EXAMINED

40 CROWN PROSECUTOR: Q. Mrs Unicomb, would you please tell the court your full name?

A. Barbara Patricia Unicomb.

45 Q. In 1999 did you live at number 6 Millard Close, Singleton?

A. Yes, I did.

50 Q. Did you come to know Craig and Kathleen Folbigg at number 8 Millard Close, Singleton?

A. Yes, I did.

Q. Was there another neighbour in that area known as Melissa Smith?

55 A. That's correct, yes.

Q. Where did Melissa live?

A. Next door to me.

Q. Did Melissa become friendly with Kathleen Folbigg?
A. Yes, she did.

5 Q. And from time to time were you aware that Kathleen used to leave her baby Laura with Melissa?
A. Yes.

10 Q. Did you become aware of that because sometimes you would go to Melissa's place?
A. Yes.

Q. And see Laura?
A. That's right.

15 Q. When was the first time that you remember going, or how old was Laura the first time that you remember going to Melissa's place and seeing that Laura had been left there by Kathleen?
20 A. When Laura was about three months old.

Q. And on that occasion, that first occasion, was Laura awake or asleep?
A. She was asleep when I was over there.

25 Q. Are you able to say whether or not there was any apnoea blanket attached to Laura?
A. No, there wasn't.

30 Q. Any sort of monitoring device?
A. No.

Q. Are you able to say whether or not any such device appeared to have been left at Melissa's place?
35 A. No, there wasn't.

<CROSS-EXAMINATION

40 COOK: Q. On this occasion the baby Laura was in the lounge room, wasn't she?
A. Yes, that's correct.

Q. Was that where Melissa was when you spoke to her?
A. Yes.

45 Q. So she was there in attendance with the child?
A. Yes, that's right.

50 Q. And you later moved. Some time later in March 1999 you learnt about Laura dying; is that right?
A. Yes, that's correct.

Q. The day after she died did you go to Craig and Kathleen's house?
55 A. Yes, I did.

Q. And you observed that both of them were upset?
A. Yes. Craig was out the front and Kathy was inside.

Q. And they both appeared upset?

A. Craig was devastated, Kathy was in the kitchen.

Q. Did she appear upset?

5 A. I suppose, yes, she did, I suppose, yeah.

Q. Is there any supposing about it?

A. Well no, yes, she was.

10 Q. You saw Kathleen in the company of Laura sometimes?

A. Yes.

Q. And on all of the occasions you saw Kathleen in the
15 company of her daughter Laura, she was always, the
relationship was good?

A. Yes, she was a good mother.

<NO RE-EXAMINATION

20 <WITNESS RETIRED AND EXECUTING

<MELISSA ANN SMITH(3.22PM)
SWORN AND EXAMINED

25 CROWN PROSECUTOR: Q. Mrs Smith, would you please tell
the court your full name?

A. Melissa Ann Smith.

Q. Mrs Smith, in 1997 to 1999 did you and your husband
30 and your three children live at 5 Millard Close,
Singleton?

A. That's right.

Q. Is it correct that in fact you had another child,
35 Mark, born in 1998 who died of SIDS?

A. Yes.

Q. In about 1997 did you meet Craig and Kathleen
40 Folbigg?

A. I did.

Q. Now, you were living at 5 Millard Close, Singleton,
and they were living at number 8?

45 A. I actually met them before then.

Q. When did you meet them?

50 A. Probably was 12 months prior, maybe six months, I
don't know, through Karen and Ray Hall because I was
working at Singleton detailing at the time.

Q. Did you come to know both of them because of that?

A. Yes.

Q. About 12 months after you got to know them did
55 Kathleen give birth to her daughter, Laura?

A. She did.

Q. Were you aware that they had lost three other

children prior to Laura's birth?

A. I was.

5 Q. After the birth of Laura did Kathleen tell you that Laura would be placed on a sleep monitor?

A. She did.

10 Q. And did you have any discussions about that with her?

A. No.

Q. Did she tell you any more about it?

A. No.

15 Q. Did Kathy ever bring Laura over to your place to leave Laura with you when she went out?

A. Yes.

20 Q. And how old was Laura the first time that Kathy did that?

A. I can't remember.

Q. Sorry?

25 A. I said I can't remember.

Q. Are you able to say whether, are you able to even approximate how old she was, how old Laura was?

A. Maybe a month old. I don't know.

30 Q. Have you made a statement in this matter?

A. I have probably, yeah.

Q. Would it assist you to refresh your recollection from the statement?

35 A. Yes.

CROWN PROSECUTOR: I seek your Honour's leave.

40 HIS HONOUR: Q. Yes, you may look at your statement, Mrs Smith. Do you have a copy there?

A. No.

45 CROWN PROSECUTOR: Q. Would you have a look at this document, please. (Statement shown.) Is that your statement?

A. That is.

50 Q. Could you go to paragraph 6 on page 2, please, and just read the first sentence to yourself.

A. Yes.

Q. Does that assist you to remember how old Laura was the first time Kathy brought her over to your house and asked you to look after her?

55 A. Yes.

Q. How old was she?

A. Six weeks. I said four so I was pretty close.

- Q. Did Kathy say where she was going that day?
A. Yes, to the gym.
- 5 Q. Did you agree to look after Laura?
A. Yes, I did.
- Q. Were you reluctant to do that?
- 10 OBJECTION. (COOK). QUESTION WITHDRAWN
- Q. Did Kathy give you any sort of monitor?
A. No.
- 15 Q. How long did she leave Laura for?
A. Approximately two hours.
- Q. And during that time did Laura go to sleep?
A. Yes.
- 20 Q. Where did she go to sleep?
A. I nursed her, actually, the whole time.
- Q. You nursed her?
A. Yes.
- 25 Q. Why did you do that?
A. Well, she was a little baby and I didn't like to leave her anywhere. I only had a lounge. I wouldn't put her in the bedroom.
- 30 Q. When was the next occasion that you looked after Laura?
A. As in time frame or--
- 35 Q. Her age or time frame, whichever you are able to say. Feel free to refer to your statement, if you wish?
A. Six months.
- 40 Q. About six months old?
A. Yes.
- Q. And on that occasion do you know where Kathy went?
A. To the gym.
- 45 Q. And on that occasion how long did she leave Laura with you for?
A. Approximately two hours.
- 50 Q. Did Kathy give you a monitor?
A. No.
- Q. Do you know if she slept on that occasion?
A. I can't remember. I don't think she did, actually, I think she was a little unsettled.
- 55 Q. She was unsettled?

- A. A little bit.
- Q. When was the next time that you looked after Laura?
A. I'll have a look. I think there was one more
5 occasion. Eleven months.
- Q. About eleven months old?
A. Yes.
- 10 Q. On that occasion where did Kathy go?
A. To the gym.
- Q. Initially did she bring Laura over to your place,
or what?
15 A. I think that was the time that I asked to go over
to Kathy's place.
- Q. You asked her if you could mind Laura at Kathy's
place?
20 A. Yeah.
- Q. Why did you do that?
A. So she could be on the monitor.
- 25 Q. Had Kathy brought Laura over to your place first?
A. No, I would say she had organised it beforehand,
yeah.
- Q. Did Kathy agree to you looking after Laura at her
place?
30 A. Yes.
- Q. Did Laura sleep on that occasion, do you know?
A. Yes, she did.
35
- Q. Where did she sleep?
A. In her crib.
- Q. Was she attached to the monitor?
40 A. Yes.
- Q. Who attached her to the monitor?
A. Kath did before she left.
- 45 Q. Were there many, many other occasions when you saw
Laura?
A. Yes.
- Q. Apart from the times that you babysat her?
50 A. Yes.
- Q. Did she appear to be a healthy and happy child?
A. She was.
- 55 Q. On any of the occasions that you saw her when she
was asleep, did she appear to have any trouble
breathing?
A. No.

Q. Did she appear to sleep well?
A. Yes.

5 Q. Do you know from your own personal knowledge whether Kathy left Laura with any other people who lived in the area?

10 OBJECTION (COOK - HEARSAY)

HIS HONOUR: No, from her own personal observations.

CROWN PROSECUTOR: I will make that absolutely clear.

15 Q. Do you know from anything you have seen if Kathy left Laura with any other people who lived in the area?
A. I think she had, yes.

20 Q. Did you ever see Laura left with any other people?
A. I saw Karen and Ray Hall over there, so--

Q. You saw?
A. Karen and Ray Hall.

25 Q. Did you see Laura at her house?
A. No, not at her house, no.

30 Q. Where did you see Laura?
A. I saw Karen at Craig and Kath's place.

Q. Did you ever see Laura being minded at anybody else's place?
A. No.

35 <CROSS-EXAMINATION

COOK: Q. On all the occasions you saw Laura did she seem to you to be a happy child?
40 A. Yes, she was.

Q. And apparently well-cared for?
A. Yes.

45 Q. Always clean and apparently well-fed?
A. Always.

Q. You never had any problems with her?
A. No.

50 Q. And you babysat her three times?
A. Yes.

55 Q. You said that the first occasion was when she was about six weeks old?
A. Yes.

Q. Do you think it actually might have been a bit later than that, that is, when she was about ten weeks

or three months?

A. Not that I recall.

5 Q. We are talking about a first babysitting which would have been in 1997; do you agree with that?

A. Yes.

10 Q. Because the child was born in August 1997; do you understand?

A. Yes, yes.

15 Q. And you first, is this correct, told the police about your babysitting this child in March 1999; is that right?

A. I assume so.

20 Q. That's the statement in front of you?

A. Yes. Well, the statement is correct.

20 Q. And that's made on 15 March 1999?

A. Yes.

25 Q. So you were then going back on your memory to a period in the latter part of 1997?

A. Yes.

30 Q. Do you think you might be mistaken about just how young Laura was when she was first looked after by you?

A. Not to my knowledge.

35 Q. I suggest to you the length of time that you minded Laura on any occasion was never as long as two hours. What do you say to that?

A. I say that's incorrect.

40 Q. I suggest to you it was actually substantially shorter than that on each occasion. What do you say to that?

A. I say that's incorrect.

45 Q. Now, you made some observations about Kathleen's response and behaviour following the birth of Laura; is that right? Her response to the birth, how she seemed after the birth of Laura. Do you understand?

A. Yes.

50 Q. And did it appear to you that she, together with Craig, were delighted with the baby?

A. Yes.

55 Q. And they were very happy?

A. Yes.

Q. You also made some observations about Kathleen Folbigg's response to the death of her child, didn't you?

A. Yes.

Q. And you saw her on the day her child died after the death, didn't you?

A. Yes, I did.

5 Q. And you saw that Kathleen was sitting in a chair crying hysterically?

A. That's correct.

10 Q. And she was shaking; is that right?

A. That's correct.

Q. And her grief was such that it distressed you just looking at her?

15 A. That's correct.

Q. And she was devastated?

A. That was correct.

20 Q. Before Laura was born, that is back in 1997, did you have some discussion with Kathleen Folbigg about a diary?

A. She did mention it once to me.

25 Q. Did she tell you that she kept a diary?

A. She did.

Q. And did she tell you that she wrote in the diary every day?

30 A. She did.

<RE-EXAMINATION

35 CROWN PROSECUTOR: Q. Did she ever show you the diary?

A. No.

Q. Did she ever invite you to read it?

A. No.

40 Q. Did she ever tell you what was in it?

A. No.

Q. Did she ever tell you the kinds of things she wrote in it?

45 A. No.

Q. Did she ever tell you anything about the diary other than that she had a diary?

A. No.

50 Q. You were asked by my learned friend, Mr Cook, some questions about Kathleen's reaction to Laura's death. Do you recall those questions?

A. Yes.

55 Q. You told Mr Cook that she appeared to be devastated?

A. That's correct.

Q. Did you speak to Craig and Kathleen after the day of Laura's death?

A. Not that I can recall.

5 Q. Did you see Kathleen after Laura's death?

A. I would say so, yes.

Q. Do you know whether Kathy went back to the gym after Laura's death?

10 A. She did.

Q. Do you know how long after Laura's death?

A. The week after, to my knowledge.

15 Q. On the occasions that you have seen Kathy after Laura's death, other than on the day of her death, has she appeared to be affected by the death of Laura?

A. Not that I can see.

20 <WITNESS RETIRED AND EXCUSED

<BRIDGET MCCOUBRIE WILCKEN(3.38PM)
SWORN AND EXAMINED

25 HIS HONOUR: Q. If you have notes that you would like to refer to in order to answer any question, you may do so?

A. Thank you.

30 CROWN PROSECUTOR: Q. Doctor, would you please tell the court your full name and your place of work?

A. Bridget McCoubrie Wilcken, and I work at the Children's Hospital at Westmead.

35 Q. Are you employed at the Children's Hospital at Westmead as a senior staff physician?

A. I am.

40 Q. You are a certified clinical geneticist?

A. Yes, I am.

Q. You are certified by the Human Genetics Society of Australasia?

45 A. Yes.

Q. And you are the director of the New South Wales Newborn Screening Programme?

A. I am, yes.

50 Q. And also the director of the New South Wales Biochemical Genetic Service?

A. Yes.

55 Q. Are you also the chairperson of the New South Wales Health Department's Genetics Services Advisory Committee?

A. I am.

Q. Would you tell the court what sort of work you actually do at the Children's Hospital?

5 A. I supervise the newborn screening programme which tests all babies for a variety of metabolic disorders. I supervise particularly offering clinical supervision to the biochemical genetics service which tests people, children, babies, children, adults, with symptoms that suggest the possibility of a genetic metabolic disease and so, those tests are complex. And I provide a
10 clinical service to see patients who do have such disorders.

Q. So if I could summarise that, is your major role as the director of a service that provides blood and urine screening to try and detect genetic and metabolic
15 diseases?

A. That is one of my roles, yes.

Q. And sometimes that screening is a uniform screening done on all newborn infants?
20

A. Yes.

Q. Other times it is specific screening for a variety of reasons for individuals?
25

A. Yes.

Q. And you are also involved in counselling people about genetic and metabolic disorders?

30 A. Treating people and counselling I guess, both.

Q. Would you have a look at this letter, please? You might have a copy of it, but if you don't?

A. Which letter?

35 Q. 10 December 1991?

A. Yes, thank you, I remember that.

Q. Referring if you want to that letter and to any other documents if you wish, do you tell the court that at some stage you conducted some tests on a urine sample that had been taken from a patient on
40 20 October 1990?

A. Yes, I did.

45 Q. And that was from a child by the name of Patrick Folbigg?

A. It was.

Q. And did you conduct some testing on that urine
50 sample?

A. Yes.

Q. Was that because this child had suffered what is colloquially known as a "near miss"?
55

A. Yes, indeed it was.

Q. Could you just, in very broad detail, tell us what kind of testing you did on this urine sample?

5 A. What we tested for was to look for markers, biochemical markers of different sorts of metabolic disorder. So we looked at amino acids in the urine, we looked at organic acids in the urine and fatty acids in the urine, and one or two other things which are less relevant.

10 Q. As a result of the tests that you conducted on that urine sample, were you able to detect any genetic or metabolic disorder in this child?

A. We were not, and one or two genetic or metabolic - or many, could be ruled out utterly.

15 Q. Do you also tell the court that in December of 1999 that your service at the Children's Hospital at Westmead conducted tests on blood samples that had been taken shortly after birth from all four babies of Kathleen Folbigg?

20 A. We did.

Q. Was there a practice during all of the 1990s to take a blood sample from all newborn babies?

A. There was. There has been since the 1970s.

25 Q. Are there various tests that are done on the blood sample from each baby?

A. There are.

30 Q. Is the remaining blood stored?

A. Yes.

Q. Was it on this stored blood that you conducted these tests?

35 A. Yes.

Q. Is the blood stored in a manner so that it is still suitable, years later, for conducting these tests?

40 A. It depends in which tests we mean, and we have done some recent investigations into the suitability of stored samples for doing one of those tests - well, doing several, but in particular the tests that we have been recently conducting by a new process called tandem mass spectrometry. So we have recently been looking back to see how suitable stored samples are.

45 Q. Are they suitable?

A. Yes. For many things, yes, and certainly for these things we are talking about which are fatty acid oxidation defects. They are suitable.

50 Q. In relation to this case, again very broadly speaking, could you just tell us the testing that you did on the four samples of blood from the four Folbigg children?

55 A. All four children had had routine tests which were done on fresh samples at the time which were only for a certain limited number of disorders, and subsequent to their being born we had started this new process of

tandem mass spectrometry. This enables us to look at some 26 or more different analytes, different substances in the blood simultaneously which cover a range of genetic metabolic disorders. It covers pretty well all important disorders related to amino acid metabolism and fatty protein metabolism and fat metabolism, pretty well all covered.

Q. And these are all genetic disorders?

A. Metabolic disorders which might affect families.

Q. In relation to these four babies' blood samples, what were the results?

A. The results were entirely normal.

Q. Did you also conduct a DNA test on these four samples?

A. We conducted a limited DNA test for one disorder.

Q. Is that also a genetic metabolic disorder?

A. Yes.

Q. And again, was there any abnormality found?

A. No. May I enlarge? This was a disorder which had been suspected by one of the doctors who had interviewed at least the parents, I'm not sure if she saw the child. And the DNA test we did virtually, 99%, and I mean that as a very definite percentage, virtually excludes that disorder, but not absolutely.

Q. Has there been any very recent confirmation of the reliability and accuracy of tandem mass spectrometry as a means of analysing these samples?

A. Yes. When I gave my initial deposition, we in New South Wales have been rather at the forefront in introducing this but we had only been doing that testing for under two years at that time, and around the world it wasn't commonly done. It has spread widely in the United States and also in Germany and also in some parts of the rest of Australia show that we have a huge amount more experience and in New South Wales we have tested now almost half a million children, and we are much more sure of the reliability. Some aspects are not reliable, some are extremely reliable, so that we know with a much greater certainty now the reliability.

Q. Doctor, I don't propose to get you to list all of the diseases that you tested for, let alone to explain what sort of diseases they are. But can you give us an idea of how many genetic metabolic diseases you tested these children for?

A. Using tandem mass spectrometry we tested them for at least 30 disorders. The routine newborn screening that they, in any case had, would have added another three or four, and then the urine tests which we performed on Patrick, Sarah when quite well at about three weeks, and Laura when evidently well at about two

weeks, would have added another handful. We might say that probably there are 50 disorders that we have tested for.

5 Q. So something like a total of 50 disorders?
A. Something like a total of 50.

10 Q. Are they in effect all of the genetic disorders that you are capable of testing for?
A. No. There are many more very specific tests, but they are probably all of the disorders, the genetic metabolic disorders which might be associated with unexpected death. I believe that to be true.

15 Q. Doctor, is one of the disorders that you did test for, a disorder which is known as MCAD?
A. Yes.

20 Q. Or MCAD?
A. Commonly MCAD, medium chain acyl CoA dehydrogenase deficiency.

25 Q. That is one of the diseases that these tests in combination were able to exclude?
A. We are confident that that has been excluded utterly.

30 CROWN PROSECUTOR: Perhaps I can inquire whether my friend feels it is in any way necessary to have the actual hard copy results?

COOK: No.

35 <CROSS-EXAMINATION

COOK: Q. The results of the tests that you perform, do they indicate that they tend to exclude certain disorders?
40 A. Mm. Yes, I did say that. That was the earlier deposition, yes.

45 Q. And that the position - when you say the earlier deposition, you mean when you first made a statement about the results of testing?
A. Yes.

50 Q. Then was it the position that they tended to exclude?
A. Yes.

55 Q. And that they weren't definite in excluding certain disorders?
A. They were not definite in excluding large numbers of - all disorders, let me put it that way.

Q. Is the effect of what you are saying that advances since you made that statement have heightened your certainty about the results?

A. It has heightened my certainty about the results, yes.

5 Q. There are certain genetic disorders which, as yet, have not been tested for to your knowledge, is that right, in relation to the tissues of these children?

10 A. There are a very, very large number of genetic disorders in all, and we have tested for those which are small molecule disorders, certain class of disorders, and I think we have probably accounted for all of certain classes of disorders, all known.

Q. Are you aware of a phenomenon or a disorder which is described as IGG deficiency?

15 A. I am, but I am not especially expert in that area.

Q. Can you just tell me whether you can answer this question. Do you know whether any testing has been done to exclude such a possibility of that deficiency being present in any of these children?

20 A. It has not to my knowledge been done.

Q. Are you familiar with a gene which is called the IL-10 gene?

25 A. Interleukin-10, but not really familiar, not very familiar. As I say, it is not an area that I am expert in.

Q. Can we take it there has been no testing that you are aware of?

30 A. None that we have done and none that I am aware of.

Q. In your institution?

35 A. Not in my institution. I can say for sure it hasn't been done in my institution.

Q. This field of testing for genetic and metabolic disorders is one which is rapidly evolving. Do you agree with that?

40 A. Yes. I think the particular area that I am in is not evolving enormously rapidly. Although everything evolves, we hope.

Q. One thing that has changed is that the technology has improved in the last few years?

45 A. Yes, yes, sure.

Q. And if we go back even further, say, the last ten years of your practice, there has been significant advances?

50 A. There have.

Q. In the way the tests are done?

55 A. Indeed, and also some new disorders, that's true.

Q. And the extent to which testing can exclude disorders or confirm them?

A. Yes, if you have got limited samples. I mean we

have limited samples here.

Q. It is always limited by the sample material one has to work with; is that right?

5 A. That's right, yes.

Q. Some of it degrades over time, doesn't it?

A. It does.

10 <RE-EXAMINATION

CROWN PROSECUTOR: Q. Please feel free to say if you are not qualified to answer these questions?

15 A. Yes.

Q. Are you able to say whether IGG deficiency is likely to cause sudden unexpected death in a child?

20 A. I would have thought it very unlikely, but I am not expert in the area. It seems highly unlikely to my general knowledge of genetics.

Q. If a child had an IGG deficiency, are you able to say whether you would expect that child to suffer from recurrent infections and failure to thrive?

25 A. Absolutely.

Q. Would they be signs that would be clearly apparent to parents and doctors during the lifetime of the child?

30 A. I would have thought so, especially if the child was as old as 20 months for sure.

Q. Is IGG a part of the immune response of the human being?

35 A. Yes.

Q. And if there was an IGG deficiency would there be an immune response deficiency in that person?

40 A. Yes, but I am really not an immunologist.

Q. Is that why you would expect that person to have recurrent infections?

A. Yes, indeed, it is.

45 Q. The IL-10 gene that you were asked about, are you aware of whether or not any variant of the IL-10 gene is associated with sudden death in children?

50 A. No, I'm sorry, I couldn't possibly answer that. I don't know very much about it.

<WITNESS RETIRED AND EXCUSED

55 HIS HONOUR: Ladies and gentlemen of the jury, so far as you are concerned I will adjourn this trial until 10.00 o'clock next Wednesday, 23 April. I wish you all a pleasant long weekend and look forward to seeing you on that occasion.

Will you forgive me if I remind you of that thing I
have said to you now on a number of occasions. You now
know, having heard a good part of the evidence and a
good part of the cross-examination of the Crown
5 witnesses, what issues are likely to arise for your
decision and now that you know so much more about the
case you are, I hope you appreciate, so much more
vulnerable to persuasion if you happen to talk to
anybody who is not concerned with this case. You must
10 not discuss the evidence at all, except when you are
present in the jury room with all your fellow jurors.
So please take that to heart.

15

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: I wonder if your Honour would make a variation in relation to bail. I don't understand there is any objection to this.

10 HIS HONOUR: Yes, I will, but may I ask you, as I did before, just to jot it down and I will make an order. I do that because if something doesn't get written down it puts my staff under a lot of pressure very late in the day, and the registry, too.

15 While that is being done, may I just ask you about tomorrow. Mr Crown, a folder of statements was handed to me yesterday, I think, having been brought up to date by your solicitor. You indicated that there might possibly be something to be added to it. I have left it in Queen Square and I haven't begun to look at the documents yet. Would it be possible for me to have a list of the statements that are going to be read tomorrow? I should like to have them all read before I come at 10.

25 CROWN PROSECUTOR: As I understand it there are three areas which we are going to have to look at. One of them is going to be a lot easier because your Honour gave judgment this morning in relation to Dr Cala, and I think that a lot of the ruling in relation to Dr Cala will apply in understanding some of the other witnesses. I think it will be necessary for us still to go over what those other witnesses say just to make sure that we all understand what's admissible and what's not.

35 HIS HONOUR: I will have read all the statements before I arrive at 10.00 tomorrow.

40 CROWN PROSECUTOR: There are only three. Dr Herdson, Dr Beal and Dr Berry.

HIS HONOUR: Didn't you say yesterday, Mr Zahra, that you would have some evidence if Dr Beal were being relied on, but not otherwise.

45 ZAHRA: Were to be called.

50 CROWN PROSECUTOR: We are not going to call him. The second area is in relation to, as I understand it, my friend's assertion that the Crown either ought to or is under some obligation to tender the accused's record of interview. It is not our intention to tender it. There is some debate on that.

55 The third area is this. I don't know whether it was inadvertent or not but I think Mr Cook has added at least a number of days to the trial, if not a week, by referring to two genetic disorders, the IGG deficiency and the IL-10 gene variant. He has thereby placed the

5 Crown on notice that that is an area in which the
defence might seek to rely in its case, and it would
prima facie be necessary for the Crown to call all of
its evidence in relation to at least those two genetic
conditions, and I use the term conditions loosely
because the IL-10 gene is a very frequent variant of a
gene that something like 40% of the community have.

10 As I understand from discussions with Mr Zahra he has
not yet formulated a definite position as to which of
the genetic conditions the defence are going to rely
upon or raise in their case, and I think that we are
all concerned not to needlessly waste the jury's time
or needlessly confuse them by going into genetic
15 disorders or genetic variations if we don't need to.

So to some extent what I am asking through your Honour
is perhaps by tomorrow my friend could formulate what
position he wishes to adopt. There are two
20 possibilities. Possibility number one is that he just
says we are going to rely upon A, B, C and D and we
have to call all our evidence in relation to those.
Possibility number 2 is that my friend reserves his
position but concedes that it would be appropriate for
25 the Crown to call its evidence in reply in relation to
whatever variants or conditions he seeks to call in the
defence case. That would mean that we wouldn't be at
all prejudiced if my friend leaves it until his case to
decide which areas he is going to rely upon so that we
30 can call whatever evidence we need to in reply, in
which case it may be unnecessary to go on for days or
even a week calling evidence that might end up not
being of any particular importance in the trial.

35 HIS HONOUR: Mr Zahra has heard what you have said,
Mr Crown, and I am content to give you, Mr Zahra, until
tomorrow to make a response, if that's what you would
like to do.

40 ZAHRA: Your Honour may recall the history of the way
that this issue had unfolded and we made a very
conscious decision--

45 HIS HONOUR: I know it is quite possible that material
might still be coming to you.

ZAHRA: Certainly when we agreed for the trial to start
we thought there was a time line that we could well
meet. But there have been real problems in the Crown
50 releasing the material and there has been quite a lot
of discussion about the releasing of certain material
so it might be tested. If I had my life again we might
have thought otherwise about starting the trial. We
are still at a stage, we are working towards and we
55 have been doing so in tandem with running this trial.
We are working towards very much crystallising these
issues and, as I presently stand here, your Honour, and
without committing myself 100% I think it will be

limited to IL-10 and IGG.

5 The others are serotonin and the QT syndrome will not be proceeded with. It is still unfolding and we are hopeful it won't mean any delay.

10 I understand the options my friend has put and it may be we won't be able to answer my friend in the short time. It may be something that he may want to reopen his case or present a case in reply, but we are obviously very keen not to delay the trial and that was the view we took at the outset. Regrettably it has taken some time.

15 HIS HONOUR: It is always regrettable, I think, if the Crown brings any substantial case in reply.

ZAHRA: Very much so.

20 HIS HONOUR: If by a modest delay of the trial we could avoid that, I would listen sympathetically to what you have to say.

25 ZAHRA: It is not a matter for us to prove these things, it is a matter for the Crown to negative. This is a very new area and there are matters my friend will be able to put to the jury about whether this area does have certain robustness about it and accepted within the general community. But it is not the main platform of our case but it is an issue that is there. It is not going to be the total focus and the case doesn't rely heavily on this. It is just an issue that, where we presently stand, we can't leave unsaid or not raise at this stage. But it is not a huge platform of our case.

35 But it is one of these issues that has raised itself and there are significant experts who, in fact, have made some comments about this area such that we can't leave it alone at this stage and it would warrant inquiry. It certainly would come within fresh evidence if we didn't pursue it to the extent that we are now.

40 HIS HONOUR: I understand. You might expect that I will ask you about it tomorrow.

ZAHRA: I accept that.

50 The issue in relation to Dr Beal could be limited in light of the decision in Clark, the last two pages of that decision address this issue. I don't think it will take a great deal of time.

55 HIS HONOUR: I have read the page and a half of Clark that deals with statistical evidence?

ZAHRA: That will be the platform of our argument.

HIS HONOUR: The conditions of bail are varied in accordance with the document which I have initialled.

5 CROWN PROSECUTOR: Could your Honour announce them so that everybody is made aware of them?

HIS HONOUR: Yes. These are the additional conditions.

10 1. That any previous order made in relation to the accused only leaving the home where she is residing in the presence of certain people be rescinded.

15 2. That the previous order be replaced with this order; that the accused remain at the residence (and I won't read out the address. The people who need to know where it is know) until her return to court, and only to leave that residence if she remains in the direct
20 presence of any of the following people:
Major Hilton Harmer, Major Joyce Harmer,
Mr Cecil Warry.

25 3. The above condition does not affect the accused leaving the premises on her own to attend to her solicitor's office and return to the premises."

30 ADJOURNED TO THURSDAY 17 APRIL 2003

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PM:RMC:RT:8

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TWELFTH DAY: THURSDAY 17 APRIL 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: Gentlemen, I have read the experts' reports you referred me to. I have read I think the relevant part of the second Court of Appeal judgment in Clark. I have not read the whole of the record of interview. I am leaving it up to you. Where do you want to go first, Mr Crown?

20 CROWN PROSECUTOR: I thought perhaps we might start with the interview, if that is suitable.

25 HIS HONOUR: What is the issue here?

CROWN PROSECUTOR: The issue is this; your Honour will recall that I did open to the jury that the Crown would be tendering the accused's record of interview and I said to the jury that it is a lengthy interview and that in that interview the accused denied any involvement in the deaths of her children. Your Honour then subsequently excluded that part of the interview which related to the diary entry where the accused said, "I'm my father's daughter", et cetera.

30 HIS HONOUR: I can't remember what I did exclude now. I thought I excluded the diary entry.

35 CROWN PROSECUTOR: Your Honour has excluded the diary entry and also, as I understand it, any reference in the interview to it.

40 HIS HONOUR: That would seem to follow, yes.

CROWN PROSECUTOR: It would be fairer to say this, that in support of the admissibility of the diary entry the Crown relied upon the answers that she gave in her record of interview in which, according to the Crown's submissions, she specifically says that what she was referring to was her father being a loser to the extent that he had caused such havoc to so many people by having killed his estranged wife in anger. Your Honour may not have specifically excluded the relevant questions in the record of interview, but we understood that as a necessary corollary.

HIS HONOUR: I think that's a fair way of putting it, Mr Crown.

5 CROWN PROSECUTOR: The Crown's position is this, that
apart from that part of the record of interview
relating to that entry in the diary, there is nothing
else in the interview that is adverse to the defence
case. The interview consists of exoneratory statements
10 by her, it consists of accounts by her of the
circumstances of the deaths of each children which have
been otherwise proven through other evidence in the
Crown case. The real substantive purpose for seeking
to tender the interview has now disappeared. It is
15 therefore not the intention of the Crown to tender the
interview at all.

In the light of my opening and for reasons of fairness
also, the Crown would be prepared to elicit from
20 Detective Sergeant Ryan that the accused voluntarily
participated in a lengthy interview in which she
voluntarily provided a large number of answers and that
during that interview she denied any involvement in the
deaths of the children.

25 However, I would not wish that concession to be taken
advantage of by the defence to say, well, if you are
going to lead that part about the contents of the
interview, then we insist upon you leading it all.
30 Because if that's the position that my friend takes
then I won't ask any questions in relation to the
contents of the interview. I would be only asking
those questions on the basis that that would not of
itself oblige the Crown to tender the interview.

35 HIS HONOUR: Mr Zahra, does that fairly summarise the
difference between you? You want the whole of the
document to go in?

40 ZAHRA: Yes, your Honour.

CROWN PROSECUTOR: Not the whole of it.

45 HIS HONOUR: At least, apart from what was impliedly
excluded when I dealt with the diary.

ZAHRA: Yes.

50 CROWN PROSECUTOR: The law is that part of the Evidence
Act, Part 3.4 on admissions, and the dictionary of the
Evidence Act, which defines admissions, and if your
Honour goes to the dictionary, an admission.

55 "An admission is a previous representation
made by a party adverse to the person's
interest in the outcome of the proceedings."

We are of the view that there is nothing in that
interview which we consider to be adverse to the

appellant's interest in this trial.

5 HIS HONOUR: Has that expression been defined, Mr Crown, "adverse to the person's interest"? The Crown, for example, has to prove that the accused is the mother of the children, and this evidence proves that. In that sense it is at least capable of being seen as adverse to the interests of the accused.

10 I would not take it, unless you can point me to some law to the contrary, that the fact that a matter has been otherwise proved robs a particular piece of evidence of the quality of being adverse to the person's interest. But what does "adverse to the person's interest" mean?

15 CROWN PROSECUTOR: We would submit that in the context of a trial it means that it is a matter which is capable of assisting the Crown case in a material particular where that is a real issue between the parties.

20 HIS HONOUR: Anyway, we might put that on one side at the moment. You were taking me to Part 3.4, which begins at section 81.

25 CROWN PROSECUTOR: My learned junior has brought to my attention a case reference in the Butterworth's Practice, the Queen v Esposito.

30 HIS HONOUR: I am just reading that myself. What do you want to rely on in Part 3.4?

35 CROWN PROSECUTOR: I don't think 3.4 really provides any assistance on this issue. It really provides for the admissibility of admissions where the Crown is seeking to lead that evidence. It doesn't assist in an instance like this where the Crown is not intending to tender.

40 I have a number of cases on this point and we would submit that they support the following propositions.

45 HIS HONOUR: There was a case in the Court of Criminal Appeal called Astill. Is that still law in New South Wales? It was a judgment of Justice Badgery-Parker, as I recall it.

50 CROWN PROSECUTOR: I am not aware of it, your Honour. I must admit it has been several weeks since I have looked at these cases, but I will refer your Honour to them. But the propositions that they support are as follows; firstly, your Honour does not have the power to oblige the Crown to tender a record of interview. It is for the Crown to decide what evidence it will tender. Secondly, the court has an overriding jurisdiction to prevent an abuse of process and that provides, in effect, a supervisory power in appropriate

circumstances.

5 HIS HONOUR: How would that be exercised? If I thought there might be a mistrial because you declined to tender a piece of evidence I might invite an application for a stay.

CROWN PROSECUTOR: Yes.

10 HIS HONOUR: That kind of approach.

CROWN PROSECUTOR: Yes.

15 HIS HONOUR: But that would stop short of the power to require you to tender it.

CROWN PROSECUTOR: That's correct.

20 HIS HONOUR: I follow that.

25 CROWN PROSECUTOR: The third proposition is this. That if the Crown wishes to rely upon part of an interview which is incriminatory it must put in the whole interview. It can't select just those parts that are incriminatory and delete those parts which are exculpatory. It either puts the whole lot in, subject to any objections from the defence, or it doesn't put it in at all.

30 HIS HONOUR: Yes, I follow.

35 CROWN PROSECUTOR: The next point is that it is for the Crown to say whether in the Crown's view it is an inculpatory admission and ought to be tendered.

HIS HONOUR: Well, that's really a restatement of the first proposition.

40 CROWN PROSECUTOR: Yes.

HIS HONOUR: That the court has no power to require the Crown to tender it.

45 CROWN PROSECUTOR: Yes. I will be absolutely frank. Perhaps I shall say this; further, that it is sometimes, perhaps even often, the practice of the Crown to tender exculpatory records of interview in the Crown case, or to tender other exculpatory material, such as oral denials of guilt, as a matter of
50 completeness and/or fairness to the defence. So that the Crown will often tender a very short record of interview that contains a mere denial by an accused of the allegations against him or her. That doesn't mean that the Crown is under an obligation to do that.
55

The next point is that we would submit that the interview is not admissible at the instigation of the defence. It falls foul of a number of sections in the

Evidence Act.

5 I said that I was going to be frank with your Honour, I will be frank now. The Crown says it is not obliged, as a matter of fairness, to permit the accused to put before the jury extensive exculpatory denials of guilt before the jury. Nor is it obliged to put before the jury her detailed and extensive explanations for evidence that now forms part of the Crown case.

10 We would submit that it is perfectly proper for the Crown to take this position, that if the accused wishes to advance exculpatory material then the jury ought to have that exculpatory material in the form of sworn evidence subject to cross-examination. That is the process which is adopted and ought to be adopted with all witnesses, and there is a reluctance on the part of the courts to permit out of court statements to be tendered as evidence, except in limited circumstances as provided by the Evidence Act. Those limited circumstances do not include such exculpatory statements by an accused who is available to give evidence.

25 We would submit that if she wants such exculpatory material to be before this jury then she ought to be obliged to do so in the normal way by taking the oath to tell the truth and being cross-examined.

30 This is an eight hour interview. In that interview she is presented with some material from one of the diaries. She was not presented with material from the other diary because it had not yet been discovered, it was only discovered during a search immediately after this interview. She advances certain explanations for those diary entries in her record of interview and the police officer, acting perfectly properly, did not cross-examine her on those answers because there have been a number of decisions in this State critical of police officers who conduct cross-examinations during the course of a police interview.

45 So if this interview were to go into evidence she would be, in effect, permitted to put forward her explanations for some of those diary entries without being properly cross-examined on them.

50 We therefore submit that as a matter of fairness if she wishes to provide any explanation for those diary entries she should do so again on oath and subject to cross-examination.

55 There is a further issue that arises, and that is this. If the Crown does not tender her record of interview and if she did give sworn evidence then would the Crown be able to cross-examine her on any discrepancies between her evidence and the record of interview.

That raises some interesting and difficult questions of law. On the one hand it could be argued that if there were any inconsistencies, those inconsistencies only emerged during the defence case. The Crown was not on any notice of those inconsistencies before the defence case so the Crown ought to be allowed to cross-examine on those inconsistencies and, if they are denied, to then tender the relevant parts in a case in reply.

The other view that can be taken is that the Crown is obliged to present all of its evidence in the Crown case by cross-examining an accused on material that hasn't been led in the Crown case, let alone seeking to tender such material in a case in reply. That the Crown is splitting its case. Those issues have been the subject of a recent judgment in the High Court in the case of the Queen v Soma, a decision of the High Court on 13 March 2003. It was an appeal from the Court of Criminal Appeal in Queensland.

The facts of that case were a little bit different in this case in that the facts in that case were that the Crown had not sought to tender a record of interview of the accused because the Crown was of the view that it would inevitably be rejected in evidence because there hadn't been the requisite caution administered, and there were certain other legality issues the Crown thought would have precluded its admissibility. The accused then gave evidence. The Crown Prosecutor then cross-examined the accused on the discrepancies and got the concession from the accused - actually played the tape recording of the interview to the accused, got a concession from the accused that in fact that was his or her voice, I can't remember whether it was a man or a woman, and then tendered the record of interview, or that part of it at least, to prove the inconsistencies.

The majority judgment of, I think, four of the judges, or at least three of them, anyway, was to the effect that the Crown ought not to have been allowed to cross-examine the accused on the interview or to tender the interview, on the on the basis that the Crown was splitting its case because the interview may well have been admissible in the Crown case. What the prosecutor should have done is to seek a ruling from the trial judge on admissibility and then, if the trial judge had excluded the interview, then the situation may well have been different.

HIS HONOUR: Is that what you are doing?

CROWN PROSECUTOR: Well, that's not what I am doing, no, because I am not seeking to tender it. I am not seeking to tender the interview.

HIS HONOUR: No, but are you seeking any ruling about whether you might cross-examine the accused on any perceived inconsistency between her evidence and what

she said in the record of interview?

5 CROWN PROSECUTOR: Our position is this, that it is not necessary for your Honour to decide that at this stage.

HIS HONOUR: The answer is no, you are not seeking to do that.

10 CROWN PROSECUTOR: No. She may not give evidence, and if she does there may not be any discrepancies. If there were we might possibly seek to litigate it or we might just forego that possible line of cross-examination. So it is not necessary for your Honour to decide it.

15 But we are certainly on notice that that's a very real issue, that we may lose that if she were to be cross-examined and some discrepancies emerge. We are certainly on notice of that possibility.

20 Despite that, we are of the view that justice and fairness, not just to the accused but to the community as well, necessitates that this interview not be put into evidence.

25 Nothing further, your Honour.

30 HIS HONOUR: Now, Mr Zahra. Please bear in mind that I have not read the record of interview, except for the portions of it that I read when dealing with the proposed tender of the diary entry.

35 Mr Crown, the law that you have given me may be uncontroversial, I am not sure about that, Mr Zahra will let me know about that, but do you have a reference to the cases there?

40 CROWN PROSECUTOR: I do, your Honour. We have got copies of the other cases that we can hand to your Honour. There is a decision of Callaghan (1994) 2 Qd R 300. A decision of Beck (1990)1 Qd R 30, a decision of the Supreme Court of Western Australia in Willis, an unreported decision on 26 September 2001. Another
45 decision of the Supreme Court of Western Australia in Middleton (1998)19 WAR 179. A decision of the New South Wales Court of Criminal Appeal in Williamson (1972)2 NSWLR 281, a decision of the Supreme Court of Western Australia in Sampson (2002) Western Australian
50 Supreme Court, CCA number 222 on 14 August 2002. A decision of Higgins, it is in the English Reports, 3 Carrington and Payne 604, (1829).

55 There is an article called The Admissibility of Self-exculpatory Statements from the Criminal Law Journal (1991) volume 15, page 42. Callaghan is also reported in (1993)70 ACR, 350.

There are some very short references in another

decision. It is a decision by a single judge of this court, Justice O'Brien CJ in 1985 in a case called Carlen v Thawat Chidkhunthod.

5 I have only got an unreported decision, but there is a statement of general principle in it about halfway through the judgment. It is reported (1985)4 NSWLR 182. I think that completes all the cases that I have now

10

COPIES OF AUTHORITIES HANDED TO HIS HONOUR

CROWN PROSECUTOR: Perhaps finally, your Honour, I anticipate that my friend may address your Honour on the obligations of a prosecutor. It is often said that the role of the prosecutor is a lonely one. The prosecutor has the burden, I suppose sometimes the opportunity, of ensuring that justice is done between the accused and the community, and it can be sometimes a very difficult task to try and perform that role, both as an officer of the court and in the context of adversarial proceedings. We would submit that it is a proper decision for a prosecutor to make that an accused ought only to be able to advance her version on critical issues that are before the jury on oath and subject to cross-examination, and that that is a legitimate ground for not tendering an exculpatory record of interview.

30 HIS HONOUR: Thank you, Mr Crown. Now, Mr Zahra, do you want to say anything about the law, to begin with?

ZAHRA: Can I take your Honour to that? Much of what my friend has said that I won't cavil with. Can I take your Honour to our primary submissions and refer to the law when I come to those particular propositions, so far as they apply to the issues in this case?

40 HIS HONOUR: Am I to assume then that the propositions the Crown has put are accurately stated propositions of law?

ZAHRA: Yes, but there are some aspects of the decision of Soma that might offer some additional assistance and I will come to those in a moment.

The first matter that needs to be considered is that firstly the Crown has opened on this record of interview. The transcript at page 68 line 50 notes what in fact was said. The Crown told the jury: "You will have the interview which was conducted...any involvement in the deaths." So my friend has already alerted the jury to the fact that there is this document in existence and it contains her version of the deaths of each of the children. It goes on to say that she denied any involvement in their deaths.

55

Now, as I understand the Crown's case, that will either

5 be implicitly or explicitly put to the jury that she in fact lied in that record of interview because she was the perpetrator of offences of murder. As I have indicated, it may be that that is implicit in the sense that, obviously its case is that she was involved in the deaths.

10 HIS HONOUR: Mr Zahra, I am just having difficulty understanding where we are going. I have asked you if you agree with the propositions of law that the Crown put, and you say that you do, subject to some distinction you want to make between this case and Soma. The first proposition the Crown put is that the court has no power to require the Crown to tender the
15 interview.

ZAHRA: Can I assist your Honour? This primary submission goes to the issue of the fact that the Crown has raised this and to not now put it before the jury would be an abuse of process. So the first submission goes to that issue.
20

HIS HONOUR: What is the purpose in your submitting that an abuse of process is about to take place? What follows from that?
25

ZAHRA: I would probably need to expand on this issue before that becomes apparent.

30 HIS HONOUR: Well, no, I am not asking you to speak to the issue, I am asking you to tell me what the issue is. You say an abuse of process is about to take place. What follows from that?

35 ZAHRA: Well, that your Honour would stay the proceedings.

HIS HONOUR: So this is an application for a stay?

40 ZAHRA: Yes. That is the only remedy that your Honour would have. I don't cavil with what my friend says, that primarily these are matters for the Crown to decide.

45 HIS HONOUR: Yes, I understand.

ZAHRA: But in the circumstances of this particular case that the failure of the Crown to now tender this record of interview is an abuse of process, and the remedy that your Honour has for that is a stay of
50 proceedings.

55 The first point that is made is that the Crown have already told the jury about this and told the jury that she has given a version of the deaths of each child. My friend says it was only subsequent to your Honour's ruling that his position has somewhat changed and the complexion of this record of interview has in fact

changed.

5 Well, the issue about that portion of the record of
interview was not a surprise to the Crown during the
course of this trial. It had been flagged previously.
The most prudent course, if my friend was to now take
the position he is taking now, would be to not refer to
the record of interview at all. My friend has made a
conscious decision to refer to the record of interview,
10 well knowing that there was a portion of the record of
interview or this issue about "I'm my father's
daughter" was going to be a matter that your Honour
would have to decide on during the trial. Regardless
of that, my friend opened to the jury and indicated
15 that there was this version that the accused had given
to the police.

20 It is only this last Monday that we were formally
notified that it was no longer the case. In fact I can
hand to your Honour some correspondence but my friend
would probably accept this, but the correspondence
originally was with a view to settling, obviously, the
questions and answers that needed to be deleted. In
25 other words, up until now the way the record of
interview has been handled was merely going through an
editing process so that the tape could be ready to be
played. It was only in fact this Monday that we were
notified by the Crown, 14 April, "In light of his
Honour's ruling on the admissibility of evidence of
30 that part of the accused's interview that refers to her
father, the Crown is-". I will tender those two
letters, one of 4 April and one of 14 April.

35 So up until last Monday we have been proceeding with
this trial on the basis that the record of interview
was to be admitted and we have made decisions in this
trial on that basis. I can take your Honour take those
issues in a moment but at this stage what the Crown
proposes, in a sense, to either do one of two things.
40 Either call Detective Ryan to say, well, look, I will
describe what this record of interview is to you but we
are not going to play it. But again it's either
implicitly or explicitly going to be put to the jury
that she was lying to the police officer at that time.
45

Now, again that evidence will be put to the jury
without the jury having the opportunity to see the
record of interview, not only as to the content of it
but the way she presented to the police officer at that
50 point of time. The jury would be prevented from
looking at those other important aspects of determining
whether she was lying to the police or not at that
point in time.

55 The Crown says that if we take advantage of that in the
sense that we now use that as a basis for argument of
the admission, that they won't even lead that. So in a
sense if the Crown were to not say anything more, he

has left his opening, indicating to the jury that there was a version, nothing more is going to be said about that and the jury would be left to wonder what it is about that record of interview, bearing in mind my friend has referred to it and referred to it as a version. So it is quite an unsatisfactory position at the present time when my friend wants to call the evidence to get a police officer to describe it but doesn't want us to do anything with that, and if we choose to do anything with that that he won't call anything at all. So then he wants to leave this statement in his opening address hanging.

The other aspect of the way this trial has proceeded, and we have always proceeded on the basis that this record of interview was going to be admitted, exhibit O was in fact tendered. These are the matters I will refer your Honour to on the basis that we have made decisions during the course of this trial based on the belief that the record of interview was going to be tendered. Does your Honour have exhibit O?

HIS HONOUR: I have exhibit O. It is the statement that Mrs Folbigg made for her solicitor.

ZAHRA: Yes.

HIS HONOUR: I have just been handed these letters.

EXHIBIT #A ON THE VOIR DIRE LETTERS FROM THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS TO PETER KRISENTHAL, 4/04/2003 AND 14/04/2003 TENDERED, ADMITTED WITHOUT OBJECTION

ZAHRA: Before I take your Honour to parts of exhibit O, can I refer your Honour to a statement of general principle that in fact is taken from Aronsen, fifth edition. This is under the heading "Obligation to Call Material Witnesses". This obviously relates to the calling of a witness, but there is an important point to be made at 1608 at the top of the second page.

HIS HONOUR: You need not read it. I have read that.

ZAHRA: The particular point that is made, whilst 1608 refers to material witnesses, the matter of general principle about the need to communicate any change of heart to the defence in reasonable time would equally apply to a situation such as this where there is in fact a change of heart as to the decision to tender the record of interview.

Can I take your Honour to parts of exhibit O, and this in fact brings us, whilst we are still arguing the issue of stay, to the second point. That is, that quite apart from the issue of the stay, that we also argue that there is an obligation on the Crown to call the record of interview because in fact they have

already called some parts of the record of interview in the sense that exhibit O relates to the record of interview.

5 In other words, the sequence of the events was that the record of interview occurred, Mrs Folbigg and Mr Folbigg went to see a solicitor. This statement was in fact produced subsequent to the record of interview and refers to parts of the record of interview itself.

10 HIS HONOUR: So exhibit O refers to parts of the record of interview.

15 ZAHRA: At the top of the first page, in brackets, "didn't mention argument in interview". So there is a reference to the interview there. Then at about point 8 in brackets "had forgotten to mention that in interview". Also "Hadn't recounted argument. Had forgotten about it also."

20 HIS HONOUR: That says what's not in the interview.

ZAHRA: And again on the second page at about point 9 "Had forgotten cough and cold in interview".

25 Now, this document was tendered by consent. This comes to a matter that I have raised previously. We had proceeded on the basis that--

30 HIS HONOUR: That's "recounted", isn't it?

ZAHRA: Yes.

35 HIS HONOUR: I read it as "recanted" first.

ZAHRA: "Recounted."

HIS HONOUR: Page 2.9, had forgotten. Yes?

40 ZAHRA: So if this was left to stand alone there are references back to the record of interview to matters that she had forgotten. It creates quite an impression about matters that she is now raising in this letter that may not have been in the record of interview, but that's one impression alone and one needs to look at the length of the record of interview and the detail otherwise to put that into perspective.

45 HIS HONOUR: Are they the only references to the record of interview?

50 ZAHRA: Yes. This document was, in fact, tendered by consent. You may recall that there were some references, I think in the absence of the jury, that there may be an issue of privilege. Page 206 line 22: "Your Honour, I tender the document...privilege issue that arises."

We have taken a very drastic position, otherwise it would not have been admissible. We waived legal professional privilege. We waived legal professional privilege on the basis that the record of interview was in fact going to be tendered and that if the jury were to hear the record of interview they would understand, even though there are only brief references in the letter, they would understand those particular references and that consequently that there would be no disadvantage in agreeing to the tender. However, we can now say that there is a disadvantage in the sense that the complexion, these matters in brackets, "didn't mention the argument in the interview, "had forgotten to mention that in the interview", also "hadn't recounted argument, had forgotten about it", had "forgotten the cough and cold in the interview". This really paints quite a different picture or one that at least needs to be looked at in the context of the lengthy record of interview.

20 HIS HONOUR: I am just not able to follow that argument.

25 ZAHRA: We would argue that the Crown has already embarked upon the tendering of what the Crown calls self-serving statements as part of the statements that she made about these matters at that point in time. In other words, we say that the fact that the Crown has tendered this document is in fact part of and closely linked to the record of interview. That being the case, the Crown is now seeking to only produce part of those out of court statements and not the whole lot. And, on that basis, the Crown is obliged consequently to tender the record of interview.

35 My point in relation to exhibit O crosses both the issues that we take. Firstly in relation to the stay of the proceedings, that in a sense this is an abuse of process. That we had agreed to tendering the material on a basis that the whole of the out of court statements were going to be placed before the jury, otherwise there would have been no basis or no reason for us to have waived legal professional privilege.

45 HIS HONOUR: I think I had better read exhibit O, in view of what you are saying to me. I have read it.

50 ZAHRA: One might pose the question rhetorically, why did the Crown want the document in anyway, if it falls into the category of the record of interview of being exculpatory statements, but I leave that to one side.

55 The other matter is that if we believe that the record of interview was not going to be tendered that we would have wanted to have cross-examined Craig Folbigg about the circumstances in which that document came into play, to put it in context that this was not going to be a complete statement of all of the incidents. It

was in fact going to be a statement of things that she could remember that were in fact not in the record of interview.

5 Now, this creates a real problem for us. The Crown might say, well, we can recall Craig Folbigg, but we have proceeded on the basis that really the context of this letter would be explained by seeing the record of interview. We would have put questions in
10 cross-examination to Craig Folbigg, putting this particular document into perspective. In other words, it was not intended to be a full recounting of every incident and every issue.

15 HIS HONOUR: What's the date of the record of interview?

ZAHRA: 23 July.

20 HIS HONOUR: This letter is not dated, exhibit O. What is the evidence about when it was made?

ZAHRA: The question was asked at page 206. "It purports to have been written on 23 July 1999. A. It does."
25

HIS HONOUR: "It purports". It must have a date then. I just couldn't see it.

30 ZAHRA: The interview is 23 July 1999.

HIS HONOUR: The same day.

ZAHRA: Yes. It would have to be after, but it is
35 within days, it is within a very short period of time afterwards. My friend has led this question, that it purports to have been written on 23 July, at page 206 line 7. As we understand it, 29 July was when she saw the solicitor. That's not yet in evidence. That would
40 have been a matter that we would have cross-examined Craig Folbigg about. It is common ground that it was written within a short period of time after the record of interview.

45 Can I just refer your Honour to a statement of general principle? It is a statement taken from Phipson, 11th edition, paragraph 682. That is a statement of general principle. But if, obviously, part of the record of
50 interview or part of the statement is to be admitted, then the whole of the document, the whole of the material should be admitted.

HIS HONOUR: Well, that's a statement already made by the Crown this morning. So you agree about that?
55

ZAHRA: Yes. But it also indicates a statement as part of the adversary's case, so much of the whole document or statement. So in other words, this would be an

exception to the rule that it must only be inculpatory. In other words, if the rest of the document is exculpatory then it should go in.

5 HIS HONOUR: There is no rule that it has to be inculpatory, is there?

10 ZAHRA: No. But depending on, obviously, your Honour's definition of the word "admission" in the dictionary of the Evidence Act.

15 HIS HONOUR: I am really not sure where that bit of debate went to. The Crown began to talk about admission.

ZAHRA: I will come to that in a moment.

20 Can I indicate other matters that go to the issue that we have proceeded with this case on the understanding that the record of interview was to be admitted. Can I take your Honour to cross-examination of Craig Folbigg at page 321 and 322? At this point there was cross-examination of Craig Folbigg in relation to listening device material that refers to the record of
25 interview.

30 This area of cross-examination was not challenged by the Crown on the basis that any reference to the record of interview would be inadmissible or not ultimately put before the court. So we have proceeded to extract parts of the listening device material that refers to the record of interview.

35 HIS HONOUR: Just let me read that. I am looking at 321 line 47: "Your wife is recorded as saying this", and then some words. That is a record of the listening device tape is it, not the record of interview?

40 ZAHRA: Yes. And it goes on at line 52.

HIS HONOUR: After she had engaged in an interview with the police.

45 ZAHRA: Yes. So in a sense the Crown has waived. Has your Honour read to page 322 line 50?

HIS HONOUR: I will read the rest of that page.

50 ZAHRA: There are parts from line 45 to line 54 on page 322 which again refer to the record of interview.

HIS HONOUR: I have read to the bottom of page 322.

55 ZAHRA: As your Honour can see there was no objection by the Crown at those times, so in a sense we have cross-examined and brought out parts of the record of interview. The Crown has not objected. So there are parts of the record of interview that are now in

evidence. So what the Crown is now seeking to do is not have the whole of the record of interview.

5 HIS HONOUR: So that is another instance, you say, of the Crown putting or permitting to be put before the jury part but not the whole of the record of interview.

10 ZAHRA: Yes, particularly those parts on the second page, 322. "My first response was that I never threw my children anywhere". See, we were clearly allowed to cross-examine on parts of the record of interview, or the way she described some of the aspects in the record of interview.

15 So in a sense both these arguments are somewhat interrelated, but our submission in relation to this is that, well, the Crown has already placed some of it before the court, so therefore it is obliged to have the whole of it now. So the arguments are somewhat
20 overlapping, the stay application based on abuse of process because it is raised and left hanging, but our secondary argument is that the Crown has already raised parts of the record of interview - exhibit O - and not
25 objecting to the reference to some of the record of interview here, so some of the record of interview was already in evidence.

30 The other aspect is that the Crown has already led quite an amount of the accused's out of court narrative about various incidents. For example, through Craig in relation to the death of Sarah at page 135 of the transcript. In relation to the death of Laura at 177.

35 HIS HONOUR: This is from line 15 onwards.

ZAHRA: Yes.

HIS HONOUR: And 177.

40 ZAHRA: Yes, from line 5 and following. And Lea Bown, again in relation to the death of Sarah, page 771 around line 55, and in relation to the death of Laura at page 776 from line 3.

45 So if my friend is relying so substantially on matters of principle in the sense that, well, if there are out of court statements that these should come from the mouth of the accused, well, he has led some out of
50 court narrative but has been selective in relation to what evidence he places before the court, because the record of interview comes within that category also.

55 Can I take your Honour to matters of law in relation to Soma that I have flagged, paragraph 31 where it talks about the duty of the Crown. The reference there to Apostilides (read.)

Can I take your Honour to paragraph 113, a judgment of

Justice Callaghan.

5 HIS HONOUR: But the circumstances of that case were that there had been cross-examination.

ZAHRA: Yes, the facts are different.

10 HIS HONOUR: In order to bring in a document which had not previously been in evidence. Paragraph 113. It is a very wide statement, "It is the responsibility of the Crown to call all relevant available evidence, both favourable and unfavourable to an accused." It is a terribly wide statement, with great respect.

15 ZAHRA: It is the majority judgment in 31 where they refer to Apostilides (Read.)

20 Can I take your Honour lastly to the question of whether this comes within the dictionary definition of "adverse"? We submit it does.

HIS HONOUR: Why do I need to consider that?

25 ZAHRA: Because my friend says it is exculpatory and therefore the definition would exclude it. But this record of interview, she admits being the mother of the children.

30 HIS HONOUR: I don't know where we are as a matter of principle. What turns on whether this is an admission or not?

35 ZAHRA: That there is no good reason for it not to be tendered because it is admissible. In other words, the Evidence Act does not make this document inadmissible.

HIS HONOUR: I didn't understand the Crown to be saying that this evidence was not admissible.

40 ZAHRA: I may have misunderstood the Crown's argument to say it does not come within the dictionary definition of an admission and therefore there was no obligation upon him to lead this evidence. That's their letter of the 14th, as I understand it.

45 HIS HONOUR: You had better say what you want to say about it.

50 ZAHRA: It is essentially what your Honour has said right at the outset when my friend took your Honour to the dictionary definition of the word "adverse". Well, it is adverse in the sense that she admitted being the mother of the children, she was the primary carer, that she found the children, that she was at the scene, the question of the opportunity, that she was the author of the diaries, that it was her handwriting, that at the relevant times she was with the children, went to the gym after the death of Laura.

5 HIS HONOUR: I think it probably is an admission. But even if it is not, the Crown is not going to submit here that it is not admissible. The Crown opened on it, and if the relevant part hadn't been knocked out it would have tendered it.

10 ZAHRA: I don't pursue it then. My reading of the letter of the 14th was otherwise.

HIS HONOUR: I will come back to it if it is necessary, but I doubt whether it is going to be necessary, Mr Zahra.

15 ZAHRA: In relation to the length of this record of interview and the fact that the mere length may be in issue here. It is lengthy, but there are five incidents referred to in the record of interview.

20 HIS HONOUR: I am not going to take into account the fact that this is going to take two days to play. I am concerned with questions of fairness.

25 ZAHRA: There are five matters, four murders.

HIS HONOUR: What do you say, Mr Zahra, is the principle upon which I should order a stay? That your client can't get a fair trial?

30 ZAHRA: Yes.

HIS HONOUR: Yes, I follow.

35 SHORT ADJOURNMENT

CROWN PROSECUTOR: May I address your Honour first because I might be able to clarify the issues somewhat.

40 We are obviously concerned that we do not wish to have a situation where, in the event of a conviction that there be a successful appeal. Although we don't concede that my friend has made out the matters that he seeks to make out, we are concerned and for that reason wish to exercise abundant caution.

45 The way that we see the situation at this stage is this: Had the Crown indicated right from the very beginning that it was not going to tender the interview, that there would have been no way that the Crown could have been forced to tender it and there would have been no basis for any stay. That is, that the Crown could legitimately not tendered the interview.

55 If, for the purposes of argument, one accepts Mr Zahra's proposition that he has done certain things during the Crown case that have altered his position in a way which he has only done because of his belief that

the Crown was going to tender the interview, then there is cause for concern that he has demonstrated some actual prejudice to the defence case. I'm not conceding that there is prejudice but it is a cause of some concern that someone else might consider that may have been prejudice.

HIS HONOUR: In view of this well-founded concern, are you proposing any different position, then?

CROWN PROSECUTOR: Yes. What I am proposing is this: At this stage, in order to try and forestall any possible concern at a later stage, the appropriate course for the Crown to take is to, exercising abundant caution in an attempt to deal with any potential prejudice that the accused may have suffered because of the change in the position that the Crown is now taking, that the Crown seeks to tender only those parts of the interview that relate to the areas in which my friend claims to have been prejudiced. Namely, the parts dealing with the birth, life and deaths of the children. That is, excluding any reference to the diary.

The Crown would therefore seek to tender only those parts of the record of interview. We would submit that that is a position which would allay any concerns that your Honour may have that there has been actual prejudice to the defence. It is a position which is justifiable in the circumstances in which the Crown and the defence now finds themselves and is a position in accordance with some authorities to this effect; it is not in every circumstance necessary for the Crown to tender the whole of an interview.

What the Crown is obliged to do is to tender the whole of what the accused says on any particular topic. It would be quite wrong for the Crown to tender only that part which suits its case.

HIS HONOUR: I asked you what you are proposing should now happen and you are making a speech.

CROWN PROSECUTOR: I'm sorry if I'm doing that. What I am proposing is to tender only those parts which relate to the topics on which the accused, through Mr Zahra, claim they may have been prejudiced.

HIS HONOUR: What you say can probably be understood precisely when one goes back through and looks at the submissions and the exhibit and the transcript that has been referred to.

Mr Zahra, do you have a firm idea of what it is now that the Crown is proposing to tender?

ZAHRA: This is a matter he has just referred me to. Again reciting the general principle that the Crown

can't pick and choose if there are favourable parts they should also be admitted as a general principle. Secondly, from what I can--

5 HIS HONOUR: The answer to my question is "no". I'm
sorry to hussle you along in this way, and I'm doing it
to both of you. You both gave me to understand
yesterday that I would be finished with this matter
well before lunch, and relying on what you both told me
10 I arranged to hear a case in Queen's Square at
1.00 o'clock. I wasn't intending to take the morning
tea adjournment. I did so at the Crown's special
request, having started late because the Crown was
late. I'm being pushed along, I want you both to
15 understand that.

I understand you want me to deal with two other issues
this morning. Let me cut this short and say this: If
there are any outstanding issues to be debated on this
20 question I propose to hear them next Thursday. Can the
evidence on Wednesday, Mr Crown, be so arranged as not
to require a conclusion of the issues raised this
morning?

25 CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: This matter will go over part heard until
Thursday.

30 What is the next matter you want me to deal with?

ZAHRA: May I finish my submission in relation to that
last matter. It is artificial. The record of
interview does not discretely look at the diary, so
35 that that can be excised. There is a body where it
does, but the rest is interspersed with issues
concerning the life, death of various children, so it
is an artificial exercise and cannot be done.

40 HIS HONOUR: There are two things that need to be done.
Mr Zahra, when I came back from the morning tea
adjournment, if the Crown hadn't wished to make the
statement that it did I would have asked you what I
will ask you now: Isn't it up to you to demonstrate
45 precisely how you say that the failure to tender the
record of interview or the failure now to tender
certain parts of the record of interview is going to
result in an unfair trial?

50 ZAHRA: Looking at the eyes of the jury, they are told
a fair bit about this record of interview and then told
nothing of where it has gone.

HIS HONOUR: That, with great respect to you, does not
55 demonstrate to me that your client can't get a fair
trial. You need to go to the detail of it and you need
to demonstrate to me by reference to documents which
are going in and material which is now being kept out

why there is unfairness to your client.

ZAHRA: I can take that further.

5 HIS HONOUR: I simply say this now to put you on notice, and you can deal with that on Thursday.

10 ZAHRA: I accept that. But, your Honour, what I will refer your Honour to all comes back to the one proposition, really. What is the jury left to do with this reference to the record of interview and that version at that point of time? They will speculate why it is not before the court.

15 HIS HONOUR: I understand why you say the principle is that if you are going to use a document you put it all in. You cannot have your cake and eat it.

20 ZAHRA: Yes, your Honour.

HIS HONOUR: That is all very well, but that does not of itself demonstrate that an unfair trial will follow. Are you with me?

25 ZAHRA: Absolutely. But one cannot go past the primary submission that what is the jury to do about what was in this record of interview? And it gets to the areas they might speculate as to why it went into the ether.

30 HIS HONOUR: Those are things you are going to have to address on Thursday, and you cannot begin to do that, of course, until you have ascertained precisely what it is that the Crown now intends to tender.

35 Mr Crown, before close of business today I require you to serve on the defence a written statement stating exactly which parts of the record of interview you intend to tender.

40 CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: Will you be so good as to have a copy sent to my associate?

45 CROWN PROSECUTOR: Yes.

HIS HONOUR: What is the next matter you want me to decide this morning?

50 CROWN PROSECUTOR: The next matter is the admissibility of the evidence of the Crown experts, Dr Herdson, Dr Beal and Dr Berry.

55 HIS HONOUR: I have read their reports. It might be efficient if I ask Mr Zahra to indicate which parts of the reports are objected to.

ZAHRA: Your Honour, can I take your Honour firstly to

the reports of Beal and Herdson? They are brief reports. In a sense, these reports are very much the same position as Dr Cala was in when he ultimately was wishing to give evidence--

5

HIS HONOUR: I did ask you to tell me which part of the report you object to.

ZAHRA: The whole of their reports.

10

HIS HONOUR: Of both reports?

ZAHRA: Yes. In relation to Professor Berry, page 26, the last two pages, "The Four Deaths Together", but particularly under the heading of "Conclusion."

15

CROWN PROSECUTOR: 26.

ZAHRA: Yes.

20

HIS HONOUR: You object to the whole of the evidence of Herdson and Beal.

ZAHRA: Yes.

25

HIS HONOUR: You object to part of the evidence of Berry.

ZAHRA: Yes.

30

HIS HONOUR: Which part is that?

ZAHRA: Pages 26 under the heading "The Four Deaths Together", particularly the conclusion.

35

HIS HONOUR: So it is page 26 beginning with the heading "The Four Deaths Together" to the end of the report.

40

ZAHRA: Yes, your Honour.

HIS HONOUR: Which one do you want to speak to first? I will take them in any order you wish.

45

ZAHRA: I could probably deal with Beal and Herdson together. Your Honour, the reports in fact follow very much the same format and my submissions are very much the same in relation to each. They refer obviously to examining a number of documents. Again we arrive at the same situation as Dr Cala did, that in relation to each of the four deaths separately that they may reach a different view, but in a sense that they form a view collectively that the four deaths must be homicide because, in fact, of this particular mantra.

50

55

In a sense the essence of their reports is not to look to certain pieces of medical evidence and say in their medical experience that these symptoms would indicate

5 suffocation or that the particular diagnosis is an
incorrect one in the sense that the particular medical
diagnoses are wrong. Their reports concentrate on the
collective view. In other words, moving on from a
consideration of the individual to say, and relying on
this particular mantra which is referred to most
particularly in Professor Herdson's report on the last
page at about .4. He goes on to say at paragraph 5,
10 "In my opinion all four infants probably died from
intentional suffocation".

15 So in a sense much of the argument has already been
addressed in relation to Dr Cala, and I again make
these submissions in relation to these witnesses for
the same reasons.

20 HIS HONOUR: I appreciate that the structure of the
reports is different from that of Dr Berry, but why,
for example, taking Dr Herdson's report cannot the
Crown adduce, for example, on p 2 the material under
(i), the death of Caleb Gibson Folbigg.

ZAHRA: I don't think that that would be a problem.

25 HIS HONOUR: It is just that you have objected to the
whole of the report.

30 ZAHRA: Because I sense really these witnesses will be
called not to go through, because the detail is
obviously not provided in the reports. I get the sense
the essence of what these witnesses is going to say is
very much the same as what others have said in relation
to going through the particular issues and I don't know
if my friend is going to lead that in longhand.

35 HIS HONOUR: I suppose the Crown can call 10 witnesses
if he want to.

40 ZAHRA: If my friend is intending to lead that in a
longhand way, I have no objection to that.

45 HIS HONOUR: So your attitude to the evidence is the
same as Dr Cala's, you have no objection to each
individual death or the ALTE and saying, assuming those
facts are correct that, a diagnosis of this or that
would be inappropriate or appropriate.

ZAHRA: Yes, I can't object to that.

50 HIS HONOUR: What you are really objecting to is what
appears in the last page of Dr Herdson's report.

ZAHRA: Yes.

55 HIS HONOUR: At point 4, "Considering these four infant
death together."

ZAHRA: Yes.

HIS HONOUR: Let's go then to Dr Beal's report.

5 ZAHRA: Similar. Her report essentially solely is based, as your Honour can see from the top of p 3, that she goes into issues of how you can suspect filicide or suspicions of filicide or cases in which there is filicide, and then concludes to suspecting filicide, and the dot point. Then on p 4, the second paragraph, again the mantra. Again with a reversal of the onus, which is the submission I made in respect of Dr Cala.

10 HIS HONOUR: A Startling statement in the third line of that paragraph.

15 ZAHRA: Yes. Again that was something I submitted in relation to Dr Cala. It reverses the onus.

20 HIS HONOUR: I don't imagine for a minute the Crown would be seeking to adduce the evidence in that form. Really, Dr Beal's report is structured differently from that of Dr Herdson and can't as easily at any rate, or perhaps at all, be dissected so as to--

25 ZAHRA: Yes. There is a little bit of additional material in Professor Herdson's report which relates to his particular assessment of at least the various histories and conditions. Dr Beal appears to go very quickly to the issue of the collective assessment.

30 HIS HONOUR: Mr Crown, may I ask to you deal firstly with Dr Berry's report?

35 CROWN PROSECUTOR: Yes.

HIS HONOUR: Is the material indicated by Mr Zahra pressed, starting at p 26 towards the bottom, the heading "The Four Deaths Together" and through to the end of the report?

40 CROWN PROSECUTOR: Part of it is and part of it isn't.

HIS HONOUR: Which part is?

45 CROWN PROSECUTOR: The part on p 26 that the unexpected and sudden death of four infants in the same family is unprecedented in his experience and in the literature. Then he goes through some unobjectionable material and says, in the third paragraph on p 27, "There are as many theories of SIDS as there are cot death...applicable to these cases". We understand that what he is saying is that it is an answer to the last question that I asked of Dr Cala, namely, if there is any disease he can think of to account for all the deaths.

55 It is the third paragraph on p 27, "There are as many theories". So we would say that that is admissible as

it was for Dr Cala, perhaps expressed in a more precise way.

5 ZAHRA: I accept that, your Honour.

HIS HONOUR: I must say it seems to me that the doctor could give that evidence. So long as and subject to anything else you want to say Mr Crown, so long as it does not appear that the cases are being considered as a clutch of cases.

10 CROWN PROSECUTOR: Yes.

ZAHRA: Could I ask my friend to indicate with some precision before he calls Dr Berry how that is going to be put.

20 CROWN PROSECUTOR: I intend to ask each of these doctors questions along the same lines as I asked Dr Cala. The next paragraph is uncontroversial. The paragraph after that, "There are no definite pathologic features...shaking or suffocation." I understand that to be a concession that each of the deaths is consistent with suffocation and again I would be phrasing it in that way rather than the way it is written in the report.

HIS HONOUR: I've dealt with a number of shaking cases. There doesn't seem to be anything about these cases that look like a shaking case.

30 CROWN PROSECUTOR: We would agree with that, your Honour. The following paragraph is just the signs of suffocation or often the absence of signs of suffocation based upon his experience. We would submit that is unobjectionable.

ZAHRA: I accept that.

40 HIS HONOUR: There may be a measure of agreement between you about this, so I would like to get Mr Zahra's comment as you enumerate the parts pressed. Can I take you back, Mr Zahra, to the bottom of p 26.

45 ZAHRA: We object to that, your Honour, the reference to the experience being unprecedented.

HIS HONOUR: Why?

50 ZAHRA: A question remains as to what utility that would be to a jury. In fact it is closely aligned to the issues of possibility. In other words in a sense in his experience there have been no cases coming very close to the issue of saying this is in fact homicide.

55 HIS HONOUR: Do you say that the Crown can't prove that unexplained natural death of a young child is rare?

5 ZAHRA: No, I don't say that. But what this says is sudden death of four infants in the same family who were previously well. In other words, it is the reference to the specific circumstances of this case, rather than a general statement about the rarity of SIDS.

10 HIS HONOUR: Thank you. Now, coming over to p 27, the third paragraph is pressed and not objected to.

ZAHRA: Yes, your Honour.

15 HIS HONOUR: The next paragraph, "If death was not natural," that is pressed. Is that objected to?

ZAHRA: No, your Honour. So long as it is asked in the same way as the questions were asked of Dr Cala.

20 HIS HONOUR: So as not to give the impression of a collective approach?

ZAHRA: Yes.

25 HIS HONOUR: I think the Crown presses the next paragraph as well, is that right?

ZAHRA: But indicating the questions asked is in accordance with what he asked Dr Cala.

30 HIS HONOUR: Yes. I think that is as far as we had got. Do you press--

35 CROWN PROSECUTOR: We had done the next one, your Honour.

HIS HONOUR: Is that to be treated in the same way, Mr Zahra?

40 ZAHRA: Yes, your Honour.

HIS HONOUR: All right. And what about what follows?

45 ZAHRA: This is the same as the objection in relation to the bottom of paragraph 26. This is a situation where the witness now is then moving on to look at the specific circumstances of this case to proffer an opinion that these cases were homicide. But the foundation for this is in fact looking at the combination. It is not particular medical issues but
50 similarly to the argument put in relation to Dr Cala, that they rely solely, if we look at the essence or distil the foundation, that they rely on the combination.

55 HIS HONOUR: Well, there's a mixture really of the collective and the individual approach here.

ZAHRA: Yes.

5 CROWN PROSECUTOR: We would only seek to lead the ones that seem to relate to specific medical issues, which I think are numbers four and five. Again we would deal with them in a similar way to the way we dealt with them with Dr Cala.

HIS HONOUR: Four and 5, Mr Zahra?

10 ZAHRA: Yes, I accept that.

HIS HONOUR: I wasn't looking at 8, 9 and 10 on the next page. Is any part of it pressed, Mr Crown? What about the conclusion?

15 CROWN PROSECUTOR: So far as the conclusion is concerned, your Honour, the first sentence is a repeat of what he says earlier about there being no previous instance of--

20 HIS HONOUR: "Unprecedented in my experience".

CROWN PROSECUTOR: Yes.

25 HIS HONOUR: I shall have to decide that, then.

CROWN PROSECUTOR: The rest of it, when he says he is unable to rule out that each of them were suffocated, that also is something he has already referred to, consistent with suffocation for each of them.

30 HIS HONOUR: That is no more than saying that the signs are consistent with suffocation. There is plenty of evidence to that extent.

35 CROWN PROSECUTOR: Yes.

HIS HONOUR: The conclusion, apart from the first sentence, is not objected to. The first sentence is objected to, and it and the first sentence only of the paragraph on p 26 following immediately after the heading "The Four Deaths Together" is pressed and objected to. I will decide those matters. What is next?

45 CROWN PROSECUTOR: I think that is all for Dr Berry. So far as Dr Herdson is concerned, we would press on p 2, and I understand there is no objection to (i), (ii), (iii).

50 HIS HONOUR: I don't understand there is an objection sustained to those passages.

55 CROWN PROSECUTOR: I didn't think my friend even made an objection to it.

HIS HONOUR: He objected to the whole of the report.

CROWN PROSECUTOR: Initially, yes.

5 HIS HONOUR: I think my understanding is that the objection is now confined to the last page beginning at point 4, "Considering these four infant deaths together" to the end.

10 CROWN PROSECUTOR: What we would seek to lead is in that third paragraph, the paragraph beginning "Considering these four infant deaths together", we would seek to lead the last sentence.

15 HIS HONOUR: "I am unaware that there have ever been three or more thoroughly investigated deaths in one family from Sudden Infant Death Syndrome." That is the same as the point raised in Dr Beal's report.

ZAHRA: Yes, your Honour.

20 HIS HONOUR: The objection is sustained there, Mr Zahra, I take it?

ZAHRA: Yes, your Honour.

25 HIS HONOUR: Anything else pressed from that passage, Mr Crown?

CROWN PROSECUTOR: No.

30 HIS HONOUR: The last report is Dr Beal.

CROWN PROSECUTOR: Dr Beal's really contains very large slabs of inadmissible material.

35 HIS HONOUR: The trouble is it is difficult to tease out the collective approach from any individual approach.

40 CROWN PROSECUTOR: What we are going to do with Dr Beal is ask her the same questions that we asked Dr Cala, see if she can answer them. Because I think that, apart from the very last sentence in her report, most of it is objectionable.

45 HIS HONOUR: Would it be convenient for you, Mr Crown, to not offer this report but to prepare a supplementary report, incorporating what we will call the model questions, à la Cala.

50 CROWN PROSECUTOR: Yes.

HIS HONOUR: And let Mr Zahra have it. I can deal with any objections that thereby arise.

55 There is only really one issue then on the reports, and that is, really, the statement of the unprecedented nature, or however you put it, of multiple SIDS death in a family.

5 CROWN PROSECUTOR: I think it goes to more than that. Dr Herdson gives that view but Dr Berry says it is unprecedented in his experience and in the literature for four such deaths from natural causes in the one family. That is more than just SIDS, it is from any natural cause.

10 HIS HONOUR: I follow. I have the passages anyway marked and I will give you a decision about that on Thursday.

15 There was one other matter. Mr Zahra, do you have yourself up to speed on where you are with IGG and IL-10?

20 ZAHRA: We are waiting on the final report. We will be able to communicate with the Crown on Tuesday about that. But we have now satisfied ourselves in relation to long QT. We got a report about that yesterday.

HIS HONOUR: That is not a goer so far as the trial is concerned.

25 ZAHRA: Also serotonin. It is just that one defined area.

30 CROWN PROSECUTOR: Perhaps that might be noted, they are not pressing long QT, serotonin.

35 HIS HONOUR: If IGG and IL-10 are issues, is that going to give us any practical difficulty? Will there be any practical consequences about overseas witnesses and the like?

ZAHRA: I don't believe so. We have--

40 HIS HONOUR: You need not answer that question. All I'm saying is if it is likely to do that you might be so good as to let me know.

45 ZAHRA: Obviously we need a notice of motion if there is a video link application, that may be in relation to one. Obviously we have to gauge how long the trial is. We are obviously intending to bring people from the United Kingdom, so we need to look at opportunity and windows. If there is a window available we will bring them out. If not, we will proceed by way of video link. We will notify your Honour as quickly as we can, but if not we are preparing either way.

HIS HONOUR: Let me know if you foresee problems and I will do what I can.

55 ZAHRA: We have a lot of available dates and very small windows. If one is open we will bring them out. If not, we will proceed by way of video link.

5 CROWN PROSECUTOR: Could I remind your Honour that this trial has been declared a complex trial, so there is an ongoing obligation on the defence to provide their expert reports to the court, and I would ask through your Honour that my friend provide any additional reports that he has that have not been provided to us.

10 ZAHRA: Yes. I understand what my friend says and we are always mindful of the obligation. It is just that the reports are only now being received, they are yet to be fully considered by us, bearing in mind we have to run the trial at the same time. Your Honour can see there is a lot going on and I regret we are not able to solve this straight away, but the reports have only just got in. But we need time to look at them without having to juggle all the other balls we have had to this week.

20 HIS HONOUR: I might say something else about the provisions in the--

CROWN PROSECUTOR: Pretrial Disclosure Act.

25 HIS HONOUR: It's the Criminal Procedure Act about the pretrial disclosure provisions in a complex trial. The relevant part of the Act states the object of the provisions as to enable the management of the trial. In other words, they are not to head off an ambush, for example, so that if you go to set up a particular state of mind which might put the Crown to the obligation of having the accused psychiatrically examined, or an alibi. It is not that kind of approach, it is a management approach, and it seems to be inherent in that approach that any documents which a party is obligated to serve, the party should also file. Now, 30 the act does not say so. I think it may be implied in the act, and the view I take is that all relevant document should be filed as well as served.

40 ZAHRA: Yes. Might I say this in relation to disclosure? I understand what my friend has had to say, but I must say from time to time during the course of this trial I have considered making an application for certain sanctions because of the late disclosure of much material which is of a very highly technical nature. So I appreciate what my friend has had to say, but I must say that it did not need to be said in the light of obviously the difficulties that we have suffered from.

50 HIS HONOUR: All right. Both sides in any fight, especially a hard one like this, are likely to be presented with material late in the piece. That is understood.

55 ADJOURNED TO WEDNESDAY 23 APRIL 2003

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RMC:PM:RT:8

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

THIRTEENTH DAY: WEDNESDAY 23 APRIL 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 HIS HONOUR: Ladies and gentlemen, I do apologise, I
had forgotten. Counsel raised this matter with me last
week. Mr Zahra, as senior public defender of this
state, has certain official duties to perform. I've
given him leave to be absent for this morning so that
20 he can perform one of those duties. Mr Cook is here,
of course, and will be conducting the case for the
defence due to Mr Zahra's absence.

25 CROWN PROSECUTOR: Dr Ian Wilkinson, who gave evidence,
I think it would have been the week before last, was
not cross-examined at the time. He is now here for
cross-examination, so I call Dr Wilkinson.

30 <IAN ARTHUR WILKINSON(10.05AM)
SWORN AND EXAMINED

HIS HONOUR: As before, if you need to refer to any
note that you have to answer any question you are free
to do so.

35 WITNESS: Thank you, your Honour.

<CROSS-EXAMINATION

40 COOK: Q. I'm going to ask you questions about the
evidence you gave on 10 April.

HIS HONOUR: Do you mind if we get the doctor's name
and description.

45 COOK: Q. What is your full name.
A. Ian Arthur Wilkinson.

Q. And you are a medical practitioner?
A. That is correct.

50 Q. And a paediatric neurologist?
A. Yes.

Q. You gave evidence on 10 April in this matter?
55 A. Yes, I did.

Q. Is this correct. Your opinion is that the child
Patrick did not die as a result of encephalitis?

A. Absolutely.

Q. And is it your opinion that he did not die as a result of an epileptic seizure?

5 A. I can't say that is impossible. It is a possibility.

Q. Is this possible, that he suffered from epileptic seizures which caused asphyxia which caused damage to the brain. Is that a possible sequence?

10 A. In terms of his actual death, do you mean?

Q. Yes?

15 A. Yes, that is a possibility.

Q. And it is also possible, isn't it, that prior to his admission to hospital on 18 October 1990, that is the first admission, he had encephalitis?

20 A. I think it is absolutely impossible.

Q. Have you ever considered that it was possible?

25 A. Yes, I did certainly so when I realised it had been raised as an issue. I examined all the detail and I believe it is impossible, him having encephalitis.

Q. In relation to Patrick and the facts and circumstances surrounding him, has it always been your opinion that it is impossible that he suffered from encephalitis?

30 A. Not always. At the time of his first admission that was an issue that was a possibility. During that first admission as the evidence, clinical evidence and the investigations unfolded it became progressively clear it was not encephalitis.

35 Q. I will have you shown the CT scan that was performed on 23 October 1990 in relation to Patrick (CT scan shown.) you have seen that before, haven't you?

40 A. I have indeed, yes.

Q. And it raises as a possibility--

OBJECTION.

45 EXHIBIT #4 CT SCAN OF 23/10/1990 TENDERED, ADMITTED WITHOUT OBJECTION

HIS HONOUR: This has not previously been marked.

50 COOK: That is correct, it has not been marked.

EXHIBIT 4 READ TO JURY BY HIS HONOUR.

55 COOK: Q. Doctor, did this document come to you in your professional capacity at around the time it was created?

A. Did it? Yes it did, I believe so, yes.

Q. And you will recall that under the heading "impression" there is the statement, "The picture is compatible with encephalitis"; correct?

5 A. Yes.

Q. As at that time, 23 October 1990, is that a proposition that you would have agreed with?

10 A. It was a possibility. If I may, I mentioned in my evidence before that herpes simplex encephalitis is such a catastrophic illness with mortality rates 80, 90 per cent, child neurologists when confronted with a child with what we call undiagnosed encephalopathy, then it is probably herpes which is untreatable, and we treat it as if it might be herpes encephalitis. I do recall, and I suggested this, it was a situation where I had written to the radiologist and said could it be, could it be, could it be, and a fairly junior radiologist may have agreed with me. There were two consent opinions with the CT scans which were against that diagnosis.

15 Q. At that time it was a diagnosis that you were prepared to entertain as a possibility?

25 A. As a possibility, yes.

Q. And treatment was embarked upon to counter against that possibility, is that right?

30 A. That's correct. We started a drug called Acyclovir.

Q. And is that specific to herpes encephalitis, or is it a drug treatment that will be used for other forms of encephalitis?

35 A. Particularly herpes simplex encephalitis. It does have some effect against herpes zoster, which is another virus in that group, and possibly other viruses, but for practical purposes it is used for herpes simplex encephalitis.

40 Q. Do I understand this, it is directed at viral encephalitis?

A. That's correct, it has no role against bacterial infections.

45 Q. Viral encephalitis is, of course, not the only form of encephalitis, is that right?

50 A. Infections in the nervous system are broadly classified into meningitis, which is an infection, usually bacterial, of the covering of the brain.

Q. Called the meninges?

55 A. That's correct, or encephalitis which is an inflammation and infection of the brain substance itself deeper in, and it is usual in an encephalitis that it is a viral infection, much more likely than, say, a bacterial infection.

Q. But is this correct, there are other forms of

encephalitis above and beyond viral forms. Is that right, as a general proposition?

A. Yes, there are. But they are not common.

5 Q. And is it your position that a number of tests performed on the child Patrick after his admission excluded viral encephalitis?

10 A. Absolutely. The lumbar puncture, which was done on, I believe, on the third day, had absolutely no inflammatory cells whatsoever. The hallmark of encephalitis or meningitis is in fact that they have inflammatory cells within the spinal fluid, and Patrick had zero white cells, zero inflammatory cells. Indeed another lumbar puncture done at a subsequent admission 15 also had zero white cells. It is recognised in herpes simplex encephalitis and other encephalitis that they will continue to have inflammatory cells for some time, but on neither occasion did he have any inflammatory cells. He had a very specific blood test called an IgM 20 or antibody test for herpes simplex encephalitis. That is, if you like, the gold standard test for herpes infections, and that IgM was negative I think on about day three, but again on day 15 or something like that. If it had been herpes simplex encephalitis I would have 25 expected one or more of those two tests to be positive, but they were not.

Q. Those tests to your satisfaction excluded herpes encephalitis, is that right?

30 A. That's correct.

Q. Not forms of encephalitis which may be non viral in their origin?

35 A. I would think it highly unlikely that any form of encephalitis, viral or otherwise, would produce no white cells, no inflammatory cells. It is the manner of any encephalitis that they have inflammation within the brain, within the nervous system that they produce white cells. That is the hallmark of encephalitis at 40 the laboratory level.

Q. Would you agree with this proposition, that in the early stages of the onset of encephalitis it is less likely that some sign of it will show up on an 45 examination through a lumbar puncture?

50 A. There is a small chance and, indeed, your Honour, since I was last a witness I've investigated this and looked at the literature, and the figure is in fact that there are some changes in the spinal fluid in somewhere between 90 and 97 per cent of people with herpes simplex encephalitis. It is very uncommon that they would not have.

55 Q. Are you saying that you had satisfied yourself by the time that Patrick died that encephalitis had no role to play?

A. I can't recall my exact thinking at that time, and I was confronted with the evidence which was clearly

totally against it and I can only assume by that stage I was of the opinion that this was not encephalitis and had never been encephalitis.

5 Q. And you signed a death certificate in relation to this child, didn't you?

A. That's correct, yes.

10 Q. And was your opinion when you signed that death certificate that an antecedent cause of the condition which led to his death was epileptic fits?

A. I thought that that was a possibility, yes indeed.

15 Q. Those epileptic fits having commenced about four months prior to the child's death?

A. The seizures commenced on at about 40 hours, as I recall, into his initial illness, which is around late on 19 October, and Patrick died I recall on 13 February, so that's about the interval, yes indeed.

20 Q. I show you the document you looked at when you were here last. (MFI 18 shown) It is the medical certificate of cause of death that is a document that you signed the day after the child died, is that right?

25 A. Yes, 14 February.

Q. And was it then your opinion that the direct cause of death was asphyxia due to airway obstruction?

30 A. I thought that that was a possibility at that time.

Q. And that the antecedent cause was epileptic fits?

35 A. I thought that that may have been the case. It's not infrequent that children with epilepsy are found dead and the assumption is they may be - a seizure may have resulted in airway obstruction and asphyxia. It is a not uncommon situation with my patients over the years, and on that basis I thought that this was a possibility.

40 EXHIBIT #5 DEATH CERTIFICATE FORMERLY MFI 18 TENDERED, ADMITTED WITHOUT OBJECTION

45 HIS HONOUR: Mr Cook, I would read this to the jury but I'm not absolutely confident about everything in the form. It is not a very good copy. There doesn't happen to be a better copy in court, does there?

50 COOK: I don't have a better copy. I don't know if the Crown has the original.

CROWN PROSECUTOR: We don't have a copy.

55 HIS HONOUR: It will be a matter for the jury what it says. The document entitled medical certificate of cause of death Patrick Folbigg marked 18 for identification is exhibit 5.

When you see the document you will see what I mean. It

looks like a photocopy of a photocopy of a photocopy, that kind of idea, and not everything that in the printed portion of the document is entirely clear.

5 EXHIBIT 5 READ TO JURY BY HIS HONOUR

COOK: Q. I show you another document. Please look at this (Document shown.) Is that a document that you
10 recognise as coming from the medical files relating to Patrick Folbigg?

A. I do believe this was a copy that was generated after the event by the medical records section at the Mater Hospital. It had been countersigned Marie Bell, who is the medical - although I don't witness it here,
15 although I am familiar with this document, which is a copy, and Marie Bell is, I think, the chief medical records librarian. I believe this was a handwritten copy by her of my original death certificate.

20 HIS HONOUR: This document is going to help you a lot because it will help you to understand what the formal printed parts of exhibit 5 say. It appears to repeat the words, and it is clear.

25 EXHIBIT #5 SUPPLEMENTED BY THE ADDITION OF LIBRARIAN'S COPY TENDERED, ADMITTED WITHOUT OBJECTION

COOK: Q. Tell me if you need to look at any of those documents which have just been entered into evidence,
30 but I'm going to ask you this: It is recorded in that last document encephalopathic disorder. Do you agree with that?

A. Yes, I have read that, yes.

35 Q. And it is also recorded that the underlying cause of the encephalopathy "not determined on investigation"; right?

A. I believe so. May I have another look at those because I'm not familiar with whose words they are. I
40 don't think they are on my original death certificate, and I'm just not quite sure whether they--

Q. (Exhibit 5 shown.)

45 A. Yes, I have that in front of me.

Q. Now, encephalopathic disorder does not feature in the original death certificate?

A. No, I cannot see it, unless there is a second page or further. I must say it is possibly the last death
50 certificate I've ever signed, so I'm not familiar with the format very well, but there may have been a follow on page and the medical record librarian has now attached that on to the copy, but I'm not really aware of whose words they are.

55 Q. Can we take it that the information would have come from you?

A. I think that is very reasonable.

Q. So can we take it that your opinion as at 14 February 1991 was that an underlying cause of the epileptic fits was an encephalopathic disorder?

5 A. Given that this death certificate was issued prior to the postmortem, which changed thing radically in my mind, yes, I had no - at that point I had no particular idea of what that encephalopathy was.

10 Q. We can take it that as at 14 February 1991 this was your opinion?

A. I believe so. As I said, this is not my writing. I can only assume this was taken from some statement I made. I think that was consistent with the way I felt at the time.

15 Q. Now, the postmortem report.

A. Yes.

20 Q. Did that have some effect on your thinking about the cause of this child's death?

A. Yes, it did.

25 Q. What effect was that?

A. In two senses. There was nothing that indicated obstruction of airways that one might perhaps have seen if he had had an epileptic seizure, vomited, inhaled vomitus, and that is one of the mechanisms of death associated with epileptic fits. There was no evidence of that. There was no evidence at postmortem that his tongue had obstructed his airway, so those were things which I might have thought, you know, possible at the postmortem which weren't there.

30
35 But in a different sense there were changes in the brain, and Dr Kan, and this was given in evidence when I first was there, there were changes in the brain which certainly made my thinking very different. Those changes were consistent with an initial asphyxial episode and certainly in no way consistent with herpes simplex or an encephalitis.

40
45 Q. But the changes in the brain that you saw reflected in Dr Kan's report did not exclude the possibility of encephalitis?

A. No, I think they did. I mean, there was comment made to the effect that this was not consistent with, either changes were not, and I'd need to look at that again, it is two weeks, but my summation of his report was he didn't believe it was to do with encephalitis. He did describe laminar cortical necrosis, and that is, of course, a classic change in the brain from hypoxia and asphyxia, and they were the words he did use. He also talked about the distribution of the change as not being consistent with herpes simplex and encephalitis. There were quite a few things in his report that allowed me to believe this was most likely to do with asphyxia and highly unlikely to do with encephalitis.

Q. When did you receive the postmortem report?

5 A. Again I cannot - I can't recall an exact date, but
the process is a very lengthy one, and in fact the
brain was removed in Newcastle and subsequently Dr Kan
10 examined it, and I don't recall the date of his
examination but the brain would have been fixed in
formalin, I think, and I would imagine that his
examination could have been some weeks or months later,
in which case I may not have seen those, his final
15 report. And the way things happened, that final report
may never have been shown to me. Certainly Detective
Sergeant Ryan drew my attention to changes later on,
but whether I witnessed that report at the time, I
don't recall.

Q. You first encountered Detective Ryan in relation to
this matter in 1989?

20 A. I believe so, yes.

Q. What I'm trying to get from you is your evolving
opinions in 1991. Do you understand?

25 A. Yes. I don't recall them, to be honest. After
Patrick's death I can recall the initial postmortem did
not help us in any way with working out why he had
died. Subsequent to that I don't recall the sequence
of events of when or if I saw Dr Kan's report.

30 Q. But is this the effect of what you are saying.
Dr Kan's report for you was inconsistent with the
presence of encephalitis, is that what you are saying?

A. Yes, that's right.

35 Q. It still left open the possibility, didn't it, to
your way of thinking?

40 A. No. I mean one doesn't take any piece of evidence
in isolation. All the evidence which I've detailed on
10 April and again today, all the evidence was against
being herpes simplex encephalitis. I saw nothing in
that report that made me change that view. It just
supported that view that this was clearly not
encephalitis.

45 Q. And this is an opinion that you say you formed
gradually, but it was crystallised, if I can put it
like that, after you saw Dr Kan's report. Is that what
you are saying?

50 A. I believe, again it must have been quite much
after, and I don't remember the sequence of my thinking
processes.

Q. Dr Kan's report is dated 24 June 1991. Do you
understand that?

55 A. So that was as I suggested. It was about four
months after Patrick died, yes.

Q. Can we take it that you would have seen that report
around the time that it was created?

5 A. Not necessarily. The report would not have been sent to me. It is normal process that our pathologists would have asked the opinion of Dr Kan in Sydney and Dr Kan would have formally reapplied to our pathologists, and it is quite possible in fact that I never witnessed that report.

Q. Did you discuss it with Dr Kan?

10 A. No, I don't believe I did.

Q. Were you made aware of what it contained?

A. I'm not certain that I was. It may have been many years later before I was notified of it.

15 Q. Dr Kan's report essentially looked at the brain under a microscope?

A. Yes, that's true. He examined the histological sections of the brain, yes, that's true.

20 Q. And part of your role then, as Patrick's treating doctor, was to have discussions with the parents after Patrick's death?

A. Yes.

25 Q. And was it your belief that they were anxious to be told about the underlying cause of his death; is that right?

A. I don't recall, but if I may refer to my letter following Patrick's tragic death?

30

Q. Can I take you to that letter.

A. Yes.

35 Q. On 19 September 1991 did you write a letter to Mr and Mrs Folbigg?

A. I would like to see that letter. I don't have - my file were taken by the court and I don't have access to my original files.

40 Q. (Document shown.) Does that have your name at the bottom, Ian Wilkinson?

A. That's correct.

45 Q. And up the top a date, 19 September 1991?

A. That's correct, yes.

Q. And it is addressed to Mr and Mrs C Folbigg?

A. That's correct.

50 Q. And you typed or dictated or caused to be typed that letter?

A. I did indeed, yes.

55 Q. And was it a true statement of your views at the time?

A. Yes, it was.

Q. And by this stage, that is, the stage that you

created this letter, was all the evidence in that related to Patrick?

5 A. It should have been. I presume the final autopsy report to which I refer was in fact the report from Dr Kan. I haven't had access to my own personal files since 1999, hence my uncertainty about this.

10 Q. Right. But the letter refers to the receipt by you of the final autopsy report on Patrick?
A. That's correct, yes.

15 Q. It also refers to what an examination of the brain revealed?
A. Yes, that is correct.

Q. It also referred to changes under the microscope, correct?
A. That's correct, yes.

20 Q. So can we take it that by the time you created this letter you had all the information particular to Patrick that you were ever going to get?
A. I can assume so, yes.

25 EXHIBIT #6 DR WILKINSON'S LETTER TO MR AND MRS FOLBIGG OF 19/09/1991 TENDERED, ADMITTED WITHOUT OBJECTION

EXHIBIT 6 READ TO JURY BY HIS HONOUR

30 Q. Can we take it, doctor, that as at your creating that letter it was your opinion that encephalitis was a possible explanation for what happened to Patrick.

35 OBJECTION. NOT WHAT IT SAYS

CROWN PROSECUTOR: If my friend is going to question the doctor on the letter he should accurately state what is in the letter. It doesn't say that.

40 COOK: My friend misunderstands the question.

QUESTION ALLOWED

45 HIS HONOUR: Mr Crown, it is sufficient if you merely object.

COOK: Q. Can we take it that when you created this letter it was your view that encephalitis was a possible explanation for Patrick's death?

50 A. From the nature of the letter it would appear so.

Q. And as you have told us, by the time you wrote this letter you had all the medical information in relation to Patrick that you were ever going to get. That's right, isn't it?

55 A. The difference between June and September, assuming that I saw Dr Kan's report, as I said, I would have received a report from the pathologist in Newcastle

which often takes a long time. I do not know for certain that I had received Dr Kan's report. I have not referred to that there. It is notorious that pathology reports, postmortem reports, take a long time to be received, and whether I had received the Newcastle postmortem report or the Newcastle and the Sydney postmortem report, I can't say from that. I may not even have been aware in fact that the specimens were sent to Dr Kan. As I explained, it was a referral I think from the pathology department.

Q. But the letter itself says:

"I have at last received the final autopsy report on Patrick."

Doesn't it?

A. That's right. That is assuming that I knew that it had been sent to Sydney. I may have simply felt that the Newcastle pathology postmortem report was the final report.

Q. And the letter also told the Folbiggs about what was found on examination of the brain, is that right?

A. Yes, it did.

Q. And also, if I can paraphrase it, tell me if you disagree, the lack of precision which could be drawn from the changes observed under the microscope?

A. Yes, I did say that in that letter, yes.

Q. Can we take it that you had a sound basis for saying that?

A. I would trust I had a sound basis for saying that.

Q. You see, you are referring to the possibility that you might not then have had all the documents. Is that what you are referring to?

A. There is a possibility that I had not received the Sydney postmortem report. I may have believed that the Newcastle was the final one.

Q. You see you are speculating about a possible lack of information, aren't you?

A. Yes, I am.

Q. You would have expected for a paediatric neurologist in your position that you would not have written this letter stating what it does until you had all the relevant information?

A. That's correct.

Q. Now, let's go back a bit. We can take it, can we, that it was your opinion in September 1991 that encephalitis was a possible explanation for this child's death; correct?

A. According to that letter, that would be the case, yes.

Q. And if the letter says that, that would be the case, wouldn't it?

5 A. Yes. I don't recall - in my own private files, I don't know whether they are available because they should indicate whether I ever did receive Dr Kan's report.

10 Q. What does "changes under the microscope" refer to in your letter?

A. It means that they were examined by a pathologist, not just in a gross sense but also looking at the slides of the brain.

15 Q. That is what Dr Kan did?

A. They may have also been done in Newcastle, I'm not sure.

20 Q. Now--

A. I would need to know whether in fact the brain was fixed in formalin and then sliced and examined under the microscope in Newcastle and then those slides were sent to Sydney, or whether in fact the Sydney doctor, Kan, was the first person to ever see the microscope files. I'm not certain about that.

25 Q. Again you are speculating; is that right?

30 A. I am. My - could I - is it possible that I could examine the postmortem report from Newcastle to know whether in fact they looked at under the microscope there?

EXHIBIT V HANDED TO MR COOK

35 Q. (Exhibit V shown.)

A. The report from Newcastle refers to the brain was fixed for later dissection. Whether that later dissection was carried out in Newcastle or in Sydney, I don't know.

40 Q. Could you look at the last page of exhibit V, please? You see about a third of the way down the page?

45 A. Yes, I've got that, yes.

Q. Is that headed "Hunter Area Pathology Service"?

A. It is indeed.

50 Q. You see about a third of the way down the page it says "Microscopic Report", underlined?

A. Yes, that is correct.

Q. Under that it says "Brain"; see that?

55 A. Yes.

Q. Under that it says, "Please see the attached microscopic report from Dr Alex Kan (Camperdown Children's Hospital Sydney)"?

A. It does, indeed.

Q. Can we take it that Dr Kan's report travelled with this one?

5 A. One would assume it did.

Q. And that you received this report which attached Kan's report before you wrote the letter to the Folbiggs?

10 A. One would assume so, yes.

Q. So it appears pretty clear, doesn't it, doctor, that in relation to Patrick's death by the time you wrote that letter to the Folbiggs you had all the relevant information. That's right, isn't it?

15 A. It would be reasonable to assume that, yes.

Q. And it follows from that, doesn't it, that your opinion based on all the relevant information relating to Patrick was that encephalitis was a possibility?

20 A. It would appear so from that letter.

Q. And that is the truth, isn't it, that encephalitis was a possible cause of his death?

25 A. I don't believe so now and I'm not quite certain what led me to make that statement. The many purposes, as I recall, was we were investigating whether there were any inherited disorders and they took some time for those result to come back from Adelaide and other places.

Q. I think the letter refers, in effect, to your investigation of inherited disorders, doesn't it?

35 A. That's right, it does.

Q. That should give you more confidence that you had all the information when you wrote the letter?

40 A. The normal time would be two or three months for the inherited disorders investigation.

Q. One of the reasons that you didn't write this letter to the Folbiggs until 19 September was you were waiting on all the information, is that right?

45 A. That seems reasonable, yes.

Q. I just want to ask you a couple of other matters. It is possible, isn't it, that epilepsy can cause sudden death?

50 A. It can do.

Q. Is there a phenomenon called SUDEP?

A. Yes, there is.

Q. What does that mean?

55 A. Sudden unexpected death in an epileptic patient.

Q. Could you describe what the biological process of that is, if you can?

5 A. Well I don't think anyone knows and there may be many causes for such sudden unexpected deaths ranging from, as I said earlier, episodes of seizure leading to vomiting, leading to inhaling vomit and suffocating, seizure resulting in the tongue, I think the colloquial phrase is "being swallowed", but the tongue can certainly obstruct the airway in an epileptic event. A patient may roll over and put their head into a pillow. There are other possible causes such as cardiac rhythm disturbances during epileptic seizures. I think it is fair to say that a lot of it is speculation as to what the cause of death is. Unless there is particular evidence found it has been my experience that often one just knows that the child was an epileptic and the child was found dead without any more clear evidence than that.

<RE-EXAMINATION

20 CROWN PROSECUTOR: Q. You were asked a number of questions by my learned friend, Mr Cook, in relation to whether or not Patrick suffered from encephalitis at the time of his first admission to hospital in October of 1990.

25 A. That's right, yes.

Q. And you have stated your view now on a number of occasions that he did not suffer from encephalitis?

30 A. That's correct.

Q. And both today and two weeks ago you provided some of the reasons why you are now of that view?

A. Yes, that's correct.

35 Q. Have you prepared a document setting out 10 particular reasons why he did not suffer from encephalitis?

A. Yes, I do have such a document.

40 Q. And with his Honour's permission, referring to that document if you wish, would you explain to the court why now you are firmly of the view that Patrick did not suffer from encephalitis?

45 A. I am of the belief that he didn't suffer from encephalitis by an accumulation of all of the evidence. To go through it issue by issue, first of all his EEG was not - the EEG was done on day one, and then I think another twice during his initial admission, and there is a classic form of EEG that one tends to see in herpes simplex encephalitis and the EEG is a recording of the background rhythms of the brain and one sees what is called a periodic discharge where every second or couple of seconds there is an electrical short circuit takes place. It is quite a striking EEG pattern, and whilst it is not seen in every single case 50 it is certainly seen in many cases and it is very typical of herpes simplex encephalitis, and he didn't have that at any stage in any of those three EEGs.

55

5 The second point was the lumbar puncture, and it, I've
written here it was clear and, as I said earlier today,
the most striking thing on lumbar puncture in
10 encephalitis is that because it is an infection,
because it is an inflammation, the nervous system
responds by powering out inflammatory cells just as in
the blood, if there is blood poisoning, the blood will
pour out inflammatory cells, similarly the nervous
15 system produces inflammatory cells. So we are all
walking the streets with those cells in our spinal
fluid, another brain fluid, but when there is an
inflammation of the brain, as occurs in encephalitis or
meningitis, it is expected there will be inflammatory
20 cells found, and on two occasions he had lumbar
puncturing which demonstrated absolutely zero numbers
of inflammatory cells, which I think is very much
against it. As I said earlier, I reviewed the
literature and in herpes simplex encephalitis anything
up to 97 per cent of patients will have spinal fluid
abnormalities. If they don't occur on the first lumbar
puncture, certainly you would expect it to occur the
second time around.

25 Thirdly, the postmortem on the brain, and again I'm
referring to Dr Kan's report, he felt, and I don't have
that report in front of me, your Honour, but I believe
there was mention made of the distribution of the
30 lesions as being not typical of herpes simplex. So the
part of the brain that was involved and, as I said two
weeks ago, herpes simplex tends to involve what is call
the temporal lobes which are the part of the brain down
in the side here or the frontal lobes which are the
part at the very front of the brain. We know that all
35 along the CAT scan chains with Patrick were not in -
they were mainly down the back of the brain, which is
highly unlikely in the case of herpes simplex
encephalitis, and I recall, I trust I recall correctly,
40 that Dr Kan's postmortem report also talked about the
distribution of those changes, implying that they were
at the back of the brain.

He also very clearly talked about cortical laminar
necrosis, laminar cortical necrosis. May I refer to
45 that report of Dr Kan's again? I haven't--

Q. (MFI 20 shown.)

50 A. Under "distribution of the lesions is unusual for
herpes simplex encephalitis", he talks about the major
changes in this extensively sectioned brain are old
infarcts and gliosis, mostly in the form of old laminar
necrosis. Now laminar necrosis is a situation where
the nerve cells in the grey matter of the brain which
sits on the surface of the brain, there is a number of
55 different layers of those nerve cells, and particularly
in asphyxia and lack of oxygen to the brain we see
changes where there are ribbons of nerve cells
destroyed, not the whole area. In herpes simplex

encephalitis, for instance, it just destroys whole areas of the brain. It used to be called acute haemorrhagic necrotising encephalitis. Haemorrhage means there is bleeding, necrotising means the brain tissues are destroyed.

5
Q. If I could ask you this: So far as the distribution and the damage to the brain, you say it was not consistent with encephalitis?

10 A. Can I just read a little further?

Q. I'm not asking you about Dr Kan's opinion, I'm asking you about yours.

15 A. Sorry. Could you ask the question again?

Q. Yes. You are referring to the damage to the brain, the damage to the brain tissue is not consistent with herpes simplex encephalitis?

20 A. No.

Q. Was it consistent with any other form of encephalitis?

25 A. I notice, well, the reason, maybe my letter to the Folbiggs related to a statement here.

Q. Could you just answer my question?

A. No, it was not consistent.

30 Q. Was it consistent with any other form of encephalitis?

A. I don't think so.

Q. Was it consistent with asphyxiation?

35 A. Yes it was, certainly.

Q. Would you continue now telling the court your reasons why you are now of the view that Patrick did not suffer from encephalitis on his first admission?

40 A. Certainly the postmortem changes, then the nature of the seizures. It is traditional that patient present with seizures at the time when they first present. In anything up to 87 per cent of presentations of herpes simplex they have seizures as they come to the hospital. He actually didn't develop
45 seizures I think until 40 hours into his illness, and classically herpes simplex gives you focal seizures which are just in one part of the brain, which he didn't have.

50 Q. The absence of seizures when he first came into the hospital and the fact that it was not a focal seizure, is that consistent with asphyxiation?

55 A. Yes, I believe it is. It's quite common in asphyxiation to find that there's effectively a honeymoon period that the child is brought in and there is a period of hours or days when there seems to be recovery and no major neurological problem, and subsequently they develop particularly seizures and

also blindness, and so on.

Q. Is that something seen, for instance, in patients who have suffered near drownings?

5 A. Yes, it is.

Q. Please continue with any other reasons why he was not suffering from encephalitis.

10 A. The loss of visual function which he had, which was clearly documented, was something which I associated much more with asphyxiation rather than herpes simplex, because as I said herpes simplex tends to involve the front parts of the brain whereas the visual part of the brain is at the very back, the loss of brain tissue

15 shown over the progressive CT scan.

Q. Did you say the progressive CT scan?

A. Yes.

20 Q. What do you mean?

A. Patrick I think had three CT scans during his initial admission.

Q. You mean over a number of CT scans?

25 A. Yes, and they did describe progressive loss of tissue, and again I recall it was particularly in the back part of the brain, the most striking changes I think on the progressive CAT scan.

30 Q. Is that inconsistent with encephalitis?

A. I think it is rather unlikely to do that with herpes simplex encephalitis.

Q. Is it consistent with asphyxiation?

35 A. Yes, I believe it is.

Q. Would you continue?

40 A. Yes. And then the CT scan on 5 November, which was 18 days into his admission, there was mention made of calcium changes and they are of a type that one tends to see after asphyxial episodes, so calcium being laid down in the brain. And the tenth point I made was that when he was admitted on 10 October, 18 October, and I examined his temperature chart in the hospital file and

45 I don't think he developed a fever until well into that, sometime into that admission, whereas it is classical in anything up to 92 per cent of people at presentation with herpes simplex encephalitis that they actually have a fever at the time of presentation,

50 which didn't appear to be the case.

Q. Is there any other reason why you are of the view that he was not suffering from encephalitis? I think you referred to the IgM test?

55 A. Yes. The IgM, which is a specific antibody reaction and it is quite specific for herpes simplex, in other words, the laboratory can do given antibodies for different infections, and we went looking for

herpes simplex in his blood shortly after admission and subsequent, I think two weeks into his admission, and on both occasions the test for herpes simplex encephalitis in the blood was negative. I think that
5 would be extraordinarily unlikely in the case of someone who has a herpes simplex infection.

Q. Putting all of those together, are you able now to exclude encephalitis as a possible cause of Patrick's admission when he first came into hospital?

A. Yes, I can.

Q. And what do you say now is the most likely cause of the first admission to hospital?

A. I think the most likely cause was asphyxia.

Q. And what does asphyxia mean?

A. Asphyxia is a situation where the end result is that the blood cannot deliver oxygen to the tissues and that may be as a result of a number of issues. It would be as a result of just obstructing the passage of air and oxygen into the lungs, it can be other situations, carbon monoxide poisoning where the oxygen can't be carried, but I think asphyxia most commonly is
20 the result of oxygen not getting into the body.
25

Q. You were asked a number of questions by Mr Cook about a letter that you sent to Mr and Mrs Folbigg on 19 September 1991?

A. That's correct.

Q. Please look at these documents, and I have that letter and another letter flagged. (Documents shown.) Firstly, could you confirm, is that bundle of documents your file on Patrick Folbigg?

A. Yes. I recognise this as my personal file.

Q. Now, the first letter that is flagged, is that the letter which has already gone into evidence which is exhibit 6? Is that a copy of exhibit 6?

A. Yes, it is.

Q. Please go to the second letter that I have flagged. Is that a letter which you sent to another doctor?

A. That's correct.

Q. And what was the date of that letter was sent?

A. That was November 28 1991.

Q. So it was sent a matter of approximately a month later?

A. Two months, I think.

Q. Two months later?

A. Yes.

Q. Please read through that letter to yourself.

A. Yes. Yes, I've read that letter.

Q. Who did you send that letter to?

5 A. That was Dr Alison Colley. Dr Colley at that time was a geneticist who worked with the Hunter Genetic Unit.

Q. In that letter did you summarise your views about Patrick Folbigg?

10 A. I did.

Q. Is there anything in that letter in which you have suggested to Dr Colley that Patrick may have suffered from encephalitis.

15 OBJECTION. QUESTION REJECTED.

WITNESS: May I examine the letter again, then?

20 CROWN PROSECUTOR: I press it.

HIS HONOUR: Please don't say anything, doctor.

IN THE ABSENCE OF THE JURY

5 COOK: Your Honour, I, having cross-examined the
witness on the letter dated 19 September 1991, drew
attention to what appears to be a conflict in the
witness's stated positions. That entitles my learned
friend, and this is what I apprehend he is seeking to
do, to demonstrate that on other occasions he has
10 expressed himself in a manner consistently with the way
he expresses himself today.

I make two points about the Crown's question. Firstly,
in answer to the question, does it go to that issue,
that is, an absence of a possible attribution in this
15 letter is not consistent with his position that that
cause can be positively excluded.

HIS HONOUR: That may be a matter of inference from the
rest of the body of the letter, of course. We don't
20 know about that.

COOK: I will come to my second point. If this is
capable of supporting the unstated assertion by my
friend, then the whole letter should go in. You can't,
25 with respect, and I'm not saying this with disrespect
to the witness, but the jury shouldn't have to rely on
this witness's analysis of the letter. They should
have the whole letter if it is capable of establishing
what the Crown thinks it can. That is the basis for
30 the objection, your Honour.

CROWN PROSECUTOR: My reason for doing it this way is
the letter is between two doctors, it is of a highly
technical nature with a considerable number of very
35 technical terms that the jury wouldn't have a hope of
understanding. The essence of the letter that I wish
to ascertain from the doctor is there is no suggestion
that Patrick may have had encephalitis and that his
conclusion to Dr Colley was that Patrick was an enigma,
40 that the cause of his demise and the cause of his
original admission were unknown, and that in essence
the doctor had not, this doctor, Dr Wilkinson, had not
really come to any satisfactory conclusion about what
the cause of his epilepsy was.

45 HIS HONOUR: I take it from your response that the
letter does not state that Dr Wilkinson does not
entertain the possibility that he spoke about in the
letter to Mrs and Mrs Folbigg. If it is in the letter,
50 it is in the letter by inference only.

CROWN PROSECUTOR: Yes, by inference. The doctor might
correct me if I am wrong, but I think there is no
specific statement that the patient did not have
55 encephalitis.

WITNESS: No. I mentioned I wondered initially about
herpes simplex encephalitis and treated him, but that

is the only reference I can find.

5 HIS HONOUR: What do you say to Mr Cook's point that the letter should go in?

10 CROWN PROSECUTOR: Just this: It is a classic instance where evidence should be excluded under that provision of the Evidence Act which says that evidence that might be unduly confusing ought not to go into evidence.

COOK: 1235.

CROWN PROSECUTOR: 135(b). (Read)

15 HIS HONOUR: The difficulty with that approach is that it is ultimately a matter for the jury whether the absence of a particular mention in the letter gives rise to the inference that that was no longer the doctor's view.

20 CROWN PROSECUTOR: I'm quite content to tender the letter, and perhaps rather than have it read and have the terms in evidence, to have it in evidence and I can ask the doctor the questions that I intend to ask.

25 HIS HONOUR: The view I've come to is you may not simply have an answer to your question and let things end there. One of two things must happen. Either the question will be rejected or it will be allowed and answered and then the letter will go before the jury. I don't know for the moment which of those is the appropriate way to deal with the matter. I may need to hear further from Mr Cook about that.

30 Mr Cook, what do you say about the nature of the letter and whether it ought to go before the jury?

35 COOK: There is no good reason why it should not. My friend is entitled to try to make the point that he is trying to make and he is entitled to have the jury look at the letter to see if it is a good point, so in my submission the letter should go before the jury.

40 HIS HONOUR: That is what should happen then and it will be up to counsel to see that any technical expressions used in the letter are explained for the benefit of the jury.

45
50

IN THE PRESENCE OF THE JURY

CROWN PROSECUTOR: I tender the letter, I have a copy here.

5

EXHIBIT #AC LETTER FROM DR WILKINSON TO DR COLLEY DATED 28/11/1991 TENDERED, ADMITTED WITHOUT OBJECTION

10

CROWN PROSECUTOR: Q. This is a letter between two doctors?

A. That's correct.

15

Q. And in this letter did you attempt to set out in summary form the medical history of Patrick?

A. I did.

20

Q. Is it expressed in fairly technical medical language?

A. It is indeed.

25

Q. And is there one and only one reference to the consideration of encephalitis?

A. That's true.

30

Q. Apart from that statement about wondering initially about herpes simplex encephalitis and treating him with Acyclovir, is there any other reference in this summary to Dr Colley of encephalitis?

A. I can't see any other reference.

35

Q. And in the second last full paragraph of the letter, do you set out in effect your conclusion in relation to the cause of both Patrick's epilepsy and his death?

A. That is true.

40

Q. And do you state there: "He remains an enigma."

A. I did.

45

Q. And by that did you mean that the cause of the epilepsy and the cause of his death were, at that stage, still unknown to you?

A. That's correct.

50

CROWN PROSECUTOR: I don't propose to ask the doctor to explain any other parts of the letter unless my friend wishes it.

55

Q. Doctor, about halfway down the first page there is a reference to ALD?

A. Yes.

Q. Would you tell the court what that is?

A. ALD is adrenoleukodystrophy. It is an inherited

disorder--

Q. You don't need to tell us that. Was that something that you tested Patrick for?

5 A. Yes.

Q. Did you send off a blood test?

A. I did.

10 Q. Did that come back normal?

A. That's correct.

Q. Now, you gave evidence in answer to questions by Mr Cook about the ways in which an epileptic who is suffering a fit might suffer an obstruction of their airways?

15 A. Yes, it is possible.

Q. What we refer to as swallowing their tongue?

20 A. Yes.

Q. You referred to inhaling vomit?

A. That's correct.

Q. As being two possible ways in which an epileptic might suffer an obstruction of their airways causing death?

25 A. Yes.

Q. From your perusal of the postmortem report was there any suggestion that that is what happened to Patrick?

30 A. No. I did peruse it and I see no evidence for that. Since perusing the report I see some detail which may have contributed to my letter to the Folbiggs in September in terms of inflammation.

Q. Could I have exhibit 5? I think you may still have it there, the two death certificates?

40 A. Yes.

Q. Now, you were asked questions about these two death certificates and you explained one was written by you and the other written by a medical record librarian?

45 A. I believe so, yes.

Q. On the second of them, the one written by the medical records librarian, there are the words "encephalopathic disorder. The underlying cause of encephalopathy not determined on investigation"?

50 A. That's correct.

Q. You told Mr Cook that that was a view that you held at the time?

55 A. Yes.

Q. What does the encephalopathic disorder actually mean?

A. A disorder in which there is some abnormality within the brain. It really is no more specific than that.

5 Q. So it just means a brain abnormality?

A. Absolutely.

Q. What does encephalopathy mean?

10 A. The state of an encephalopathic disorder.

Q. So it is the state of having a brain disorder?

A. Yes.

15 Q. Is this what this last entry means, that the cause of Patrick's brain disorder, the underlying cause of it was still not determined?

A. That's correct.

20 Q. You were asked a number of questions about the CT scans in this matter.

A. Yes.

25 Q. And Mr Cook showed you one CT scan which became exhibit 4. Please look at this other CT scan which has been marked for identification 17. Do you confirm the other CT scan is another scan on Patrick, again performed by Dr Lai?

A. That's correct.

30 COOK: No objection to that and no objection to the course my friend suggests.

35 EXHIBIT #4 SUPPLEMENTED BY THE ADDITION OF FURTHER CT SCAN DATED 5/11/1990 TENDERED, ADMITTED WITHOUT OBJECTION

40 CROWN PROSECUTOR: Q. You were asked some questions about the first of those CT scans by Mr Cook and you said that, as I understood it, that Dr Lai was a junior radiologist and that you had got two other opinions about that CT scan?

A. That's correct.

45 Q. Who did you get those other opinions from?

A. Dr John Bear, and I believe that is recorded in the file, Dr John Bear is the senior paediatric radiologist in Newcastle, and subsequently Dr Merle Da Silva who was the most senior radiologist at the Royal Alexandra Hospital for Children.

50 Q. What was the view they expressed to you and how did it differ from the suggestion of Dr Lai?

55 A. Basically that the first, Dr Bear, I recall the conversation when he said he didn't think it was classical of, but it was a possibility of. Dr Da Silva I recall said he didn't believe it was in keeping with that.

Q. With what?

A. With the encephalitis type process. I, I, I may need to refer to Dr Da Silva's report on that. That was my recollection of the situation.

5 Q. One further matter, doctor. You have used the term hypoxia. Would you tell the court what that means?

10 A. Hypoxia means a lack of oxygen, effectively. The hypoxia is the process whereby the blood is not able to carry enough oxygen to look after tissues and hypoxia results in changes of a damaging type in the tissues.

Q. Can hypoxia be caused by deliberate smothering?

15 A. It can.

HIS HONOUR: Q. Would you please make sure none of the exhibits get mixed up with your own papers?

20 A. Those are my own personal papers that the court still holds.

CROWN PROSECUTOR: They haven't been marked, perhaps they might be returned to the doctor.

25 HIS HONOUR: Mr Cook, is there any problem with that? It has been suggested that the doctor's own papers which have been in the court be returned to them.

30 COOK: I can't see a problem with that. I think we have copies of them all so I don't think there is a problem with that.

<WITNESS RETIRED AND EXCUSED

SHORT ADJOURNMENT

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: The next witness is Karen Hall.
Your Honour should have a copy of her statement. It is
number 13 in volume 2.

HIS HONOUR: This is 29 July 1999.

10 CROWN PROSECUTOR: Yes. If your Honour goes to the
third page of her statement. If your Honour goes to
paragraph 7 which starts on page 2, that is probably
the most significant part of her statement, and
paragraph 8 as well.

15 HIS HONOUR: I have read paragraphs 7 and 8.

20 CROWN PROSECUTOR: In paragraph 8 she says that she was
worried because it seemed to her that Laura had stopped
breathing for a short time. I must admit I have been
remiss and I haven't notified either of my friends this
morning, but she has said to me this morning that she
is not able to say whether Laura had actually stopped
breathing or whether she was just shallowly breathing.
25 I may be able to elicit that in her evidence-in-chief.
If she didn't, then I would need to seek leave under
section 38 to elicit that from her. But I will attempt
to elicit her evidence from her in chief. It may be
that I don't need to. I just wanted to notify my
friend of that at this stage.

30 HIS HONOUR: Thank you, Mr Crown.

IN THE PRESENCE OF THE JURY

<KAREN MAREE HALL(12.03PM)
AFFIRMED AND EXAMINED

5

CROWN PROSECUTOR: Q. Mrs Hall, would you please tell the court your full name?

A. Karen Maree Hall.

10

Q. Mrs Hall, in 1994 did you come to know Craig Folbigg?

A. Yes.

15

Q. I think you were working in the same motor vehicle dealership where he was working?

A. Yes.

20

Q. And a short time after you met Craig did you meet his wife, the accused, Kathy Folbigg?

A. Yes.

25

Q. And did you and your husband, Ray, become friends with Craig and Kathy?

A. Yes.

30

Q. And did you come to know at that stage in 1994 that they had, at that time, lost three babies?

A. Yes.

35

Q. At that time were Craig and Kathy living in Singleton?

A. Yes.

40

Q. And were you and your husband also living in Singleton?

A. Yes.

45

Q. And did you have a fair bit of contact with Kathy and Craig?

A. Yes.

50

Q. When Laura was about two months or so did you start to sometimes look after her when Kathy needed it?

A. Yes.

55

Q. And at that time were you living in a mobile home?

A. Yes.

Q. Would you sometimes look after Laura in your mobile home?

A. Yes.

Q. Would you sometimes look after Laura in Kathy and Craig's home?

A. Yes.

Q. Have you yourself got three children?

A. Yes.

5

Q. Are they presently aged 17, 14 and 13?

A. Yes.

10 Q. And it goes without saying, I suppose, that you looked after them when they were babies?

A. Yes.

15 Q. When you were looking after Laura to enable Kathy Folbigg to go out, were you at all concerned about Laura's welfare, based upon what you had known about the previous three Folbigg children?

A. Yes.

20 Q. And what were your concerns?

A. Just--

Q. Sit closer to the microphone.

25 A. Just to make sure that it wasn't going to happen again, just to keep an eye on her. You know the history so you make sure that you are not going to let that happen.

30 Q. What did you do to try and make sure that that wouldn't happen when you were minding Laura in your mobile home?

A. Just kept a constant eye on her, whether she was awake or asleep. I always watched her.

35 Q. Was there something that you used to do about where you would let Laura sleep when she was at your mobile home during the first few months of her life?

A. Yes. She always slept on the lounge where I sat.

40 Q. Did you sometimes nurse her on your lap when she went to sleep?

A. Occasionally.

Q. Did you and Kathy speak at all about Laura and sleeping whilst she was in your care?

45 A. When she was young Kathy and I decided that I wouldn't watch her while she was sleeping, like in the sleeping period, but if she went to sleep that I was to keep - I decided I would keep a real good eye on her.

50 Q. Could you explain the first part of that answer, that you decided that you wouldn't watch her while she was sleeping. What you said was that "when she was young Kathy and I decided that I wouldn't watch her while she was sleeping."

55 A. Yes.

Q. What was that?

A. It was just so that she was on the monitor when she

was sleeping and I couldn't do that at my place, so I just didn't have her when she needed to sleep until she was a little older.

5 Q. Was that your wish or Kathy's wish?

A. It was a bit of both. It was a mutual decision.

Q. Did you discuss it with Kathy?

10 A. Yes.

Q. When you looked after Laura at Kathy's place was she placed on the monitor?

A. When she was asleep, yes.

15 Q. Did you place her on the monitor?

A. No, she was usually in bed before Kathy and Craig left.

20 Q. During any of the times that you minded Laura when she was on the monitor at Kathy's place, was there ever any incident when the monitor was activated and an alarm went off?

A. No.

25 Q. Was there one occasion when Laura was about 12 months old that you were looking after her in your mobile home?

A. Yes.

30 Q. And did she go to sleep that day?

A. Yes.

Q. Where did she go to sleep?

35 A. She went to sleep and I placed her on the lounge.

Q. On the lounge?

A. Yes.

40 Q. Was that a normal sort of lounge that you would find in a house?

A. Yes.

Q. But it was inside your mobile home?

45 A. Yes.

Q. During the time that Laura was asleep in your mobile home did you speak to Kathy on the telephone?

50 A. I did get up to answer the phone and yes, it was Kathy.

Q. For about how long were you on the phone?

A. Oh, probably two to three minutes.

55 Q. And when you returned from the phone did you become concerned about anything?

A. Yes. Laura didn't look right.

Q. In what way did Laura not look right?

A. She looked very pale, a funny colour, on off colour.

Q. What did you do?

5 A. I walked over to the lounge and tried to see if she was breathing to make sure she was breathing. I couldn't see so I put my hand on her chest to feel if she was breathing. I couldn't feel anything so I put my head down near her mouth and I couldn't feel her
10 breathing in my ear, so I scooped her up in my hands to put her on the floor.

Q. When you scooped her up, what did Laura do?

15 A. She was startled, like a baby, when you, you know, you shake it, like touch a baby or something and they are startled.

Q. Did she immediately have that startled response when you lifted her up, when you scooped her up?

20 A. Yes.

Q. I take it that with your own children when they were babies you would from time to time have had to wake them up from a deep sleep?

25 A. Yes.

Q. And had you noticed that sort of startled response in your own children?

30 A. Yes.

Q. And did Laura react in the same sort of way as your own children had when you had woken them up unexpectedly from deep sleep?

35 A. Yes.

Q. After you lifted her up and you saw this startled response, what did you do then?

40 A. I went to put her on the floor, so if I had to do CPR or anything that I could, but she took a couple of really big deep breaths and started breathing, so I just held her.

Q. Did she start to wake up?

45 A. Yes.

Q. Immediately after you scooped her up?

A. Yes.

50 Q. I think you said you were going to put her on the floor to do CPR if need be?

A. Yes.

Q. Have you had some training in CPR?

55 A. I had done a first aid course, yes.

Q. Did you in fact do any CPR on Laura?

A. No.

Q. Was that because you came to the view that it was totally unnecessary?

A. Yes.

5 Q. Whenever you looked after Laura would you check her, whether she was breathing?

A. Not obsessively, but she was always there in front of me, so you were constantly looking at her, yes.

10 Q. Was that because of the past history that you had been told in that family?

A. Yes.

15 Q. And on this day that you have told us about, what was Laura wearing?

A. I'm not sure. I think it was a jumper and overalls.

20 Q. After you had woken Laura up, later that day did Kathy come to pick Laura up from your mobile home?

A. Yes.

Q. And did you tell Kathy what had happened?

A. Yes.

25

Q. And what was Kathy's response?

A. She told me not to worry too much because Laura slept deeply and it was probably just sleeping.

30 Q. Were you satisfied with that?

A. She did promise that she would put her on the monitor when she went home, when she put her back to bed, so I was happy with that.

35 Q. Are you able to say whether or not before you scooped Laura up, whether she was breathing shallowly, as though she was deeply asleep?

A. No.

40 Q. You are not able to say?

A. No.

Q. What do you mean by that answer? Are you not able to say or what?

45 A. I can't say for certain that she wasn't breathing.

Q. So she may have been shallowly breathing?

A. Yes.

50 <CROSS-EXAMINATION

COOK: Q. Ms Hall, is this the position, that sometimes when Kathy and Craig Folbigg went out at night you would mind Laura at their house?

55 A. Yes.

Q. And was the practice that if she was in bed at those times she would be on the monitor?

A. Yes.

Q. And at all times when you minded her at your place did you keep a very close eye on her?

5 A. Yes.

Q. And as far as you are aware, Kathleen Folbigg knew that?

10 A. Yes.

Q. You were quite good friends with both Kathleen and Craig Folbigg; is that right?

A. Yes.

15 Q. You knew them both before the birth of Laura and after the birth of Laura; correct?

A. Yes.

20 Q. And you made some observations about the way that Kathleen seemed to be affected by the birth of Laura, how it seemed to her, whether she was happy about it, her mood?

A. Yes.

25 Q. Did it seem to you that she was very happy with the new baby?

A. Yes.

30 Q. And you made observations about her interaction with Laura?

A. Yes.

Q. And did you make observations about her care for Laura?

35 A. Yes.

Q. And did you come to the view that Kathleen Folbigg was a good mother?

A. Yes.

40

Q. Was she very attentive to the child?

A. Yes.

45 Q. And was she very alert to this particular child's needs?

A. Yes.

Q. And alert to the fact that this child needed, so she thought, special care and attention, alert?

50 A. Yes.

55 Q. You told us about an incident when Laura was about 12 months old which happened at your mobile home when the child was in a position where you are not able to say whether she was not breathing, or just breathing shallowly?

A. Yes.

Q. Had your attention been diverted away from the child by the phone call?

A. Yes.

5 Q. And when you came back from the phone call, that's how you found Laura?

A. Yes.

10 Q. And Kathleen Folbigg was on the phone?

A. Yes.

Q. What did she want?

A. She was just checking on Laura.

15 Q. To see if Laura was okay?

A. Yes.

Q. You had contact with both the Folbiggs after the death of Laura; is that right?

20 A. Yes.

Q. And you observed both of them on the very day that she died?

A. Yes.

25

Q. And did you observe that both of them appeared to be devastated?

A. Yes.

30 Q. Both of them were crying?

A. Yes.

Q. You tried to help them, support them?

A. Yes.

35

Q. And the behaviour of Kathleen after Laura's death was consistent with somebody who had suffered a terrible tragedy. Is that right?

A. Yes.

40

<NO RE-EXAMINATION

<WITNESS RETIRED AND EXCUSED

45 <CAROL ANNE NEWITT(12.21PM)
SWORN AND EXAMINED

CROWN PROSECUTOR: Q. Mrs Newitt, would you please tell the court your full name?

50 A. Carol Anne Newitt.

Q. Mrs Newitt, you are a sister of Mr Craig Folbigg?

A. Yes.

55 Q. You and he come from a family of eight children?

A. Yes.

Q. Have you had a lot of contact with Craig over the

years?

A. Yes.

5 Q. And you have had a lot of contact with him during the early years of his marriage and the years during which the four children of that marriage were born?

A. Yes, very close contact.

10 Q. And died?

A. Yes.

Q. I would like to take you to October of 1990. Do you remember that time when Patrick was about four months old?

15 A. Yes, I do.

Q. Do you recall receiving a telephone call from your brother, Craig, to tell you that something had happened to Patrick?

20 A. Yes, I do.

Q. And did you go over to Craig's house?

A. Yes.

25 Q. And would you tell the court what you saw when you arrived at their house?

A. I arrived there and Craig and Kathy were sitting on the bed and Pat was laying there and he was very rigid. He was making really awful whimpering sounds and--

30 Q. And did an ambulance officer arrive at about the same time as you did?

A. Just after I walked into the room the ambulance arrived.

35 Q. Did they put the oxygen mask on Patrick?

A. Yes, they put the oxygen mask on Patrick and he just seemed to snap out of whatever he was in.

40 Q. He was then taken by the ambulance officers to the hospital?

A. Yes.

45 Q. At some stage did you become aware that Patrick was suffering from epileptic type fits or seizures?

A. Yes.

Q. And that he was also blind?

50 A. They told us that he had a partial blindness.

Q. Were you told that he needed to have regular physiotherapy?

A. Mm.

55 Q. Did you offer your assistance to Kathy in relation to the care of Patrick?

A. Yes, I did.

Q. And did you in fact assist Kathy on many occasions in the care of Patrick?

A. Yes.

5 Q. And did that cause you to form a very strong bond with Patrick?

A. Yes. Very, very strong.

10 Q. A couple of months after Patrick's acute event, did Craig tell you something about Kathy's intentions. Would you just answer that yes or no?

A. Yes.

15 Q. As a result did you and your husband go and speak to Kathy?

A. Yes, we did.

Q. And what did you speak about?

20 A. She said that she didn't think that she could stay with Craig and look after Pat and she thought at the time that they might be better off if she did leave and we advised her that she would always be his mum and that we could look after him and we couldn't love him any more if he was ours, but she would always be his
25 mother and she would surely miss him if she left.

Q. Had you seen any signs before that, that Kathy wasn't coping with Patrick?

30 A. There were times that Kathy would come over to our place in the daytime and she would just walk in and give him to me and say, "You look after him. We're good for you and I can't get him to shut up." And I only ever thought that that - I loved him more than
35 anything. He was an angel and, I suppose I was proud of the fact that he was also good for me.

Q. Had Kathy ever told you that she wasn't coping?

40 A. Not as much, and there were times that she would say it was really hard and I kind of just thought that he wasn't easy, he was sick. It wasn't easy, she had lost a child and I just - I thought that if we could help and make it easier for her and for Craig that the stress would be a little easier if it was divided.

45 Q. So did you and your husband both offer to help as much as you could with Patrick?

A. Yes.

Q. And his special needs?

50 A. Yes.

Q. And as a result did Kathy agree to stay with Craig and Patrick?

A. Yes.

55 Q. And did you and your husband continue to support them?

A. Yes.

Q. When Patrick was about eight months old, do you recall 13 February 1991?

A. Yes.

5

Q. At about 10.00 o'clock in the morning roughly did you receive a telephone call?

A. Mm.

10

Q. And was it Kathy?

A. Yes.

Q. What did she say to you?

15 A. She said it had happened again, and I thought it was that he had had a fit and I just went straight over there.

Q. You went over by car?

A. Yes, I drove over.

20

Q. How long did it take you to get from your place to their place?

A. It only took approximately five to eight minutes to get from my place to Kath's.

25

Q. When you entered their house, what did you see?

A. Kathy was sitting on the lounge directly in front of the door with her elbows on her knees and her head down and she was crying.

30

Q. She was sitting on the lounge?

A. Mm.

Q. Where was Patrick? Was he on the lounge?

35 A. No, he was in his cot.

Q. Was that in another room?

A. Yes, it was.

40

Q. At that time where were Craig and Kathy living?

A. In Rawson Street in Mayfield.

Q. Would you have a look at this diagram? (Shown.) Are you able to tell us whether that appears to be a diagram of that house? If you are not able to say, just say so.

45

A. Yeah.

Q. Are you able to say?

50 A. Yeah, that's their house.

Q. It is their house? If you are not sure, just say so.

55 A. No, I'm just trying to put things into perspective. They changed it a lot.

Q. Does that appear to be the same house?

A. It does.

Q. I'm sorry?

A. Yes.

5 Q. Just mark with a rectangle where the lounge was, where Kathy was sitting.

A. I don't think this is Rawson Street.

Q. You don't?

10 A. No, because Rawson Street you walked in and the lounge was sort of there.

Q. Kathy was on the lounge and you went to a bedroom?

15 A. Into Pat's room.

Q. When you went into Pat's room, what did you see?

A. Pat was in the cot.

Q. And was it the kind of cot that has one side that goes up and down?

20 A. I think it had - yeah, the sides could go up and down, yeah.

Q. When you went into the room was the side up or down?

25 A. I think it was up.

Q. What did you see in relation to Pat?

30 A. Pat was laying there like he was asleep and he had his little hands alongside of his face like when he went to sleep.

Q. Did he have any covers on him?

35 A. No, he didn't.

Q. Was there any pillow?

A. Not that I can recall.

Q. What did you go to do?

40 A. I went to pick him up.

Q. And what happened?

45 A. And Kathy said "No, don't. Don't pick him up." But I took that at the time to mean

Q. Just tell us what was said?

A. Kathy said, "Don't pick him up."

Q. Did you pick him up?

50 A. No, I didn't pick him up.

Q. What did you do?

55 A. I just stood there and stroked his face and talked to him and asked him to come back to us and just not long after that Craig arrived and he come through the door at a hundred miles an hour and just picked him up straight away and tried to revive him and he couldn't revive him.

Q. A short while after that did the ambulance officers arrive?

5 A. Then the ambulance arrived and they tried to revive him too.

Q. When you were stroking Patrick, are you able to say whether his skin was warm or cold or what?

10 A. It was warm. He was just soft and warm.

Q. I would like to ask you some questions about a completely different topic. Have you in the past visited a number of people who claim to be clairvoyants?

15 A. Yes.

Q. And on how many occasions would you have visited clairvoyants?

20 A. I don't know, four, maybe five, I don't know.

Q. And after you had visited clairvoyants, from time to time had you discussed your visits to clairvoyants with members of the family?

25 A. Always.

Q. And did that include Kathy?

A. Probably.

Q. Had you spoken to your brother, Craig, about your visits to clairvoyants?

30 A. Probably, yeah.

Q. Do you recall having conversations with Craig about life before birth and life after death?

35 A. Yeah. My family know my opinions on--

Q. Listen to my question. Did you discuss that with Craig?

40 A. I don't recall specifically, but I would say yes.

Q. Did you ever have a conversation with Craig about your visits to clairvoyants or one visit to a clairvoyant?

45 A. Yeah.

Q. Did Craig ever tell you any belief that he had in relation to Laura?

50 A. Craig believed that all of his children were reborn again in Laura.

Q. That all of his children were reborn again in Laura?

A. Yes.

55 Q. And can you recall when it was that he told you that, like in relation to Laura's birth?

A. When she - as she got older and she had her own personality and she was just such a little pixie, I

think, that she had all the good parts of all the kids.

Q. Did any of Craig and Kathy's children ever show any signs of a failure to thrive and grow in a normal way?

5 A. No, no.

Q. Did any of them ever appear to have constantly recurring infections?

10 A. No.

Q. You yourself are a parent?

A. I have four children.

<CROSS-EXAMINATION

15

COOK: Q. You had contact with both Craig and Kathleen around the time that their first child, Caleb, was born; is that right?

20 A. Yes, I did.

Q. As far as you were aware there was no problem with Caleb?

A. Only that he had what they diagnosed as a lazy larynx.

25

Q. There came a time when you were told that Caleb was dead; is that right?

A. Yes.

30

Q. And you were told that by Craig Folbigg?

A. He rang me one night.

Q. And you went over to where Craig and Kathleen were living straight away?

35 A. Yes.

Q. And were you there when there was an ambulance outside the house?

40 A. Yes.

Q. And did you make some observations about the behaviour of both Craig and Kathleen Folbigg, what they were doing, how they seemed when you saw them?

45 A. Yes, I did.

Q. Was Craig Folbigg nursing Caleb?

A. Yes.

Q. And was Kathleen sitting right next to him?

50 A. Yes.

Q. And what was she doing?

55 A. As far as I can recall she was sitting alongside him with her hands on his shoulder and they were both crying.

Q. Was she leaning against him?

A. Yes.

Q. And they were both crying?

A. Yes.

5 Q. Do you recall hearing Kathleen cry later on in that day, the day of Caleb's death? Or later on after you got there, do you recall her crying later on?

A. Yes.

10 Q. And was that when she was describing finding Caleb?

A. I don't remember. I don't remember her describing finding Caleb to me.

15 Q. Did she say something to this effect while you were at the house: That when she found Caleb he didn't like right and she woke up Craig. Did she say something like that?

A. She may have. I don't recall.

20 Q. And do you recall her crying in a way that you thought was the most lonely cry you could ever imagine?

A. That was when Pat died.

25 Q. Do you recall her crying when Caleb, as you were there with them later do you recall her crying?

A. Yes, she did cry.

Q. Very upset?

A. Yes.

30 Q. When Patrick was born. I will just go back a minute. You said that your recollection is that she cried the most lonely cry you could imagine when Patrick died?

35 A. That's what I remember, yeah.

Q. Do you think you might have got it around the wrong way, it was actually when Caleb died?

A. She cried both times, both times.

40 Q. In a manner which suggested she was devastated, both times?

A. Yes.

45 Q. After Patrick was born did you make some observations about the type of parents that Craig and Kathleen Folbigg appeared to be towards him?

A. Yes.

50 Q. And this was a period when you had quite a lot of contact with both the baby and them; is that right?

A. Yes.

55 Q. Did it appear to you that they were both dedicated parents?

A. Yes.

Q. You would sometimes babysit?

A. Yes.

Q. And on those occasions when you babysat they would never stay out late?

5 A. They never abused it, no.

Q. They would always be home early for Patrick?

A. Yes.

10 Q. After October 1990 when you and the family became aware of Patrick's particular difficulties, you had quite a lot of contact with Craig and Kathleen and Patrick; is that right?

A. Yes.

15

Q. You were doing your best to support the family with Patrick's difficulties?

A. Yes.

20

Q. And what sort of things were over and above the normal parenting duties were required with Patrick for his special needs?

A. He needed physio, they were trying to teach him how to crawl and turn over.

25

Q. Who was trying to teach him to crawl and turn over?

A. The physio was giving Kathy and I instructions on it. And I suppose he needed extra supervision because of the fits, and he was always in and out of hospital.

30

Q. Did much of the burden of that extra care fall on Kathy?

A. Yes.

35

Q. And did it appear to you that most of the time she handled this quite well?

A. Yeah, most of the time. It got her down like it would get anybody else down, I suppose.

40

Q. Because it was a very heavy burden, wasn't it, for everyone?

A. For everyone, yes, for everyone, I think. And holding him while he was fitting was not an easy thing to do.

45

Q. One of the several things she had to do in relation to him in accordance with the instructions about the physiotherapy was to actually administer it herself to Patrick; is that right?

50

A. Yes.

Q. And did there come a time when she actually asked for your help in caring for Patrick?

A. Yes.

55

Q. There was then a time when there was discussion about Kathleen leaving the household. Do you recall that?

A. Yes.

5 Q. And did it seem to you that Kathleen Folbigg at that time, from what she told you, was having real difficulty in coping with the extra problems?

A. I thought it was more having difficulty facing the inevitable future.

10 Q. Did she say to you that sometimes she wasn't sure whether she was good enough for it?

A. Yeah.

15 Q. But that passed, didn't it?

A. It appeared to.

Q. And it passed partly with the help of you and your husband; is that right?

A. I would like to think that.

20 Q. And she decided to stay with Craig and with Patrick?

A. And appeared to, yes.

25 Q. Would this be a fair way of saying it. Kathy and Craig worked out their problems and stayed together. Is that a fair description of it?

A. I thought so, but then he died.

30 Q. When you saw Kathleen Folbigg after the death of Patrick, you made some observations about her demeanour?

A. Yeah.

35 Q. Did it appear to you that she looked like the loneliest person in the world?

A. Yes.

40 Q. Then you told us that you went to pick Patrick up; is that right?

A. Yes.

Q. And you say that she said to you, "Don't pick him up."

45 A. No, I said she said "No".

Q. She said "No"?

A. Yes.

50 Q. That's all she said?

A. Yes.

Q. At the time you took that to mean he is dead; is that right?

55 OBJECTION

HIS HONOUR: Why do you object?

CROWN PROSECUTOR: My friend is asking what her interpretation was of what Kathleen Folbigg had said. I mean, the words speak for themselves. She said the word "No".

5

HIS HONOUR: The question may be answered.

COOK: Q. Did you take this to mean that Patrick was dead and that's why she was saying "No"?

10

A. No, I didn't take it to mean that. I didn't think that's what Kathy was saying.

Q. When she said "No", is that when you realised that Patrick was dead?

15

A. I think I knew he was dead when I walked in the room.

Q. Are you right to go on?

A. Mm.

20

Q. I just want to ask you some questions about a statement that you made to police on 29 October last year, and you made that at Charlestown Police Station. Do you recall that?

25

A. Yes.

Q. Did you give the police some information then about what happened after you went to the house and saw Patrick?

30

A. In what regard?

Q. Did you give them some information about Kathleen's behaviour and the way she appeared?

35

A. Probably if I was asked.

Q. I am just going to read something to you from your statement. If you want to have a look at it to follow it, please indicate it. This is in paragraph 5:

40

"When I arrived at the house I walked up the stairs at the front of the house and saw Kathy sitting on the lounge in the lounge room. She had her head down with her elbows resting on her knees. I remember thinking that she appeared lonely and alone. I walked into Patrick's room and went to pick him up from his cot. Kathy said something like 'Don't' or 'No' and it was then I realised that Patrick was dead."

50

Do you agree you said that to the police?

A. Yeah.

Q. Is this the case, that it was after Kathleen said "No" or "Don't" that you then realised that the child was dead?

55

A. That's when I - that's when it really hit me that he was dead.

Q. And you then touched his face. It was after that that you touched him?

A. Yeah.

5

Q. Can I ask you this. Are you sure she said something like "No" or "Don't" when you went to touch Patrick or pick him up?

A. Yes, I am sure.

10

Q. You made two statements to the police; is that correct?

A. Yes.

15

Q. One you made on 27 July 1999, that's the first one. Do you recall that?

A. Mm.

20

Q. You didn't say anything about Kathleen saying "No" or "Don't" when you went to pick up Patrick. Do you agree with that?

A. If that's what's written there.

25

Q. I will have you shown the statement. If you could just look at this document, please. (Statement shown.) You don't need to read all of it unless you wish, but do you agree that that is the statement that you made to police, apparently on 27 July 1999? If you look down the bottom left there is a date under a signature?

30

A. Mm.

Q. Would you go, please, to paragraph 23, which is on page 5?

A. Yep.

35

Q. You set out there going to Kathleen and Craig's house, walking through the door and seeing Kathy sitting on the lounge, you described that?

A. Yes.

40

Q. In paragraph 24 you say, "I don't remember what she said, but I went straight into Pat's room." Do you see that?

A. Yes, I do.

45

Q. And you started to cry and to ask Patrick to come back. Do you recall that?

A. Mm.

50

Q. And that's what you told the police, is that right, in paragraph 24?

A. Yes.

55

Q. Then in paragraph 25 you say: "I heard Kathy crying at the doorway and she was telling me not to cry."?

A. That's right.

Q. "I was touching Pat's face and I was extremely

upset." Do you see that?

A. Yes.

5 Q. Do you agree with this, there is nothing in your description of the circumstances surrounding going there and seeing Kathleen and seeing Pat, about Kathleen saying "No" or "Don't" when you went to pick up or touch Patrick. Do you agree with that?

10 A. Yes, I agree with that.

15 Q. In fact the only reference you have got to her saying anything at that point was her telling you not to cry?

A. Mm.

20 Q. Is that right?

A. Mm.

25 Q. How clear is your memory about her saying "No" or "Don't" when you went to pick up or touch Patrick?

A. Pretty clear.

30 Q. Is it something that you did not remember when you spoke to the police in July 1999?

25 A. I suppose my explanation for that is in July, this is a day I never wanted to revisit again, and through all of this I have had to revisit it. And I suppose - I suppose your memory becomes clearer as you keep revisiting that event.

35 Q. Can we take it that you didn't remember it when you first spoke to the police in July 1999?

A. I mustn't have if I didn't say it.

40 Q. Did you continue to have close contact with Craig and Kathleen after the funeral of Patrick?

A. Yes.

45 Q. You made some observations that they were both grieving for Patrick?

A. Yes.

50 Q. Did you continue to have the same level of contact with Craig and Kathleen after the birth of their third child, Sarah?

45 A. Yes. Myself and my family promised the support that we have always felt. We learnt resuscitation for the child.

55 Q. Did it appear to you that after the death of Sarah that both of them, Craig and Kathleen, grieved for the loss of Sarah?

A. Our contact wasn't as strong after the loss of Sarah, so - and Craig and Kathy had separated by that time, so I can't really say.

Q. You can't say one way or the other?

A. No. We kind of - Craig had moved to Singleton and

Kathy was living in town and I didn't see them much.

Q. After Laura was born you had moved away; is that right?

5 A. No. Craig and Kathy were living in Singleton then and we - the distance made it difficult for Laura, so visits were actually purpose visits rather than drop in visits as they had been before.

10 Q. You were actually away in Sydney when Laura passed away; is that right?

A. No.

Q. Weren't you?

15 A. No.

Q. Your statement says, "I was away in Sydney when Laura passed away." That was what you said to the police in July 1999. Does that sound right?

20 A. We didn't receive the phone call. One of our neighbours had to come and tell us.

<NO RE-EXAMINATION

25 <WITNESS RETIRED AND EXCUSED

LUNCHEON ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: There is a matter, your Honour.
Because we only have one day with the jury today and
one further day before the public holiday, we will be
getting to the question of the record of interview on
10 Monday morning and it is going to take my instructing
solicitor a full day to edit it. What we would
appreciate having if at all possible is some sort of
resolution of the interview today, if it is possible.
If it is not possible then we will just have to make
15 alternative arrangements.

My instructing solicitor has sent the defence a list of
questions that we view as being relevant to the issue
of the births, lives and deaths of the three children
and by implication the ones that we would object to.
20 It also occurs to me that really this is a situation
where the Crown is willing to make a concession to the
defence to allow in some parts of the interview because
of some possible prejudice perceived by the defence.

25 HIS HONOUR: Let me stop you there. Do you want to go
on now and deal with the record of interview and put
off the jury? Is that what you are asking me to do?

30 CROWN PROSECUTOR: I suppose what I would really like
to do is have the next witness, Professor Hilton and
then resolve the record of interview.

We do have a few witnesses here. Perhaps what might be
most convenient is if we can deal with those witnesses
35 and consider the record of interview in the remaining
time that is available.

40 HIS HONOUR: I will do what I can to help you,
Mr Crown. However, I did indicate last week that I
would deal with the matter on Thursday and I may have
left in Queens Square material which it is necessary to
have in order for me to deal with it, but I will do
what I can.

45

IN PRESENCE OF THE JURY

<JOHN MILLAR NAPIER HILTON (2.05PM)
RECALLED, SWORN AND EXAMINED

5

HIS HONOUR: As before, if you want to look at yours notes to answer a question, please do so.

10

WITNESS: Thank you.

CROWN PROSECUTOR: Q. Could you please tell the court your full name and place of work?

15 A. John Millar Napier Hilton, Clinical Director of the Department of Forensic Medicine at the Sydney Area Health Service and Associate Professor of Pathology at the University of Sydney.

Q. You have previously given evidence in this matter?

20

A. Yes.

<FURTHER CROSS-EXAMINATION

25 COOK: Q. You were present when Dr Allan Cala did an autopsy on the deceased Laura Folbigg, is that right?

A. Yes.

30 Q. Why were you present for that autopsy?
A. Several reasons. One was having a life long interest and involvement in the investigation of unexpected infant death I was particularly interested in this child's death. Dr Cala was a member of my staff. This is the second reason. At that time he was the most junior member of the specialist staff and I think he merited, and I think he possibly wanted, some professional support during the course of the autopsy, and as his director I felt it was my duty.

35

Q. In your opinion was it a very thorough autopsy?

40

A. Yes.

Q. And did your involvement in the investigation of the death of Laura end with your presence at the autopsy or did you have some further involvement?

45 A. No. The investigation of any unexpected infant death is a fairly prolonged, protracted and detailed process which involves taking tests for infections. It involves taking tissues for histological examination and very often organ samples for further dissection. So although I wasn't personally involved in each and every one of these steps, I certainly kept myself aware of what was happening and the outcome of the various tests, and in fact I reviewed the histological slides, that is, the little pieces of tissue which are cut very, very fine, mounted on glass slides, looked at under a microscope, and I was involved in that, again as a backup to Dr Cala.

50

55

Q. And in particular did you examine slides taken from

.24/04/03

the brain, I'm sorry, from the heart?

A. From the heart, not the brain.

5 Q. And did you observe something about the slides that you looked at?

A. Yes.

Q. What was that?

10 A. The heart slides showed a fairly extensive inflammation of the heart muscle.

Q. Could you describe how extensive the inflammation seemed to be?

15 A. Well, there were a number of slides taken from different parts of the heart and inflammation was present in each one of the slides I saw. The severity of the inflammation on a scale of 1 to 10 I would put at probably about 6 - 5, 6, somewhere like that, so it was significant because it was there, it was of more than just moderate intensity.

Q. And can you describe this inflammation in more detail, what it was?

25 A. Yes. The heart muscle is made up of a lot of interlinking fibres, and there are little spaces between these fibres. And this inflammation consisted of white blood cells which had migrated out from the small blood vessels into the spaces between the muscle fibre. There was also some - in association with that there was also some degeneration of some muscle fibres.

Q. Did you form the view that this child had had myocarditis?

35 A. At the time of the child's death she was suffering from myocarditis or the physical manifestations of myocarditis.

Q. Is that a condition which can lead to death?

40 A. Yes.

Q. And in your opinion did it possibly lead to this child's death?

45 A. Yes, it could have. It was of an intensity and a severity and a distribution which could have caused this child's death.

Q. Would this be fair to say. You would not dismiss it as an incidental finding?

50 A. Oh, that is a difficult question to answer in a very simple way. I think myocarditis is a serious condition which can be of significant in extreme situations, such as if someone had a gunshot wound to the head and died quite clearly because of that. If I saw it in someone who had run off the road and killed themselves in the car I would not regard it as an incidental finding, I would have to regard it as an important finding, and in someone who unexpectedly was found dead I would regard it as a highly significant

finding, although it may be incidental to something else.

5 Q. Now, did you see any other indication on autopsy or from any of your subsequent investigations for what could have caused this child's death?

A. No.

10 Q. So the only cause of death or possible cause of death that was there, as far as you are concerned, is myocarditis?

A. The only pathological lesion that was present that could account for the child's death was myocarditis.

15 Q. You said a couple of moments ago something about an unexpected death, right? Is myocarditis something which will have observable symptoms prior to the death of the person who suffers it?

20 A. Yes, it can do and in fact it usually does.

Q. What sort of symptoms?

25 A. Shortness of breath, heart failure, which may be fairly obvious both to the person who has got it and to the medical attendant and the relatives, for that matter. On the other hand, it's well recognised that myocarditis can be entirely silent until it results in a totally unexpected death.

30 Q. And is that something which is in any way affected by the age of the person who suffers it?

A. No.

35 Q. Now, are you aware that there is a video of the child Laura playing in a swimming pool and around the swimming pool that was made the day before she died?

A. I have been told that, yes.

40 Q. Now, what do you say as to the significance of an apparently symptom free child 24 hours before death from myocarditis?

A. That certainly doesn't preclude myocarditis as a cause of death, an unexpected death.

45 Q. Now, we're going to go to another subject matter. When you performed the autopsy on Sarah Folbigg you noticed some punctate abrasions?

A. Yes.

50 Q. And you didn't photograph them, is that right?

A. That's correct, yes.

Q. Is there any reason for that?

55 A. Yes. I think I indicated that when I was here on the previous occasion that I personally don't take photographs of all my cases. One of my colleagues does, but I certainly don't and never have done. If there is an evidentiary need perceived at the time, a perceived evidentiary need for photographs, then these

photographs are taken by a police photographer.

5 Q. Did you attach any significance in terms of establishing a cause of death to the punctate abrasions on the body of Sarah Folbigg?

A. No.

10 Q. Is that part of the reason why no photograph was taken?

A. Yes.

15 Q. Now, you gave some evidence when you were here on the last occasion, which was 14 April, about being the Chairman of the SIDS International Pathology Committee?

A. Yes.

Q. When did you take up that position?

A. Oh, it was in the mid 1990s.

20 Q. And for how long did you occupy that position?

A. From memory I think it was about three years, from one SIDS international conference to the next.

25 Q. And does this, as the name suggests, involve pathologists from all over the world focussing on SIDS?

30 A. These meetings involve a wide variety of people who are involved in the investigation of unexpected infant deaths, including pathologists, paediatricians, epidemiologists, who are people who look at the distribution patterns of disease in society, basic medical scientists and, indeed, parent and carers of the babies.

35 Q. Why is it that you were the chairman?

A. I was elected as the chairman.

Q. Did you consider yourself qualified to occupy that position?

40 A. Well, I'm a very modest person, but I'd been looking at the problem for some time by that time, nearly 30 years, and I had published on it and obviously other people thought I was. It is not for me to say whether I was qualified or not, but other people

45 Q. Can we take it as a sign that you were considered as a leading world expert on the subject?

A. Yes.

50 CROWN PROSECUTOR: I would like to make an application to your Honour.

IN THE ABSENCE OF THE JURY

WITNESS LEFT THE COURTROOM

5 CROWN PROSECUTOR: There are some areas on which I
would seek to re-examine Professor Hilton, but my
learned friend asked questions about the punctate
abrasions on Sarah and, in effect, elicited from
10 Professor Hilton the reason he didn't take photographs
is that he considered them not to be of any
significance to his postmortem results. I would seek
leave under s 38 to cross-examine the doctor on that.

15 HIS HONOUR: Haven't you already done that?

COOK: Page 648.

20 CROWN PROSECUTOR: I think I need to seek further
leave, your Honour.

HIS HONOUR: What is it that you want to ask him?

25 CROWN PROSECUTOR: I wish to ask him questions with a
view to suggesting to him that the punctate abrasions
were far from being insignificant and that they were
highly significant to his consideration, bearing in
mind that he knew that there were two previous deaths
and that he ought to have taken photographs of them.

30 HIS HONOUR: Mr Cook, what do you say about this?

35 COOK: Your Honour, two things. Firstly, the Crown has
already to some extent taken the professor to the
factor about the punctate abrasions, and that is the
bottom of p 648. So that goes to the utility of this
process.

40 My submission is that it shouldn't be allowed because,
firstly, the subject is sufficiently in a general way
canvassed there. Greater significance should be have
been attached, in effect, to that. And--

45 HIS HONOUR: Did the Crown suggest to the professor
before that he ought to have taken photographs of them?

COOK: No, it wasn't suggested then.

50 HIS HONOUR: That came from Dr Cala's evidence, didn't
it?

55 COOK: That's right. I submit that if the Crown wanted
to take this up, this additional aspect of failing to
photograph, the Crown should have sought this before
cross-examination. That is, the Crown had in mind a
criticism to make of the professor based on what
Dr Cala had said. There is no sound reason, I submit,
to have waited until I finished cross-examining, if it
was a criticism that they wanted to make in any event.

That is a discretionary reason I submit why your Honour would not allow cross-examination on it now.

5 HIS HONOUR: I see the force of that, Mr Cook, but I think any disadvantage flowing from it can be cured by my leave for you to cross-examine further if it appears appropriate for to you do so.

10 It does seem to me, Mr Cook, that as with the leave that was given to cross-examine Professor Hilton in the first place, that it is appropriate if the Crown is going to submit, in accordance with Dr Cala's evidence that it would have been appropriate in view of the presence of the punctate abrasions below the lower lip, 15 to have photographs taken and that Professor Hilton was in some way remiss and that perhaps his opinion ought to be on that account worth the less in an assessment of it, that those matters should be put fairly to Professor Hilton so that he can have a proper chance to 20 respond.

COOK: Yes, may it please the court.

25 HIS HONOUR: Mr Crown, you may have leave to cross-examine further.

CROWN PROSECUTOR: Thank you. I will do the re-examination first and then I will come to the cross-examination. 30

WITNESS RETURNED TO THE WITNESS BOX

IN THE PRESENCE OF THE JURY

<FURTHER RE-EXAMINATION

5 CROWN PROSECUTOR: Q. My learned friend, Mr Cook,
asked you some questions about myocarditis, and one of
the answers that you gave is that in your view the
finding of myocarditis in a postmortem is a highly
significant finding?

10 A. Yes.

Q. Then you added, "Although it may be incidental to
something else"?

A. Yes.

15

Q. What may myocarditis be incidental to?

20 A. Almost anything else that can cause an unexpected
death, and I used the analogy of a gunshot wound to the
head. Now, I have never seen this happening but it
could happen that somebody can be shot in the head and
die because of the gunshot wound in the head and have a
myocarditis of considerable significance.

25 Q. And, professor, what sort of illnesses can cause
myocarditis?

30 A. Oh, yes. Well almost any infectious agent. The
most common, or perhaps the most insidious and
dangerous, are viruses, for instance, flu virus, and
it's not unknown in flu epidemics for people to have a
dose of flu and then to partly recover and then to die
unexpectedly maybe two or three weeks after the event
because of influenza myocarditis.

35 Q. Do the vast majority of people who have myocarditis
progress to become well again?

A. Yes.

40 Q. Can myocarditis be caused by the common cold?

A. Oh, well, nobody knows what the common cold is, but
it is a viral illness of some sort and any viral
illness can produce myocarditis.

45 Q. You were asked some questions about the video of
Laura taken the day before she died which shows her
playing in a swimming pool and with other children?

A. Yes.

50 Q. Apparently in a normal fashion, and you were asked
by Mr Cook about observable symptoms that you might
expect to see of myocarditis and you said usually
shortness of breath and heart failure?

A. Yes.

55 Q. What sort of symptoms would you expect to see in a
child?

A. Well, again there's a spectrum from a child being
gravely ill with congestive heart failure through to a
child appearing apparently well. This is not just a

child, this can happen in an adult as well.

Q. Would you generally expect a person, either an adult or a child, to feel very unwell with myocarditis?
5 A. No, not necessarily, and I have had the misfortune of seeing people who have felt well enough to engage in athletic pursuit and they have dropped dead while they are doing this from myocarditis and it was totally unsuspected.

10 Q. You have said that the finding of myocarditis is a highly significant finding. Does the finding of myocarditis in your view exclude deliberate suffocation as a possible cause of death?

15 A. No.

Q. You were also asked some questions by Mr Cook about the punctate abrasions that you found on Sarah?

20 A. Yes.

Q. When you did the postmortem examination of Sarah you knew that there had been two previous deaths in the family?

25 A. Yes.

Q. You knew that one of them was a SIDS death?

A. Yes.

30 Q. And SIDS in essence is a finding of death from unknown causes?

A. Currently, yes.

Q. And you knew that that was the first child who had died of SIDS?

35 A. Yes.

Q. You knew that there was a second child who had suffered an acute life threatening event at about four months of age from unknown causes?

40 A. I knew there was a second child who had died with brain damage. I don't think I actually knew the exact nature of the child's death at the time of the autopsy, but I certainly went to the trouble of getting some autopsy notes on this child subsequent to the autopsy.

45 Q. Subsequent to your autopsy?

A. Subsequent to my autopsy, yes.

Q. On Sarah?

50 A. Yes.

Q. At the time that you conducted your autopsy on Sarah, were you alert to the fact that there had been a previous unexplained death in this family?

55 A. Yes, that a child, the first child born to the family had died and had been diagnosed as having SIDS. The second child had had an illness which had either resulted or was associated with brain damage and

convulsions and had died.

Q. From unexplained causes?

5 A. No, from memory the--

Q. If you can just answer my original question. When you conducted the postmortem on Sarah did you consider that this was a family where there had been unexpected deaths from unknown causes?

10 A. I knew it was a family where there had been one unexpected death and one other death which was not entirely unexpected.

Q. So you--

15 A. But I didn't realise the significance of the second child's death at the time of the autopsy.

Q. You knew, though, that there had been two death of infants in this family?

20 A. Yes.

Q. One at least you knew at the time was an unexplained death?

25 A. Well it was attributed to cot death or SIDS.

Q. As a result of what you knew about this family were you particularly alert to the possibility of deliberate smothering?

30 A. I wouldn't say I was particularly alert. I mean I'm always alert I hope to the possibility of homicide.

Q. In this particular family with at least one other unexplained death that you knew about, weren't you even more alert to the possibility of deliberate smothering or other abuse that had caused this child's death?

35 A. I was alert to several possibilities, of which that could be one.

Q. So is the answer to my question yes?

40 A. A very qualified yes.

Q. You were alert, you were particularly alert in this case to the possibility of this child having been smothered?

45 A. No. I was alert to the fact that there had been at least one cot death or SIDS death in the family and another child who had died with some brain abnormality, and there could well have been a common factor in all of these deaths.

50 Q. And was one of those common factors the possibility of deliberate smothering?

A. Yes.

55 Q. And that was something which you were aware of at the time that you conducted the postmortem examination of Sarah?

A. Yes.

Q. Now, when you came to see those two punctate abrasions did you pay particular regard to them?

5 A. Yes, because they were there.

Q. Now, did you consider the possibility that those punctate abrasions may have been caused by some deliberate act of smothering by some person?

10 A. No, the characteristic did not suggest that to me. There are certain characteristics that may occur with deliberate smothering, but two punctate abrasions under her lip is just that, pinpoint on the lower lip really did not particularly suggest deliberate smothering to me.

15 Q. Would you agree that any sort of injury at all, particularly to the face area, is of particular interest in a case like this?

20 A. Small injuries to children's faces at this time in their life are not uncommon, and I think that is a common observation of any parent.

Q. But you have told us, I think, professor, that you were of the view that these punctate abrasions were recent abrasions.

25 A. Yes?

Q. Recent to the time of death?

30 A. Yes.

Q. Would you agree that any injuries, particularly to the mouth and nose area of a child such as Sarah, were of particular interest to you?

35 A. They were of particular interest because they were there. I regarded them at the time and I regard them now as being trivial and certainly not suggestive to my mind of an effort of an adult to gently suffocate a child.

40 Q. If an adult attempted to suffocate a child with a hand?

A. Yes.

45 Q. That could cause punctate abrasions?

A. It could do.

Q. If the adult was wearing a ring that could cause punctate abrasions?

50 A. I would expect it if the ring was of the - or depends, I suppose, on the character of the ring.

Q. But it could, a ring could cause punctate abrasions?

55 A. If it was a jewelled ring then I would probably expect more in the way of scratches, with length rather than pinpoint abrasions.

Q. If a pillow was used, a button could cause punctate

abrasions?

A. Again would I not have thought so. I wouldn't say it was beyond the bound of possibility because I'm not--

5

Q. Would you agree it is possible?

A. I would agree it is possible.

10 Q. If a soft toy was used, any sort of hard object on the soft toy could cause punctate abrasions?

A. I think would you have to be a bit more specific.

15 Q. Any sort of sharp or hard object on a child's soft toy, eyes, nose, something like that, could cause punctate abrasions. Would you agree with that?

A. Nowadays I don't think most children's toys have got sharp - they used to have eyes with little spikes in them, but that has gone years and years ago, so the short answer is it is unlikely.

20

Q. I suggest to you, doctor, that there were any number of scenarios that could have caused these punctate abrasions in the event of that child being deliberately smothered?

25

A. Yes.

Q. Do you agree that that is possible?

A. Yes.

30 Q. And because of that possibility I suggest to you that you ought to have taken photographs of the punctate abrasions?

35 A. As I've already explained, I don't take photographs at autopsy. If the police in the course of their investigations feel it necessary they will have a police photographer present to take photographs, and I did not think it necessary to call in a police photographer.

40 Q. In 1993 when this postmortem examination was being conducted, were there cameras available for the use of pathologists at the Glebe morgue where you conducted this postmortem examination?

45 A. I believe so, yes.

Q. And from time to time did you yourself use those cameras?

50 A. No, I'm not a photographer, I'm not a good photographer and I personally - I cannot recall actually using a camera.

Q. From time to time did you request other employees at the morgue to take photographs of certain findings on bodies that you were conducting the postmortems on?

55

A. Yes, for non evidentiary purposes.

Q. Was it for training purposes?

A. Well, educational. We were and we are a teaching

institution and we he had occasional undergraduate students and post-graduate students, and yes, we do take photographs in our pathology.

5 Q. Was there anything to stop you making a request from somebody at the morgue to take photographs of these punctate abrasions?

A. No.

10 Q. Anything stops you from calling a police officer from the crime scene unit or any unit to come and take photographs of the punctate abrasions?

A. If I had considered it necessary at the time I would have done so.

15

<FURTHER CROSS-EXAMINATION

20 COOK: Q. The Crown Prosecutor took you to some scenarios whereby the punctate abrasions with have been attributable to suffocation by a hand which had a ring on it, that was one of them. Do you recall that?

A. Yes.

25 Q. And you said it was possible?

A. Yes.

Q. How possible?

30 A. Well. If there's movement, and from what limited video evidence I have seen myself of children being deliberately suffocated it is very, very limited, there is generally fairly vigorous movement by the child, and in my view a jewelled ring under these circumstances would be inclined to move across the skin and would therefore produce a scratch with length and not a
35 pinpoint abrasion. However, having said that, there is an old adage in forensic medicine that anything is possible.

40 Q. And was it with that adage in mind that you agreed with the Crown Prosecutor that his scenario was possible?

A. Yes.

45 Q. Can we take it that you think it was unlikely?

A. For the reasons I have given I think it is unlikely.

50 Q. Similarly I think with the way the Crown Prosecutor put it was a soft toy with hard bits on it. How likely is that to cause pinpoint--

A. I would have thought highly unlikely.

55 Q. A pillow which had some sort of button on it, how likely is that to have caused abrasions such as you saw on this child?

A. Once again a pinpoint abrasion, it would be highly unlikely that a button would do that. I'm not saying it is impossible.

Q. Again, is that with the adage in mind that anything is possible?

5 A. There is an infinite infinity of possibility.

Q. The Crown Prosecutor is putting to you or was putting to you in effect that it was some kind of oversight by you to fail to have this photographed. Do you understand that?

10 A. Yes.

Q. What do you say to that?

15 A. Oh, I don't accept that, again for the reasons that I've already given. The two pinpoint abrasions were of trivial size, trivial nature, and bearing in mind I'm now talking even then with some 25 years of experience of investigating baby deaths behind me, had I thought that there was any potential benefit at that time of taking photographs I would have had photographs, I would have had the police photographers come to take the photographs.

Q. One final matter. You referred to the punctate abrasions being of recent origin?

25 A. Yes.

Q. Do you recall that? What do you define as recent?

A. Probably not more than a few hours.

30 Q. What, are there sort of limits to that?

35 A. No. No, there are - obviously there are limits, but I don't know what the limits are. What I'm saying is they were recent and I'm not going to go any further than say a few hours prior to.

<NO FURTHER RE-EXAMINATION

<WITNESS RETIRED AND EXCUSED

40 <KERRIE NARELLE ANDERSON(2.45PM)
SWORN AND EXAMINED

CROWN PROSECUTOR: Q. Would you tell the court your full name?

45 A. Kerrie Narelle Anderson.

Q. In 1997 were you working as a child care person at a gym in Singleton?

50 A. Yes, I was.

Q. If you can sit close to the microphone, thank you very much. And as part of your activity as a child care worker, did you come to meet the accused, Kathy Folbigg?

55 A. I did.

Q. Did you also come to meet her daughter Laura?

A. I did.

- 5 Q. Was Laura literally only a few weeks old when you met her?
A. Yes.
- 10 Q. And did Kathy come to the gym quite frequently over the next 18 months or so to do aerobics classes?
A. She did.
- 15 Q. And when she came to do aerobics classes would she generally leave Laura in your care?
A. Yes.
- 20 Q. Was that for an hour or two?
A. Yes, usually an hour or two, yeah.
- 25 Q. Fairly early in the time that you knew Kathleen Folbigg, did she tell you that she had lost previous children?
A. Yes, she did.
- 30 Q. And did that cause you to pay any particular care of Laura?
A. I certainly did, yes.
- 35 Q. What sort of extra care did you give Laura?
A. Yes. When ever she was asleep I just watched her. I used to always keep an extra special eye on her.
- 40 Q. As Laura got older did Kathleen start to come in more regularly to the gym?
A. Yes.
- 45 Q. And at some stage did she generally come in regularly each day?
A. Yes.
- 50 Q. From the period when Laura was about eight months old and after that, did you notice anything about Laura's sleep?
A. Yes. She used to sleep very, like in a deep sleep. Very still.
- 55 Q. And did you notice anything about her breathing when she was in a deep sleep and very still?
A. No.
- Q. Did you ever have any occasion when you thought that Laura might have stopped breathing?
A. No.
- Q. And were you aware of checking for that?
A. Oh, yes.
- Q. I'd like to ask you some questions about 1 March 1999. On that day did you see Kathleen and Laura at the gym in Singleton in the morning?
A. Yes, I did.

- Q. And did Kathy go to a 9.00am aerobics class?
A. Yes.
- 5 Q. And during the time that the aerobics class was on
did she leave Laura in your care?
A. Yes, she did.
- 10 Q. Was there a special area for the young children in
the gym to play?
A. Yes.
- Q. And can you remember if there were other children
that you were minding also on that same day?
15 A. All that day there would have been 11, about 11.
- Q. Eleven in the whole day or 11 at one time?
A. No, 11 in the whole day.
- 20 Q. How many children were there during the time that
Laura was there?
A. Oh, the whole 11, but there would have been eight
probably, you know, at one stage.
- 25 Q. And did Laura play with the other children?
A. Two in particular, yes.
- Q. Did you notice anything unusual about the way in
which she was playing?
30 A. No. Later on, just before the class finished she
seemed a little bit tired, but other than that no, she
seemed fine.
- Q. Had she been playing vigorously?
35 A. Yes. There was one show in particular where they
were dancing and trying to sing songs and that, yeah.
- Q. Did she appear to you to be acting normally?
40 A. Yes.
- Q. Did she appear to be suffering from a cold?
A. No. She had the week before, but that morning she
seemed, yeah, all right.
- 45 Q. Had Laura been in every day that week?
A. Yes.
- Q. Did she appear to be normal when you saw her during
the previous week before her death?
50 A. Oh, she just had a bit of a cold, bit of a snuffle,
bit of a runny nose, but other than that, yeah.
- Q. After the aerobics class had finished did you see
Kathy attending to Laura at about 10.35?
55 A. Yes.
- Q. And did you hear Kathy saying anything?
A. Yes. She was changing Laura, Laura was laying on

the floor, and I said hooray to them because I was leaving, and I - someone said something about going for coffee and she said no, she wasn't going, and then I left.

5

Q. Who said that?

A. One of the other ladies asked was they going for coffee.

10

Q. What did Kathy say?

A. She said no, she wasn't, and we walked out, and I left my sunglasses behind and I went back, and as I went back she stood Laura up and she said, "I can't have a coffee because you just run around."

15

Q. "I can't have a coffee because you"--

A. "Just run around".

20

Q. Did she say those words in any particular way?

A. No.

<CROSS-EXAMINATION

25

COOK: Q. You said that you first started to look after Laura when she was a few weeks old?

A. Yes. She would have been about seven or eight weeks old.

30

Q. Just about two months or nearly two months?

A. Yes.

Q. And you took extra care with Laura, is that right?

A. Oh, I kept an extra eye on her, yes.

35

Q. Is one of the reasons you did that because Kathleen Folbigg asked you to keep a close eye on Laura?

A. Yes, when she explained to me about the other children, yes.

40

Q. Did she say she had lost previous children and would you keep a close eye on Laura?

A. Yes, yes.

45

Q. Is that substantially what she said?

A. Yes.

50

Q. Did you notice something about Kathleen's behaviour in relation to Laura when Kathleen had an exercise class and Laura was in the child minding area? Would Kathleen do something?

A. Oh, at first she used to come and check on her and then as she got older she sort of, you know, just used to stay in the class.

55

Q. But in the initial stages at least she would regularly walk away from the class, is that right?

A. Yes.

Q. And check on Laura?

A. Yes.

5 Q. Now, over the period that Kathleen was coming to the gym you met her husband, Craig, is that right?

A. Yes.

10 Q. Was that at the gym?

A. The first time, yes.

Q. And you saw them as a family unit, that is Craig, Kathleen and the child Laura, sometimes?

A. Yes.

15 Q. You formed some impression about what sort of family they appeared to be?

A. Yes.

20 Q. Did it appear to you that both parents, Kathleen and Craig, were very loving towards Laura?

A. Yes.

Q. They were loving parents?

A. Yes.

25

Q. Now, in relation to 1 March were Laura and Kathleen Folbigg already there in the baby-sitting area when you arrived?

A. Yes.

30

Q. And was this after Kathleen's scheduled class had begun?

A. Yes. I would have got there about five past nine.

35

Q. And the class was to start at 9.00?

A. Yes.

40 Q. Was Kathleen attending the class when you arrived?
A. No, she was at the gateway, and as soon as I got there she went off to the class.

Q. Was she waiting there with Laura for you to arrive?

A. Yes, yes.

45

Q. Now, you had seen both Laura and Kathleen in the week leading up to this?

A. Yes.

50 Q. And you thought that Laura was suffering from a cold?

A. Yes.

Q. And was she still suffering from that cold on 1 March?

55 A. Not really, no.

Q. Little bit?

A. Oh, maybe just a little bit, but yeah, you know,

like she was just, how could I say, she didn't like have a runny nose or anything like that or a cough, but she might have been just a little bit off, yeah.

5 Q. A little bit off colour?
A. Yes.

10 Q. So recovering from the cold she had had for the preceding week?
A. Yes.

Q. Is that right?
A. Yes.

15 Q. And while she was playing with the other children in the child minding area--
A. Yes.

20 Q. --did she seem to be, to you, to be a bit quieter than she normally was?
A. At first, yes.

25 Q. A bit tired?
A. Oh not--

30 Q. Is that the way it seemed to you?
A. Oh, yeah, quite tired to start with, yeah. And then when they're favourite show came on it was like they sort of got a second lease of life, you know, dancing and carrying on.

35 Q. And is this right, that Kathleen said she couldn't come for coffee because she had to take Laura home for a sleep?
A. No, when Kathy came to get Laura I said, "Oh, she's starting to get a bit tired or quiet", I said she might need a sleep, and that's when someone asked was she going for coffee and she said no, that she was going to take her home for a sleep.

40 Q. You notice that Laura appeared to be getting tired at the end of her time in the child care area of that day, she was starting to get tired?
A. Yes.

45 Q. Is that right?
A. Mm.

50 Q. And you said that to Kathleen, that Laura appeared to be tired and she might need a sleep?
A. Yeah.

55 Q. It was after that, was it, that Kathleen said she wouldn't be coming for coffee because she wanted to take the child home to have a sleep?
A. Yes.

Q. Now, you made some observations about Kathleen

Folbigg's apparent mood during that day, is that right, the way she seemed, Kathleen?

A. Oh, yes. She just seemed like her normal self.

5 Q. Did she seem to you on this day, 1 March, to be her happy normal friendly self?

A. Yes. Well, I only seen her for a couple of minutes when I first got there and when I was leaving when she come to get Laura, so she just seemed like herself.

10 Q. When you spoke to her that day at the beginning and at the end of her exercise class?

A. Yes.

15 Q. Did she seem to you to be happy and her normal friendly self?

A. Yes.

20 Q. You were an employee at the Bodyflex gym, is that right.

A. Yes?

25 Q. Was the manager of the gym a person called Kerry Landers.

A. Yes.

30 Q. And would she regularly be there when Kathleen and the child Laura were there?

A. The majority of the time, yes.

35 Q. And in a position to make observations about Kathleen and the child in the time she was there?

A. Yes.

40 Q. And was she there on 1 March 1999?

A. I can't remember, yeah.

45 Q. Was she generally there every day of the week?

A. Yes.

50 Q. So you would expect that she was probably there?

A. Yes.

55 Q. In business hours?

A. Oh yeah, she was always there when I got there, yeah if.

<NO RE-EXAMINATION

50 <WITNESS RETIRED AND EXCUSED

<ALEX EUGENE KAN(3.02PM)
SWORN AND EXAMINED

55 HIS HONOUR: Doctor, please be seated. If you wish to refer to any of your notes to answer any question, you may do so.

CULVER: Q. Is your full name Alex Eugene Kan?
A. Yes.

5 Q. Are you a visiting senior pathologist now at the Children's Hospital at Westmead?

A. Yes, I am.

10 Q. And, doctor, is it the case that back in 1991 you were at the Royal Alexandra Hospital for Children at Camperdown as the senior staff specialist?

A. Yes, I was.

15 Q. In that capacity did you receive some slides which had tissue sections from Patrick Folbigg's brain following post-mortem?

A. I did, yes.

20 Q. And were you in fact given a history relating to Patrick Folbigg for you to then conduct an examination of those slides?

A. A history was enclosed with the slides.

25 Q. Are you able to say, doctor, whether or not that history was mainly comprised of an autopsy report?

A. Autopsy, yes, it was, Dr Singh-Khaira's report.

Q. (Exhibit V shown.)

A. That's the one.

30 Q. Is exhibit V the report which you received in connection with the slides for Patrick?

A. Yes.

35 Q. Are you able to say how many slides you received?

A. I can't recall the precise number, but I think it's somewhere between a dozen and a dozen and a half.

40 Q. Did you examine those slides using a microscope?

A. I did, yes.

45 Q. When you conducted that examination did you see signs that Patrick could have suffered from epilepsy during the course of his life?

A. Yes, I did, yes.

Q. In other words, from seizures?

A. Yes.

50 Q. Did you also find when you examined those slides a light lymphoid infiltrate in Patrick's leptomeninges?

A. Yes.

55 Q. Could you explain what the leptomeninges are?

A. The leptomeninges are the very same membranes covering the brain, the surface of the brain.

Q. Can you explain what a light lymphoid infiltrate is?

5 A. Light lymphoid infiltrate is - lymphoid infiltrate means a number of lymphocytes, one of the white blood cells, one of the cells that are found in the circulating blood.

Q. And an infiltrate?

A. An infiltrate is when you find these cells in the tissue, other than lymphoid tissue.

10 Q. Can I show you a document? (Mfi 20 shown.) Do you see that document is marked mfi 20.

A. Yes, I've got it here.

15 Q. Do you agree that that's a copy of a report prepared by you on 24 June 1991 in respect of your examination of the slides of Patrick's brain?

A. Yes, it is.

20 Q. Have you noted in that report that this finding of the light lymphoid infiltrate could be related to cortical infarcts?

A. It could, amongst other things.

25 Q. And can you explain what cortical infarcts are?

A. Infarcts are areas of tissue which have died, lost vitality. Usually reasonably localised area of tissue have lost vitality.

30 Q. From your examination are you able to say how old the infarcts were which you saw in the slides?

A. Yes. They would be older than a month but beyond that I'm unable to speculate.

35 Q. Is it consistent with infarcts which occurred four months prior to Patrick's death?

A. Yes, it was consistent with.

40 Q. Doctor, did you also note in your report that alternatively the light lymphoid infiltrate could have been related to treated encephalitis?

A. I would say there was a fairly remote possibility.

45 Q. And had you been told as part of the history that Patrick had been treated for encephalitis at some stage during his life?

A. Only in the enclosed history that was part of the post-mortem report.

50 Q. And in fact, doctor, did you in your report dated 24 June 1991, mfi 20, did you then write next to "treated encephalitis". "Question mark, assumed or proven"?

A. Oh, yes, in parenthesis at the last - first paragraph.

55

Q. So are you in a position, doctor, to say whether or not Patrick had encephalitis?

A. No, not in the presence of evidence of old brain,

to use your word, infarct.

HIS HONOUR: The answer will be misunderstood, madam
Crown. Would you clear that up, please?

CULVER: Yes, certainly.

Q. Doctor, just to return to my question, are you in a
position, having examined those slides, to say whether
or not in fact Patrick had suffered from encephalitis
during his lifetime?

HIS HONOUR: Q. Please answer that yes or no. Are you
in a position to say that?

A. No.

CULVER: Q. Doctor, why is it that you can't say,
after having examined the slides?

A. Because the lymphoid infiltrate present is not
necessarily due to previous encephalitis. There are
other - there could be other predisposing causes for
there to be lymphocytes in the leptomeninges.

Q. And did you see any sign in the slides, some 20-odd
or however many you did in fact examine, did you see
any sign that Patrick definitely had encephalitis?

A. No.

Q. Doctor, were you certain of what specifically
caused that lymphoid infiltrate that you spoke about
earlier?

A. No, I can't be certain.

Q. Do you also in your report, doctor, say that you
saw a distribution of lesions in the slides?

A. Sorry, could you repeat?

Q. A distribution of lesions?

A. Lesions meaning any abnormal changes.

Q. Yes, and do you put in your report that you in fact
observed a distribution of lesions?

A. I did see certain pattern of distribution.

Q. And did you note also that that distribution was
unusual for herpes encephalitis?

A. I believe it was, for a child of that age.

Q. Were there any findings which you made which you've
never seen in a cot death case or a SIDS case?

A. In the number of cot death autopsies I have been
involved with I have never seen the calcification, for
example, which I mentioned in my report.

Q. And is it the case, then, from what you have just
said that you did observe calcification in the slides
of Patrick's brain?

A. I believe I did, yes.

Q. Doctor, what could cause the calcification which you observed?

5 A. In the distribution I saw it was most likely the result of hypoxic damage to a certain layer in the cerebral cortex, that is the layer of grey matter on the surface of the brain.

10 Q. And when you say "hypoxic", do you mean resulting from a lack of oxygen?

A. Deprivation of oxygen supply to that part of the brain.

15 Q. Doctor, do your findings enable you to rule out that Patrick suffered a catastrophic asphyxiating event when he was four to five months old?

A. I cannot rule out that event.

20 Q. Do your finds allow you to rule out that Patrick suffered a catastrophic asphyxiating event when he died?

A. No, I cannot, but it is not based on this - sorry, I can't be precise with one word here. No, just to your question, no.

25 Q. You cannot rule that out. Is that right, doctor? You are saying you can't rule that out?

A. I cannot rule that out.

30 Q. In your experience as a paediatric pathologist, are you able to say whether or not deliberate suffocation of a child can cause a catastrophic asphyxiating event?

35 A. I believe it is the case, but it is circumstantial. I mean I can't draw the conclusion that the changes I saw were definitely due to that, but I cannot again rule out the possibility.

<CROSS-EXAMINATION

40 ZAHRA: Q. Doctor, can I take you to the causes or the possible causes of the lymphoid infiltrate?

45 A. In the presence of the damage to the cortex, which is a fairly superficial part of the brain, the presence of lymphocyte is not an uncommon phenomenon. The presence of any scarring of the brain tissue or any other tissue in the body as a matter of fact, it is usual to see a few lymphocytes.

50 Q. And this is usually consequent upon swelling of the brain?

A. Not usually, but yes, it can be.

55 Q. And if we were to look at the range of causes that that could include encephalitis in one of its varied forms?

A. Yes, encephalitis certainly is one of the causes.

Q. Also, for example, if there was a seizure, the

result of epilepsy?

5 A. Yes. That could bring about the changes, provided the seizure was prolonged enough and there was any - and if there was sufficient deprivation of oxygen supply to certain parts of the brain, because of the seizure.

10 Q. And that seizure doesn't necessarily have to follow from encephalitis. It could follow from some other small part of the brain?

A. That's correct, it doesn't have to.

15 Q. In other words, quite separately from encephalitis there could have been a seizure here because of some abnormality in some section of the brain?

A. There could have been, yes.

20 Q. And that abnormality is not necessarily evident by the testing or the examinations that you have done?

A. That's true.

25 Q. So when we look at the infiltrate we can see that it could be caused by a number of different symptoms, from encephalitis in its forms to the possibility of a seizure consequent upon an abnormality of the part of the brain that cannot be identified by your examination of it?

A. That's correct.

30 Q. And if there was such a seizure, that that might lead to an hypoxic event?

A. It could.

35 Q. So in other words, when you spoke about your findings being consistent with an hypoxic event, the cause of that may have in fact been a seizure disorder which developed when the child was about five months of age?

40 A. It might have been.

45 Q. In other words, from your examination of the slides you can't rule out the possibility that there was a seizure that caused a hypoxic event when the child was about five months of age?

A. Sorry, would you repeat the question?

50 Q. From your examination of the brain, you can't exclude that there was in fact a seizure when the child was about five months of age?

A. No, I couldn't exclude it.

55 Q. It could have been caused by encephalitis in its varying forms or it could have been caused by a seizure by itself because of an abnormality in the brain?

A. That's correct.

Q. Not apparent from your examination?

A. That's true.

5 Q. And consequent upon a seizure disorder developing because of that seizure at age five months, that there could be damage to the brain that you in fact have observed here?

A. Yes.

10 Q. And the ultimate cause of death could in fact have been a seizure in itself which has caused an hypoxic event?

A. That was certainly possible.

15 Q. In the background of a history of seizures?

A. Yes.

20 Q. When you were asked questions about whether you can definitely exclude encephalitis, is what you are saying that you can't exclude it, however?

A. Not on the material available to me.

25 Q. And there is nothing about your examination of these particular slides which would exclude the scenario of a seizure disorder when the child was five months old and the ultimate death being caused by a seizure against that history?

A. That's true.

<RE-EXAMINATION

30 CULVER: Your Honour, I neglected to actually tender mfi 20.

35 EXHIBIT #AD DR KAN'S REPORT OF 24/06/1991 PREVIOUSLY MFI 20

40 CULVER: Q. Do you recall that my friend asked you about the presence of lymphocytes? Do you recall those questions?

A. Yes.

45 Q. You were asked whether or not that presence can be consequent upon a swelling of the brain. Are you able to say whether or not swelling of the brain can be caused by a deliberate suffocation of a child?

A. Yes, it could.

50 Q. And you also gave an answer under cross-examination by my learned friend as to the sufficiency of the deprivation, or a prolonged deprivation. Are you able to say whether or not your findings in respect of the old laminar necrosis was significant in that regard?

55 A. It certainly, in respect to that part of the cortex that was damaged it was significant, otherwise I wouldn't see the changes there.

Q. So if I could just clarify, is the significance to you, as the pathologist looking at those slides, such that it indicated that there had been a prolonged

deprivation of oxygen to Patrick's brain which caused that laminar necrosis?

A. Yes, I believe there would have been.

5 Q. Doctor, you were also asked by my learned friend questions about whether or not seizures could be caused by an abnormality of the brain. Did you in fact observe any abnormality of the brain which could have caused a seizure in the first place?

10 A. I could not precisely pinpoint any of the lesions as the primary cause of the seizure, but any of the lesions would have been capable of triggering off seizures.

15 Q. My friend posed a hypothetical to you that some abnormality of the brain may have led to an initial seizure and then a seizure disorder developed following swelling of the brain. Are you able to say whether or not your findings are equally consistent with another hypothetical, which I will put to you now. If you assume that this child had been deprived of oxygen for some length of time, is it possible that his brain could have swollen and then that in turn led to a seizure disorder?

20 A. Yes, it was possible, yes.

ZAHRA: Might I be permitted to ask one further question?

25 HIS HONOUR: Yes. I was going to ask whether anything arose out of the tender of the report.

<FURTHER CROSS-EXAMINATION

30 ZAHRA: Q. You were asked about the statement you made that there may have been a prolonged deprivation of oxygen. Do you recall your evidence about that?

A. Yes.

35 Q. Could a seizure cause such prolonged deprivation of oxygen?

A. A seizure could.

<WITNESS RETIRED AND EXCUSED

40 CROWN PROSECUTOR: We did have one further witness here, but after discussions with my learned friend it is not necessary to call that witness, which means that we have run out of witnesses for today.

45 HIS HONOUR: Ladies and gentlemen, you will not be here tomorrow. You will see the case listed in the paper, if you care to look, and in the court lists, but that will just mean that counsel and I are dealing with matters that are obliged to be dealt with in your absence, so don't concern yourself about that. You are going to have another long weekend.

5 CROWN PROSECUTOR: Just by way of indicating where we are, I think that that completes all of our evidence, except for some medical overview evidence and Detective Ryan.

HIS HONOUR: Can you put a number of days on how long? That may be difficult.

10 CROWN PROSECUTOR: It will some time next week, late next week.

ZAHRA: Despite the days over Easter we are still on schedule and there is no unexpected delay.

15 HIS HONOUR: Ladies and gentlemen, with that I wish you good afternoon and say that we all look forward to seeing you again next Monday for a start at 10.00 o'clock.

20

IN THE ABSENCE OF THE JURY

5 ZAHRA: Can I indicate in relation to my friend's argument that I am at the same disadvantage as your Honour. I didn't bring the material with me today. We may be able to shorten the argument if my friend can at least present his argument at this stage.

10 HIS HONOUR: It will be necessary for me to leave the bench for a couple of minutes. I want to find out what is here in chambers and bring it on to the bench.

SHORT ADJOURNMENT

15 HIS HONOUR: Mr Zahra, on Thursday I received a copy of a letter from the Office of the Director.

ZAHRA: Yes, we have that also.

20 HIS HONOUR: Of 17 April, with an annexed schedule of questions and answers from the record of interview. Do you have a copy of that here?

25 ZAHRA: Yes.

30 HIS HONOUR: A new matter has now arisen. I was dealing with a stay application based upon the Crown's asserted intention not to tender the record of interview. The Crown has changed its position once again and now proposes to make a partial tender of the record of interview. You've made it clear, Mr Zahra, that you want the whole document in. Do you object to the partial tender?

35 ZAHRA: Yes, your Honour. Might I say because of that the emphasis of our argument has somewhat changed, bearing in mind there is quite a bit of the material already going in.

40 Our primary submission now is that unless my friend shows good reason to go against a significant line of authority that your Honour should be editing the record of interview, that it all should go in. I can't take your Honour to the authorities because I have them in chambers, but essentially our primary submission is just that.

45 If my friend goes against a very significant line of authority to suggest that, your Honour is in a process of editing the record of interview. The authorities make it clear that the good with the bad, even if there is good for the accused, that must go in. I think the argument can be distilled down to that. What can my friend say about your Honour going against the line of authority that the whole of the record of interview should go in.

55 HIS HONOUR: Well, it is by no means the first

statement, but there is a statement of a majority in Soma which fairly well summarises it.

5 ZAHRA: Yes, together with the text that I have also taken your Honour to initially also.

10 HIS HONOUR: Well, Mr Crown, why should you be allowed to tender part of a record of interview for your own purposes but not the rest?

15 CROWN PROSECUTOR: I have had an opportunity over the intervening period to consider it further. The situation we would submit is this; that prima facie we are not obliged to tender the interview at all because it is exoneratory.

HIS HONOUR: Yes, I agree.

20 CROWN PROSECUTOR: However, my learned friend has demonstrated a degree of prejudice which he claims has flown to the defence because of the fact that the Crown had flagged at the beginning of the trial that it would be tendering the interview. The Crown was originally
25 going to tender the interview because of the damaging admission which was excluded by your Honour and, to be quite frank, we had not reconsidered our position until last week. Possibly we should have considered it before we opened. Be that as it may, we accept
30 Mr Zahra's statements to the extent that he claims to have suffered prejudice.

35 On reflection what, we submit is this. That if my friend claims to have suffered prejudice, that the appropriate remedy for that prejudice is for the Crown to remove any objection to the defence tendering that part of the interview.

THE FOLLOWING ERRATA WERE NOTED:

- 40 1. Page 810, "executed" amended to read "excused".
2. Page 761 line 56, the words "did not die" amended to read "died".

45 CROWN PROSECUTOR: In order to avoid the prejudice that the defence claim that they have suffered, and I don't want to be misconstrued on this, we don't concede that they have suffered any prejudice, but we hear what
50 Mr Zahra has said. In order to avoid that prejudice we would submit that the appropriate course of action is for the accused to tender the record of interview and we would have no objection to those questions which are listed on the form which has been sent to your Honour, and perhaps I might hand up a copy for the record of
55 those portions of the accused' interview which are not objected to.

MFI #30 LIST OF QUESTIONS FROM RECORD OF INTERVIEW TO
.24/04/03

WHICH THE CROWN HAS NO OBJECTION

5 CROWN PROSECUTOR: I have amended it to rather than that the Crown intends to tender, to that the Crown has no objection to, because the position we take--

HIS HONOUR: These are the other ones.

10 CROWN PROSECUTOR: Yes. The position we take now is that the defence ought to tender those parts of the record of interview, and we would have no objection to those parts, in order to alleviate any potential
15 prejudice. That doesn't mean that it is admissible in the Crown case or that it would need to be tendered in the Crown case. We are doing this as a matter of abundant caution to facilitate the defence to remove any prejudice that they see as falling from the fact that we opened on the existence of the record of
20 interview and told the jury and the court that we would be leading it.

HIS HONOUR: So you are not tendering any part of the record of interview now.

25 CROWN PROSECUTOR: No.

HIS HONOUR: You've gone back to your second position.

30 CROWN PROSECUTOR: We have gone back to our original position, that we are under no obligation--

HIS HONOUR: Your original position was you were going to tender the lot. You have gone back to the second
35 position.

CROWN PROSECUTOR: Yes. The second position is we are under no obligation to tender it because it is
40 exoneratory, exculpatory. However, we would have no objection to the defence tendering those parts that we have indicated in order to avoid any potential prejudice that they have identified.

45 HIS HONOUR: It is implicit in this list and in what you have said that if any other part of the record of interview were tendered you would object to it.

CROWN PROSECUTOR: Yes.

50 HIS HONOUR: Mr Zahra, if you tendered any part of the record of interview and it were objected to, could you get it into evidence?

55 ZAHRA: I must say it is very difficult to keep up with the Crown's positions and I haven't really had an opportunity to digest. I still don't really understand whether my friend proposes to lead the evidence in his own case.

5 HIS HONOUR: No, the Crown is not going to tender anything now. It is back to the letter of 14 April, we are not tendering the record of interview. That is what the Crown now says. It forecasts that if you tender the record of interview then it will object to some parts and not others.

10 ZAHRA: Our primary - it is difficult to talk about it in terms of primary submission, but when we addressed this issue last Thursday we spoke about the Crown's obligation to tender this material because of the course they have taken, and really we have already made extensive submissions about that, and that is in fact our primary view, that this is something that the Crown should now be tendering for the reasons that we have argued previously.

15 HIS HONOUR: Mr Crown, is this mfi 30 any different in its schedule from the schedule that was annexed to the letter?

20 CROWN PROSECUTOR: No, your Honour.

25 HIS HONOUR: All you have changed is you have crossed out "proposed to be tendered" and you have substituted "not objected to."

CROWN PROSECUTOR: Yes.

30 HIS HONOUR: Well, we are back to where we started then. You were making an application for a stay on the basis that the Crown is not tendering the record of interview, Mr Zahra.

35 ZAHRA: Yes. What I said a moment ago is still quite helpful to get to the essence of what our argument is. If your Honour is of the view that we have argued that already part of the record of interview is before the court, then the Crown, still by just taking this last minute change, is still not exonerated from having to argue to your Honour why is it the record of interview has now partially been referred to in evidence, why is it that your Honour is now placed in the position of having to edit the record of interview.

40 So the essence of what I have distilled a moment ago is really the thrust of our submissions, that when we took your Honour to the fact that it was not only in the Crown's opening that the record of interview has been referred to but we have always proceeded on the basis that the record of interview was going to be part of the evidence, and I took your Honour to the number of references already in the evidence to the record of interview, including the fact that the Crown had tendered a letter, which I think is exhibit O, which is referring back to the record of interview.

45 HIS HONOUR: To which you had not taken objection or

raised any claim to privilege.

5 ZAHRA: Because we believed the record of interview was
going to be part of the proceedings and part of the
Crown case, not the defence case. So whilst I have
distilled the argument a moment ago, that really is
distilled, even though the mechanism is by way of stay
of proceedings, but really the whole thrust of the
10 submission is what I have indicated a moment ago in a
few moments. It is for your Honour to clearly now
conclude that the record of interview is now already
partially before this court, not because we haven't
played a minute of it but because there have been so
many references to it and we have proceeded on that
15 basis. So part of the record of interview is before
the court. So my friend, despite this last minute
change, is still faced with having to argue, against
authority, as to why your Honour should be in a
position to edit the record of interview.
20

HIS HONOUR: It would help if you answered that
question I asked you in the first place, Mr Zahra. If
you were to tender any portion of the record of
interview to which the Crown has implied that it will
25 object, can you get it into evidence?

ZAHRA: Well, again, I am just thinking on my feet
because this is all evolving moments ago, but the
rationale really behind the tendering of the whole of
30 the record of interview must be that really, well, for
sake of completeness that it needs to be all before the
court so the jury may--

HIS HONOUR: I understand that.
35

ZAHRA: We say that primarily the Crown has made this
admissible. It is not for us to now argue its
admissibility. The Crown has made this admissible by
40 the way the hearing has proceeded so far.

HIS HONOUR: May I say this, that I take the
preliminary view that if you tendered any of the
portions of the record of interview to which the Crown
has impliedly said that it will object, it will not be
45 admissible. So that whatever happens we are going to
finish up either with no part of the record of
interview in or with part of it in. That seems to be
the necessary logical conclusion, one or the other, but
no third possibility.
50

ZAHRA: Is your Honour saying in a sense their primary
argument that the whole should be in because the Crown
has made this admissible, that your Honour is rejecting
55 that at this stage?

HIS HONOUR: No. I am just saying on the way things
stand we will finish up with no record of interview or
such parts as you care to tender and to which the Crown
.24/04/03

does not care to object.

ZAHRA: Yes. I understand what your Honour is saying, yes.

HIS HONOUR: It must be either of those two positions. Do you agree that that's right, Mr Crown?

CROWN PROSECUTOR: Yes, we do.

HIS HONOUR: I will state a preliminary view now, if it helps the parties. I have been particularly asked to do so, although I would have preferred to wait until tomorrow to hear more extensive argument about the matter, and it is this.

I would have to give very serious consideration to staying the trial if the record of interview were not put into evidence, and that is what the Crown now proposes. We began to hear this stay application the other day upon the basis that the defence had conducted its case upon an understanding, well-founded, that the Crown would tender the record of interview. It told the jury that it would. The defence conducted itself in various ways, relying upon that undertaking.

By no means the only one, but the principal exemplar is the decision of the defence not to claim privilege with respect to, or to object to the tender of, the letter that Mrs Folbigg wrote for her solicitor in amplification of things she had said to the police in the record of interview. That became exhibit O. If things remain as they are, I may well come to the view that the trial should stop because it would be quite unfair for the defence to have been put in that false position and to have changed its position relying upon the indication which turns out, at the decision of the Crown alone, to be unreliable.

I also take the view that it is not appropriate for the Crown to put the defence in the position of having to tender the record of interview, or rather part of it, in order to alleviate the disadvantaged position into which it has been put by the actions of the Crown alone. I think that the Crown should consider its position about this.

ADJOURNED TO THURSDAY 24 APRIL 2003

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PM:RMC:RT:8

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION5 BARR J
AND A JURY OF TWELVE

FOURTEENTH DAY: THURSDAY 24 APRIL 2003

10 70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG

15 HIS HONOUR: Is it convenient for me to deal first to
the objections to portions of the evidence of Drs berry
and Herdson? I still haven't given you my judgment
about those matters, have I?20 CROWN PROSECUTOR: We have been in communication with
Dr Beal, Dr Berry and Dr Herdson since the matter was
last raised with your Honour. We have prepared a
document that sets out in question and answer form the
sort of questions that we would intend asking them in
much more admissible form than their reports.
25 Certainly there are parts of their reports which are
admissible, as your Honour has provisionally indicated,
but there are other parts which we would seek to lead
in a form which is closer to the form that was used
with Dr Cala. I have a copy to hand up to your Honour
30 of those and my friend received that some days ago, I
think, Tuesday. I don't know at this stage that we
need the judgment from your Honour, unless my friend
has some area that he wishes to raise.35 HIS HONOUR: As I understood it, there was still an
issue at the end of debate on the last occasion. I
thought that you were still disagreeing about some part
of the statement in Dr Berry's report at the bottom of
page 26.40 CROWN PROSECUTOR: Yes, I think that is still an area
of dispute, your Honour. Your Honour is quite right.45 HIS HONOUR: And the statement under the heading
"Conclusion" on page 28. Are you still at odds about
those passages, Mr Zahra?

ZAHRA: Yes.

50 HIS HONOUR: There is also Dr Herdson's report at
page 3. At about point 3 there is a paragraph which
begins "Considering these four infant deaths together".
The whole of the report from there on was objected to
by Mr Zahra and the Crown did not press it, except to
55 the last sentence of that first paragraph. As I understood
it, the Crown was pressing the statement "I am unaware
that there have ever been", et cetera. Are you still
pressing that, Mr Crown?

CROWN PROSECUTOR: Yes, certainly, your Honour.

5 HIS HONOUR: And, Mr Zahra, are you still objecting to that?

ZAHRA: Yes, your Honour.

10 HIS HONOUR: So I still have to decide those matters I think.

ZAHRA: Yes.

15 HIS HONOUR: I will do that now. Before I do, I take it, Mr Zahra, if Dr Beal's evidence is dealt with in the way that Dr Cala's was, you would not be raising any objection.

20 ZAHRA: Yes. I wouldn't cavil with your Honour's previous judgment on that.

FOR JUDGMENT ON ADMISSIBILITY OF EVIDENCE OF DR BERRY AND DR HERDSON SEE SEPARATE TRANSCRIPT

25 HIS HONOUR: I think that should deal with all the matters in respect of which you are at issue on the expert medical evidence.

30 CROWN PROSECUTOR: Can I just clarify one area, your Honour? I don't think it has been indicated as a source of any dispute, but for abundant caution it is better that I raise it.

35 The report of Dr Berry begins by going through each of the children individually, and then starting at page 23 of his report he comments on each of the deaths in isolation and says, faced with a similar case today, what his finding would be, taking each case in isolation. Then it goes through to page 26, and then 40 he goes to look at each of the cases together. I don't think there is anything on page 27 that has been objected to.

45 HIS HONOUR: There was initial objection to the third, fourth, fifth and sixth paragraphs on that page, but I think the two of you dealt with that during the course of argument.

50 CROWN PROSECUTOR: I think I indicated that the only ones I seek to rely on is paragraphs 4 and 5.

55 HIS HONOUR: I am not talking about the numbered paragraphs. The unnumbered paragraphs, beginning with the third one, "There are as many theories."

CROWN PROSECUTOR: I would be seeking to lead that.

HIS HONOUR: You pressed that and Mr Zahra withdrew his

objection. The same can be said of the following paragraph, "If death was not natural", the next one, "There were no definite" and the next one "Suffocation in young children."

5

CROWN PROSECUTOR: It is the last four paragraphs on that page.

10 HIS HONOUR: The objection was sustained in the last paragraph which incorporates the numbered subparagraphs and you indicated you would be relying only on the fourth and fifth numbered subparagraphs.

15 CROWN PROSECUTOR: I would also wish to rely on point 3. In my submission that is a factual detail, namely, that they were discovered very soon after death.

20 HIS HONOUR: The basis of the objection, as I understood it, was the objection to the collective approach. Now, so long as that evidence is given in relation to each child in isolation, I don't understand that Mr Zahra will be objecting.

25 CROWN PROSECUTOR: But I think that this whole part is dealing with all four deaths together. I would be asking him, taking into account only paragraphs 3, 4 - I think really that I don't really need that whole paragraph if I have substantially what's in the conclusion. And, if I understand your Honour
30 correctly, your Honour is allowing Dr Berry to give evidence that the sudden and unexpected death of three children in the same family without evidence of a natural cause is extraordinary; that he is unable to rule out that Caleb, Patrick, Sarah and possibly Laura
35 were suffocated, and that's it.

HIS HONOUR: Yes.

40 CROWN PROSECUTOR: So far as Dr Herdson is concerned, I think everything on page 2 goes in.

HIS HONOUR: Mr Zahra's final position was not to object to anything on the first two pages but to object to the whole of the report commencing with the third
45 paragraph on the last page.

CROWN PROSECUTOR: Yes. I think paragraph 5 I am not pressing.

50 HIS HONOUR: Well, you are not pressing any part of that, except the part that I have dealt with this morning.

55 CROWN PROSECUTOR: Yes.

HIS HONOUR: At least that's what I understood your position to be last Thursday.

CROWN PROSECUTOR: The paragraph just before paragraph 5 your Honour has admitted.

5 HIS HONOUR: No, just the last sentence. That's the only part of it that you pressed.

10 CROWN PROSECUTOR: I would be pressing the first paragraph on page 3. I don't think there is any objection to that.

HIS HONOUR: There is no objection to any part of page 3 before the paragraph which appears third on that page beginning "Considering these four infants together."

15 CROWN PROSECUTOR: Yes, and your Honour has said that that paragraph is admissible.

20 HIS HONOUR: No, I have said that you are not pressing any part of the report beginning with the passage that I just read, except the last sentence of the first paragraph, "I am unaware", et cetera. That's all you pressed and I am letting it in.

25 CROWN PROSECUTOR: Yes, that is correct, your Honour.

HIS HONOUR: I didn't deal in detail with Dr Beal and, as I understand it, you don't need me to make any decision about her evidence. It will be dealt with along the model of questions that were asked of Dr Cala.

30 CROWN PROSECUTOR: Yes.

35 ZAHRA: Can I just say one thing and this may be rather trite and obvious, but in relation to Professor Berry's individual consideration of the cases, there are some mixtures of factual, if I could loosely call it that, rather than medical foundation, and I would presume my friend will not be leading that in the light of your Honour's judgment today.

40 Can I just take your Honour to one part to probably highlight what I am submitting? For example, at page 24, about halfway down the page in relation to Caleb, that in the overall opinion that he refers to the diary entry that would lead him to suspect suffocation.

45 HIS HONOUR: This is amateur detective work.

ZAHRA: Yes. Obviously I think I have indicated an approach from the very start.

50 HIS HONOUR: I think the Crown understand that.

ZAHRA: The line needs to be drawn between matters of factual determination rather than medical opinion.

HIS HONOUR: Yes.

5 CROWN PROSECUTOR: In relation to Dr Beal, the material
that we have provided to the defence a couple of days
ago, and to your Honour today, does contain some
material asking her to consider all four of the
10 children together and asking her in her view what the
appropriate diagnosis ought to have been on the part of
the pathologists.

HIS HONOUR: I haven't read the document you have
handed to me.

15 CROWN PROSECUTOR: What I am trying to do is flush out
from my friend if there is any objection to that,
page 4, second question and third question and fourth
question.

20 HIS HONOUR: Why do you need that question? It is only
a wrap up question, Mr Crown. Hasn't the individual
evidence been given as to the opinion of each death?

25 CROWN PROSECUTOR: The individual opinion has been
given.

HIS HONOUR: Why do you need to put them all together,
then? I only ask that, I mean it is not for me to say
30 how questions ought to be asked or evidence adduced,
but if it gives rise to the risk of a collective
approach it seems to me that that risk ought to be
avoided. Have you asked, for example, in respect of
each individual child whether Dr Beal's opinion is that
35 the death should have been diagnosed as undetermined
causes?

CROWN PROSECUTOR: I will certainly be doing that, your
Honour.

40 HIS HONOUR: Well, if that is done, you don't need this
question. You can do that for each individual child.

45 CROWN PROSECUTOR: Yes, I can, your Honour. But as I
understand it she may well say that in relation to each
child, when looked at individually, that the result of
the dying or diagnosis should have been undetermined,
but that looking at all four of them together, with the
knowledge we now have of all of them, that, for
50 instance, the diagnosis for the third child should have
been suspected suffocation.

HIS HONOUR: Yes.

55 CROWN PROSECUTOR: Dr Beal is an epidemiologist, so her
speciality is looking at the incidence of natural
diseases.

HIS HONOUR: You say that she can express a view about

causes of death by taking into account more than one death and she can do that from her experience.

5 CROWN PROSECUTOR: Because her speciality is
specifically looking at the patterns of diseases in
communities, or it may be. And, in particular, the
recurrence of SIDS in the community generally and in
particular families, in individual families in
10 particular. I don't think there is any objection that
could be made to the third last question or the second
last question or the last question. So I suppose it is
the second question on that page, page 4.

15 HIS HONOUR: You will have to educate me. What does an
expert in epidemiology know that other experts in child
morbidity or mortality might not know?

20 CROWN PROSECUTOR: As I understand it the speciality is
the incidence and patterns of disease in the community
at large and in sections of the community and in
families. The evidence we would anticipate leading
from her would begin with her opinion as to whether or
not the incidence of SIDS is such that a child, where
25 there has already been one SIDS death in a family,
whether the incidence of a subsequent SIDS death is
exactly the same as the first or more. So she would
initially give evidence about that, about the risk of
subsequent SIDS death in the one family. I would then
be seeking to ask her questions about whether there has
30 ever been established in the medical literature and
accepted by the medical community a family in which
there have been three SIDS deaths, and I anticipate she
will say that there is not. Then I would take her
through the individual causes of death for each of
35 these children, looking at each of them individually,
asking her the questions that are contained in the
document that was handed up to your Honour today,
asking her in each case whether in her view the death
is consistent with deliberate smothering. Then asking
40 her to confirm that all four children died in
circumstances that were consistent with deliberate
smothering, that they were all consistent with having
died from an acute asphyxiating event, asking her
whether there is any natural cause that could account
45 for all of the deaths, bearing in mind the testing that
was done of the children. And then, finally, what I
would wish to ask her is along the lines of that second
question on page 4, namely, if she were now, in
50 retrospect, with the knowledge of that whole family, to
ascribe a diagnosis for each death, what would she put
down as the diagnosis for each child.

55 HIS HONOUR: Yes, I follow what you say, Mr. Zahra? I
don't know if you have had a chance to have a careful
look at what the Crown puts forward?

ZAHRA: Not in this passage, because what he is doing
is changing the terminology, using such words as

"incidence" and "risk".

HIS HONOUR: I don't want to deal hypothetically with any issue which might be raised.

5

ZAHRA: This boils down to ultimately statistical evidence so we are back really, although we might repackage it, to incidence.

10

HIS HONOUR: Are you in a position to cope with this now?

15

ZAHRA: To a point. If what my friend is seeking to do, and from what I can understand, really, whilst my friend wants to package it in this way at the moment, to my understanding of Dr Beal's qualifications, she is not a pathologist, that really the whole foundation for all of this is it statistical evidence and a database that in fact she has considered. In other words, this evidence is not based on her experience as a pathologist, as Professor Berry, Professor Herdson. The foundation for all this evidence is based in statistical evidence, a database.

20

25

The difficulty here is that if this evidence is allowed it is almost tantamount to having to leave it as it is because the cross-examination has to go down to the foundation, and the foundation ultimately is statistics, the database. That's our primary concern here. In a sense what my friend has done is repackaged his statistical argument that has clearly been considered in the recent decision of Clark, and they have found this type of evidence unhelpful. We should be concerned that my friend's terminology is really no different than what his original argument about pressing statistical evidence and this is what the foundation ultimately of this evidence is.

30

35

40

CROWN PROSECUTOR: Perhaps I should state exactly what it is in relation to any incidence that I wish to elicit from her.

45

HIS HONOUR: You are taking it all too quickly for me. I do not know what it is that the defence objects to. I have just been given a document which is in substantially different form from Dr Beal's report, which is not now relied on.

50

ZAHRA: Yes, your Honour.

55

HIS HONOUR: Am I to assume that you are objecting only to the question and answer that the Crown seems to think you will be objecting to, Mr Zahra, or is there more to it than this?

ZAHRA: My friend has said we received this a couple of days ago. It was faxed to my instructing solicitor on Tuesday night and we received it yesterday and we had a

lot happening yesterday to fully digest this. So it is a difficult consideration, particularly in the light of Dr Beal.

5 There was at one stage considered the necessity, or there may be some examination of Dr Beal on the voir dire about this particular area of epidemiology and the foundation for her conclusions and we really need to ascertain that. If it is the foundation of statistical evidence only and her expertise doesn't carry on from that, then really the consideration of this evidence is really no different than the consideration of the others.

15 But my friend seeks to draw now a distinction here from the others which we question whether it is any more than statistical evidence from what our initial assessment is. If my friend is suggesting that it is more than that, then maybe there is some need for a short voir dire with Professor Beal to determine what it is that is so different and whether this is a field of expertise.

25 HIS HONOUR: When are you expecting Dr Beal to be available?

CROWN PROSECUTOR: She should be available from Monday.

30 HIS HONOUR: She is South Australian.

CROWN PROSECUTOR: Yes. We are content for that to happen.

35 HIS HONOUR: Mr Zahra, it might be appropriate to do what you are saying but could I just leave it with you? Could you let the Crown and me know as soon as you can which, if any, questions you object to in the draft?

40 ZAHRA: Yes.

HIS HONOUR: And we will deal with them.

ZAHRA: I will do that.

45 CROWN PROSECUTOR: Two matters. Firstly, we will be relying in part on her statement. We are certainly not abandoning it entirely. Secondly, when I say that I will be asking her questions about the incidence of SIDS, the only questions that I will be asking her in terms of the incidence of SIDS is, where a family has had a SIDS death, is the risk of another SIDS death exactly the same or greater or less than the chances of the first child dying. So I will not be asking her to give any statistics for overall multiple deaths from SIDS. I will also be asking her whether there ever has been a family with three established SIDS deaths. So I think that my friend's fears that this is just a rewrapping of my argument on statistics is really not

borne out.

5 HIS HONOUR: Well, you can make your submissions about it when we find out precisely what, if anything, is objected to.

10 CROWN PROSECUTOR: Yes. There is one further issue that I think might be worthwhile raising now. My friend has served us with some reports from their experts. One of those experts is a pathologist, Professor Byard from South Australia who your Honour has already heard mention of. I would wish in cross-examination of Dr Byard to ask him questions about the appropriateness of certain diagnoses by other pathologists in the light of everything that we now know about all of the children. For instance, in relation to the diagnosis of Sarah's death, I have flagged that the Crown has some criticism of Professor Hilton's diagnosis of SIDS in the knowledge that there were two previous children who had died, at least one of them in undetermined circumstances. What I wish to cross-examine him about is whether, in the light of the previous deaths it was or was not appropriate for that diagnosis to be made. Now, in a sense that requires Dr Byard to look not just at one child individually, but to do what Professor Hilton did, which was to act in the knowledge of what was already known about the other children. So I just wish to place that on the record so that if there is any objection it can be dealt with in advance.

35 HIS HONOUR: Thank you for that, Mr Crown. I must say that it may be significant that evidence was put before the jury that in considering a diagnosis of SIDS death it is appropriate for a pathologist to take into account prior unexplained deaths in the same family or under the same carer. Evidence of that kind was adduced without objection, I think first from Professor Hilton.

40 The difficulty arose when tender of the American policy statement was objected to and the matter was dealt with in a different way. The tender was withdrawn, but the Crown was permitted to ask of Professor Hilton whether he agreed with certain propositions, and he said that he did. On that basis there is evidence before the jury that a diagnosis of SIDS death or not SIDS death may depend in part upon the existence of other unexplained deaths in the same family.

50 It was only afterwards that an objection was raised to what I have called a collective approach. I am only saying this to have it recorded. I am not inviting counsel to respond now, but it is a matter that may need to be considered if I deal with any objection to evidence in due course.

55 ZAHRA: Can I say something in relation to that at the

moment? Certainly we would need to consider what my friend has had to say to see what the limitations are, in relation to the experts, of the collective approach.

5 HIS HONOUR: The trouble is you let that evidence in.

ZAHRA: I understand what you are saying, that in relation to Professor Hilton, this was in fact in a series of questions that related to obviously an
10 approach to the autopsy. In other words, whether the approach to the autopsy is different in the sense that you take into account that there had been the previous SIDS death in obviously looking at signs of suffocation or not. That was my understanding of those questions
15 in that context went to. Not that obviously you take into account that there had been a previous SIDS death.

In other words, if you are a pathologist and you go about undertaking an autopsy, then obviously the fact that there had been a previous SIDS death is a matter that you consider in your approach to the autopsy
20 itself, and that's what I understood Professor Hilton was saying. Not that, in a sense, the mere fact of the previous death.

25 HIS HONOUR: Should influence your individual conclusion.

ZAHRA: Yes. Obviously if you are looking at a history that you take before the autopsy is carried out and the fact that there is a previous SIDS death, then that's a matter that you take into account when you are about to
30 embark upon an autopsy.

35 HIS HONOUR: Because it might influence the way you go about your work in your autopsy.

ZAHRA: Yes. Professor Hilton was saying I am so thorough anyway that really that is probably
40 superfluous, that I need that mind set because the way I go about things anyway is that I am thorough. I think there was a lot of cross-examination about that, in the sense that that was where my friend and Professor Hilton sought to differ, that in a sense my
45 friend was trying to draw from him that in a sense that he should have approached this autopsy differently because there was a previous SIDS death. He is saying not necessarily so because I am thorough, and that would have been caught by my usual practice, anyway.
50

But that is the context of the evidence. So this issue between my friend and Professor Hilton as to whether in fact you take into account the mere fact it is there, or whether you take it into account as an approach when
55 you are embarking on an autopsy. That's where that area of questioning goes to.

HIS HONOUR: Thank you, Mr Zahra. I think we have said

all that needs to be said at the moment about those topics. Is that right?

5 ZAHRA: Yes.

HIS HONOUR: Mr Crown?

10 CROWN PROSECUTOR: In the light of your Honour's preliminary views that were expressed yesterday the Crown will be tendering the whole of the record of interview, apart from those parts that were excluded by your Honour at the instigation of the defence.

15 HIS HONOUR: Very well. Then the matter that I thought would engage us at least all morning will not do so.

CROWN PROSECUTOR: Yes.

20 HIS HONOUR: Thank you for that indication, Mr Crown.

CROWN PROSECUTOR: It will be about six hours of playing.

25 HIS HONOUR: Yes, I have read the record of interview, of course, and I imagined it would probably take the best part of two days to play.

30 There was, I thought, at least a suggestion, and I may be wrong about this, that there might be some evidence about the incidence, statistically speaking, of multiple SIDS deaths, such as was discussed in Clark. Am I wrong about that? It is a 1 in 73 million kind of approach.

35 CROWN PROSECUTOR: There is already evidence from one of the doctors of the rough incidence of SIDS. A figure of 1 in 1,000 was mentioned. I am content to leave it at that. I don't intend to ask any expert what the actual statistics are for multiple SIDS so as to avoid the sort of overwhelming statistical figure
40 that was criticised in the Clark case.

HIS HONOUR: Thank you, Mr Crown.

45 ZAHRA: Can I indicate something in relation to that, your Honour? If my recollection is right, I think it was Dr Cooper, and in a sense he was taken generally to matters about the incidence of SIDS death, and my friend didn't lead that evidence through this doctor.
50 I think from memory he, in a sense, just offered it during the answer. It was a matter that I did not object to at the time, but it would have only highlighted that statistical evidence.

55 I want to say something about whether my friend should rely on that because in a sense this was evidence that was always flagged as an area of objection. It was something that the witness added and I don't think my

friend expected it and certainly his question wasn't designed to elicit it. It is one of the dangers obviously that the medical experts relying on a lot of research material, I don't suggest my friend was attempting to lead it but it was thrown in. I didn't object because it would only highlight it.

In the light of the Clark judgment I would ultimately make the submission that my friend shouldn't highlight it or rely on it. Obviously it proposes a whole new area.

HIS HONOUR: I don't think that was the evil to which the Clark judgment was direct to, was it?

ZAHRA: Well, it does in fact address the individualistic also, in other words, not only the collective but the individual. I can take your Honour to the last page. In fact, it is only a very brief portion of the judgment. Paragraph 173, the question in relation to the statistical evidence, that it wasn't a consideration as to whether it should be admitted in evidence and also referring to the collective. But then 174 talks about the individual figure

HIS HONOUR: This is the judgment of 11 April 2003, isn't it?

ZAHRA: Yes, paragraph 173 on the second last page. Then at 174 they turn their minds particularly to the individual statistics, which was 1 in 8,000, not 1 in 1,000, ultimately in 177 saying if there had been a challenge to the admissibility of evidence we would have thought that the wisest course would have been to exclude it altogether.

Whilst this portion of the judgment is relatively brief, it really does follow on from a more detailed consideration of the use of statistical evidence in the previous judgment in Clark, and if I could take your Honour to some of the detail there. Whilst that portion of the judgment was brief, it should also be read in conjunction with some of the comments that they made in the judgment, which was 2 October 2000, particularly when they referred to Professor Berry's evidence that, in a sense, the statistics itself was unhelpful to determine issues in the individual case.

HIS HONOUR: I just can't pick up the piece of evidence.

ZAHRA: I don't know if my friend can pinpoint it.

HIS HONOUR: I remember the figure was mentioned in evidence.

ZAHRA: Whilst much evidence was allowed to be led, it is clearly on the basis that it is accepted that the

question of the rarity, and Clark's case basically says that, that really questions of rarity are an issue. But people will accept that the incidence of SIDS deaths is rare and that the incidence of a second death is even rarer, and that those matters clearly are appropriate matters for evidence to be led on. But there is a line at which you can't transgress and that's when it gets down to actual figures being quoted, and that is the concern of the judgment in Clark. That really, what does the figure do to assist any more than what the evidence that is already there, particularly from Dr Cooper.

HIS HONOUR: The difficulty with a figure is that it most certainly gives an illusion of exactness. In fact it starts off from a position of exactness. Let's say that the established rate of deaths in the community is a certain rate. That is something we can know for certain in the way that we can know rainfall figures and temperatures and the like. But the difficulty is that that is only a distribution over the whole community. It is acknowledged that there are factors which may make the children of one household more or less likely to experience unexplained natural child deaths, one of them is smoking. Mr Folbigg was a smoker. How would the jury use the figure of 1 in 1,000 if it had to temper it by reference to Mr Folbigg's smoking?

ZAHRA: These were matters some time ago actually in preliminary argument that were raised, because at that point in time we were looking at, well, what do we cross-examine Mr Folbigg about to address this issue? Do we need to, obviously talking about smoking on the one hand, but things like their financial position, because it appears that even your financial status has some bearing.

HIS HONOUR: And their financial position may have changed, Mrs Folbigg's age changed. She was a young mother with Caleb, she might not be so described with Laura.

ZAHRA: The initial judgment in the Court of Appeal talks about the fact in the Clark trial it became a sideshow where experts were talking about the probability compared to the steeplechase races.

HIS HONOUR: All I am saying is that I understand the problem to which you are drawing attention. That's all. Am I being asked to decide anything at the moment?

CROWN PROSECUTOR: I am not going to particularly highlight that evidence in any address. If I did mention it at all I would merely be saying to the jury that it gives them some idea of the generator of SIDS in the general rarity of SIDS in the community, and

that's all.

HIS HONOUR: Can you point me to the evidence?

5 CROWN PROSECUTOR: We are still looking.

10 HIS HONOUR: I do remember it has been given. Perhaps there is no need for any further consideration for the moment. Are there any other matters that need to be sorted out this morning?

15 CROWN PROSECUTOR: Not at this stage. There is one issue that my friend has raised with me that relates to your Honour's summing-up.

20 HIS HONOUR: I am going to give you both plenty of opportunity to make submissions. They can be in writing, if you wish. I have done an amount of work on the summing-up already, but I want to be influenced by what counsel have to say about the matter and I think you can assume that I will be giving you an opportunity to have substantial time to talk about the summing-up before I begin it and, indeed, before you give your own final addresses, if you wish, because sometimes it is necessary to do that.

30 ZAHRA: There may be an issue I can flag next week in relation to the question as to directions which would be given in relation to the failure to give evidence, in line with the decisions of RPS and Azzopardi. That might be a matter that we would seek a ruling on. It is a matter that I have ventilated with my friend and asked him to consider what his position will be.

35 HIS HONOUR: Talk to the Crown about that anyway and raise those matters when it seems appropriate.

40 CROWN PROSECUTOR: We have found the evidence. It is the evidence of Dr Seton. At page 698 in re-examination he was asked this:

45 "Q. You were asked some questions by my learned friend, Mr Zahra, about excluding inheritable disorder and you mentioned MCAD. Having excluded MCAD in Laura's case and having excluded obstructive sleep apnoea in Laura's case what do you say her risks were in relation to, compared to other children, of dying from SIDS.

50 A. Laura's risk of dying from SIDS in my opinion was extremely low, infinitely perhaps less than the average, which is 1 in 1,000. The reason for that was she was exhaustively investigated, she was monitored and she was well beyond her first birthday when she died."

55 ZAHRA: The submission I made previously applied to

what was said here, I thought it was Dr Cooper but it
was Dr Seton. My recollection was very much the same
as this, that it wasn't necessarily responsive to the
question that was asked and it was just dropped in
5 there and I didn't object to it at the time because I
thought it would only highlight it. But the question
remains, and my friend may have to think about this, as
to whether he is going to use this. He would need to
10 notify us, because essentially it opens up the
statistical area, the smoking, financial situation, all
this other area.

HIS HONOUR: Would you be good you have to let the
15 defence know, Mr Crown, if you intend to rely on the
figure?

CROWN PROSECUTOR: Yes.

20 ADJOURNED TO MONDAY 28 APRIL 2003.

oOo

EE:BOW:RT:8

D15

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

FIFTEENTH DAY: MONDAY 28 APRIL 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

ZAHRA: As your Honour would be aware, there have been, during the course of the trial, continuing investigations in relation to IGG and IL-10. We will not be pursuing IGG, but IL-10 is still an issue.

20

IN THE PRESENCE OF THE JURY

HIS HONOUR: Ladies and gentlemen, the reason for the late start this morning is all down to me. I had a commitment in Queen's Square this morning. I expected to be able to be free for a start not long after 10 o'clock. My expectations were not realised. The same thing is going to happen tomorrow. I shall say right now that we will not sit until half past ten tomorrow morning. I do not like keeping you waiting unnecessarily.

<BERNARD MICHAEL RYAN(10.40AM)
SWORN AND EXAMINED

15 CROWN PROSECUTOR: Q. Would you please tell the Court your full name, your rank and your present station?

A. Yes. My full name is Bernard Michael Ryan. I am a Detective Sergeant attached to the Goulburn Area Local Command.

20 Q. In March of 1999, were you attached to the Singleton Police Station?

A. Yes, I was.

25 Q. Were you a detective senior constable at that stage?

A. Yes, I was.

30 Q. Did you perform general investigative duties as part of your role at the Singleton Police Station in 1999?

A. Yes.

35 Q. On the early afternoon of 1 March 1999, did you attend the Singleton Hospital?

A. Yes, I did.

40 Q. Were you there in order to conduct investigations into the death of Laura Folbigg?

A. Yes.

45 Q. Did you initially speak to some other police officers who were already there?

A. Yes, Senior Constable Robinson, yes.

50 Q. Did you then, after speaking to some hospital employees, speak to the accused Kathleen Folbigg?

A. Yes, I did.

55 Q. Have you made a statement in relation to this matter?

A. Yes, I have.

Q. Would you like to refer to your statement?

A. Yes.

Q. Now, would you tell the Court what your conversation was with Mrs Folbigg at the Singleton Hospital?

A. Yes, I will. I said to Mrs Folbigg, "Can you tell me what happened with Laura today?" Mrs Folbigg replied, "She woke up at 6.20am this morning. She was in a bad

mood. Craig went to work and we had breakfast. We went to the gym and then we went to see Craig at work for morning tea. She went to sleep in the car on the way home, so I put her into bed when we got home. I heard her coughing and did not think much of it. I went to check on her about five minutes later and saw that she wasn't breathing. I took her to the breakfast bar and did CPR and rang 000". I said, "Why was Laura in a bad mood?", and she said, "She's had a cold for about a week now."

I said, "What was Laura wearing this morning?" Mrs Folbigg said, "Flower bike shorts and a yellow T-shirt." I said, "What time did you leave the gym?", and she said, "10.30am." I said, "What time did you get home this morning from Craig's work?", and she said "11am." I said, "How long after you put Laura to bed did you hear her coughing?", and she said, "Half an hour." I said, "What did you see when you walked into Laura's room to check on her?", and she said, "She was laying on her back" - sorry, "She was laying on her back and her face was white."

Q. Did you then have a short conversation with Mr Craig Folbigg?

A. Yes, I did.

Q. Did he tell you that Laura was the fourth child from their family to die in infancy?

A. Yes, he did.

Q. Did he tell you about the involvement of Dr Chris Seton from the Westmead Children's Hospital?

A. Yes.

Q. Some time later did Mr Folbigg formally identify the body of Laura to you?

A. Yes, he did.

Q. At about 3.30 that same afternoon, that is 1 March 1999, did you go to the home of Mr and Mrs Folbigg at 8 Millard Close, Singleton?

A. Yes, I did.

Q. By the time you got there was there already another police officer who was guarding the premises to ensure the integrity of any physical scenes or exhibits?

A. Yes.

Q. Did you, yourself, together with another police officer, conduct an inspection of the interior of the house?

A. Yes, I did.

Q. Did you see a number of things on and around the breakfast bar and the dining room consistent with ambulance officers having treated Laura in that vicinity?

A. Yes.

Q. Did you see some further paraphernalia from the

ambulance personnel on the floor in the kitchen, near the breakfast bar?

A. Yes.

5 Q. Did you then go into a room, which you had been told was Laura's bedroom?

A. Yes. At that stage I assumed it was Laura's, because of the plaque "Laura" on the front - on the door to that room.

10

Q. Referring to paragraph 9 of your statement, would you tell the Court what you found?

15 A. I saw a bedroom, which appeared typical of a small child's room. There were numerous stuffed toys and paraphernalia on the floor and walls throughout the room. There was a single steel-framed bed, and a single mattress, positioned in the north-eastern corner of the room. The bed was made up with two pink sheets, a doona that was covered with a "Wiggles" doona cover, a pillow covered in a "Wiggles" pillow case, and a pillow covered in a yellow and white pillow case. There was also a heavy, dark-coloured, woollen rug on top of the doona. I saw what appeared to be four small circular stains on the yellow pillow case.

25

Q. Did you cause photographs to be taken of the staining on the yellow pillow case?

A. Yes, I did.

30

Q. Just tell us again, whereabouts in Laura's room was this pillow case situated when you saw it?

A. On the bed, at the head of the bed.

35

Q. Would you have a look please at these two photographs, which are numbered 40 and 41 (shown)? Do those two photographs show the staining on the yellow pillow case that you have just referred to?

A. Yes, they do.

40

Q. Would you have a look please at this photograph (shown)? Does that show the same pillow located on the bed in the position where you saw it?

A. Yes, that's right.

45

Q. The bed, being the bed that you assumed was Laura's bed?

A. Yes.

50

Q. The number of that photograph?

A. That number is number 4.

Q. Would you have a look at number 2 (shown)? Does that show the same bed and the same pillow located in the same room?

55

A. Yes, it does.

Q. Did you obtain a certificate in relation to an analysis of the staining on the pillow?

A. Yes, I did.

5 Q. Would you have a look please at this document (shown)?
Is that the certificate which you obtained from the
Department of Health?

A. Yes, it is.

10 EXHIBIT #AE FOUR PHOTOGRAPHS, RESPECTIVELY NUMBERED 2, 4,
40 AND 41, TOGETHER WITH THEIR CAPTIONS, TENDERED,
ADMITTED WITHOUT OBJECTION

15 EXHIBIT #AF CERTIFICATE OF VIRGINIA FRIEDMAN OF 09/11/89
TENDERED, ADMITTED WITHOUT OBJECTION. EXHIBIT AF READ TO
JURY.

CROWN PROSECUTOR: I would like to add one more photograph
to those of the room. It is a photograph numbered 9.

20 EXHIBIT #AE SUPPLEMENTED BY THE ADDITION OF A FURTHER
PHOTOGRAPH NUMBERED 9 TENDERED, ADMITTED WITHOUT
OBJECTION. EXHIBIT AE SHOWN TO JURY.

25 Q. I show you exhibit N, which is a plan of the house at
8 Millard Close, which has been drawn by Craig Folbigg
(shown). You have seen that before?

A. Yes, I have.

30 Q. Do you see that there is a room which he has drawn
marked "Laura's room"?

A. Yes, that's correct.

Q. He has marked in Laura's bed?

A. Yes, he has.

35 Q. Does the overall plan accord with your memory of the
layout of the house when you went there?

A. Yes, it does.

40 Q. Could you just draw please, with a rectangle, where
the pillow was that you found, and draw a line and write
the word perhaps "pillow"?

A. (Witness complied).

45 CROWN PROSECUTOR: I will ask him to mark something else,
so I might wait before we show the jury.

Q. Sergeant, did you then go into the lounge room of the
premises?

A. Yes, I did.

50 Q. What did you see in the lounge room?

A. I saw a pair of white Teletubby sandals and a baby's
bottle on a - I think I'd call it a lounge, in the
north-western corner of the room.

55 Q. Would you have a look please at exhibit M, two
photographs (shown)? If you could confirm that the first
photograph shows the Teletubby sandals and the plastic

baby's bottle--

A. Yes.

5 Q. The second photograph, I think, shows the lounge on which the sandals and the bottle were located, with an arrow pointing to where they were?

A. Yes, that's right.

10 Q. Would you have a look again at exhibit N (shown)? Do you see there has been a rectangle drawn in the lounge room with the word "futon" written on it?

A. Yes.

15 Q. And an "X". Is that the location of the lounge that you have described?

A. That's exactly right, yes.

20 Q. Did the bottle have anything in it?

A. I can't remember seeing anything in that bottle on the day. I have looked at the photograph, and there appears to be something in the bottle, but I cannot remember, I'm afraid.

25 Q. Would you have a look please at this photograph, which is numbered 25 (shown)? Does that photograph show the back verandah of the house?

A. Yes, it does.

30 Q. Is that an open verandah or a closed and locked verandah?

A. I honestly can't remember if it was locked.

35 Q. Would you have a look at exhibit F please, some more photographs (shown)? Do those two photographs show a baby monitor?

A. Yes, they do.

40 Q. Are you able to say whereabouts in the house that was located?

A. That is in the vicinity of the sandals and the baby's bottle in the lounge room. I'd call that the north-western corner of the room.

45 EXHIBIT #AG PHOTOGRAPH NUMBERED 25, TOGETHER WITH CAPTION, TENDERED, ADMITTED WITHOUT OBJECTION

50 Q. Could you indicate with an "X" where the monitor was located, and could you do a little arrow with the word "monitor"?

A. (Witness complied).

55 Q. Could you indicate the door drawn by Mr Folbigg?

A. I think "door" is not the right word. It is an arch, a square set entry, to the room.

HIS HONOUR: The plan, exhibit N, together with its new markings, and exhibit AG may be shown to the jury.

EXHIBITS N AND AG SHOWN TO JURY

5 CROWN PROSECUTOR: Q. Later that same day, the day of
Laura's death, did you speak further to Kathleen and Craig
Folbigg?

A. Yes, I did.

10 Q. Sergeant, about two and a half months later, on 14 May
1999, did you go, together with another police officer,
back to 8 Millard Close, Singleton?

A. Yes, I did.

15 Q. How did you come to go back to that address?

A. What actually happened was Mr Folbigg, Craig Folbigg,
15 contacted my supervisor, Detective Sergeant Wells, and
told him certain things.

20 Q. Two and a half months later, were you aware of whether
or not the accused was still living at that address?

A. When I attended that night, I believe that I had heard
20 information that the accused, Mrs Folbigg, had moved out
of the home.

25 Q. That night, on 14 May 1999, did you have a lengthy
conversation with Mr Craig Folbigg?

A. Yes, I did.

30 Q. Was there a friend of his who was present at the house
at the same time?

A. Yes.

35 Q. If required, would you be able to tell the Court what
Mr Folbigg told you?

A. Yes, I could.

40 Q. Did he give you something?

A. Not then he did not, no.

45 Q. Did he tell you about an item?

A. He told me about the existence of an item, yes.

50 Q. Was that a diary?

A. Yes, it was.

45 Q. Did he give you the diary on that night?

A. No, he did not.

50 Q. But he told you about the diary?

A. Yes.

55 Q. Did he also tell you about other things?

A. Yes, he did.

Q. Did you request Mr Folbigg to come to the Singleton
Police Station on another occasion?

A. Yes, I did.

Q. When was the next time that you saw him?

A. 19 May 1999.

Q. So, that was five days later?

A. Yes.

5

Q. Was that at the Detectives' Office at the Singleton Police Station?

A. Yes, it was.

10 Q. Did Mr Folbigg bring you something on that occasion?

A. Yes, he did.

Q. What did he bring you?

15 A. He brought two diaries and a number of other documents.

Q. Would you have a look please at exhibit M and MFI 5 (shown)? Are those two diaries the two items that were handed to you by Mr Folbigg that day?

20 A. Yes, they are.

Q. Was your attention drawn to one particular entry in the black 1989 diary, exhibit L?

A. Yes, it was.

25

Q. You took possession of both of those?

A. Yes, I did.

30 Q. Were there certain other handwritten letters that were given to you on that same date by Mr Folbigg?

A. Yes.

Q. On that day, did you commence to take a typewritten statement from Mr Folbigg?

35 A. Yes, I did.

Q. Could you tell the Court what the format was of how you went about taking this statement?

40 A. Yes. What we are taught to do as police officers is to make the person that is giving the statement comfortable, and then ask them a series of questions and attempt to allow them to give a free account of their evidence. During that free account it is - often it may be the case I need to ask a clarifying question on a particular point to keep them in a particular area, so I am not putting in the statement something that is not relevant.

50 Q. That was the format that you adopted on this occasion?

A. That was the format, yes.

Q. Did you complete the statement on that day?

A. No, I did not.

55 Q. Because you had not completed the statement, did you make any arrangement with Mr Folbigg to come back?

A. Yes, I did.

Q. What was the arrangement that you made?

A. The arrangement was for Mr Folbigg to return on the Sunday, the 23rd, due to a work commitment.

5 Q. Sorry, due to work commitments?

A. Work commitments of Mr Folbigg. I wanted him to return the next day; however, he had just spent that day, the 19th, away from his work.

10 Q. Did he return to the police station on 23 May?

A. Yes, he did.

15 Q. When he returned on 23 May, did he tell you anything about what he had said to you during the taking of the statement back on 19 May?

A. Yes, he did.

Q. What did he tell you?

20 A. He told me that he hadn't told me the truth in regard to a number of issues.

Q. Did you then continue the interview with Mr Folbigg to conclude his statement on that day?

25 A. Yes, I did.

Q. If you could just answer this "yes" or "no", did he amend some of the things that he had originally told you back on the 19th?

30 A. I don't think I can answer that just "yes" or "no", sorry, Mr Crown.

Q. Did he change any of the information that he had previously told you on either the 19th or the 14th back at his home?

35 A. Yes, he did.

Q. Did he tell you anything on 23 May about the status, as at that day, of his relationship with the accused Kathleen Folbigg?

40 A. Yes, he did.

Q. What did he tell you?

45 A. He said that he had resumed his relationship with Kathleen Folbigg, and he supported her.

Q. I would like to take you to nearly two years later - sorry. I withdraw that.

50 Did you read the smaller of the two diaries, which is MFI 5? Did you read that after it had been left with you by Craig Folbigg?

A. Yes, I did.

Q. Did you read it very carefully?

55 A. Yes, I did.

Q. As a result of what you had read, and what you had been told by Craig Folbigg, on 23 July 1999 did you go

back to
8 Millard Close at Singleton?
A. Yes, I did.

5 Q. Did you speak to the accused Kathleen Folbigg?
A. Yes, I did.

Q. Would you tell the Court what you said to her?
10 A. I said "Mrs Folbigg, I'm Detective Ryan. This is
Detective Engdahl. Do you remember me?", and Mrs Folbigg
said, "Yes." I said "Mrs Folbigg, the investigation has
come to a stage where I now wish to interview you in
relation to the death of all the children. Are you
15 prepared to come to the police station to be interviewed?"
She said, "Yes. Can I have a shower first?" I said, "Of
course. Take your time."

Mrs Folbigg allowed Detective Engdahl and I to wait in the
20 dining room of the house while she had a shower and
changed.

A short time later Mrs Folbigg walked into the dining room
and said, "Will I come with you or can I drive down
25 myself?" I said, "It's up to you. Whatever you want to
do." She said she'd drive down.

Q. Did she then follow you and the other detective
towards the Singleton Police Station?
30 A. Yes, she did.

Q. On the way, did you see her speaking in a mobile
phone?
A. Yes, I did.

35 Q. Did you actually then see her drive along the New
England Highway past the motor dealership where her
husband worked?
A. Yes.

40 Q. Did you see Mr Craig Folbigg also standing on the
footpath outside the motor dealership talking on his
mobile phone?
A. Yes, I did.

45 Q. A short time later, after you arrived at the police
station, did you see both Mr and Mrs Folbigg at the police
station?
A. Yes, I did.

50 Q. Did you explain to Mr Folbigg that he was not able to
be present during an interview of his wife?
A. Yes, I did.

55 Q. Did you ask Mrs Folbigg if she still wished to be
interviewed?
A. Yes.

Q. Did she say, yes, she did?

A. Yes, she did.

Q. Did you ask if she wanted someone to be present with her during the interview?

5 A. Yes, I did that.

Q. Did she say "no"?

A. Yes.

10 Q. Did Mr Folbigg then leave the police station?

A. Yes.

Q. Did you and Detective Engdahl then conduct a recorded interview with Mrs Folbigg?

15 A. Yes.

Q. Would you tell the Court what the process was of conducting that interview?

20 A. The interview is conducted simultaneously on three audio tapes and one video tape. During that process - the length of the interview - I think in total there were 27 audio tapes and nine video tapes.

Q. Was the whole interview recorded on videos?

25 A. Yes.

Q. And audios?

A. Yes.

30 Q. At the conclusion of the interview, did you leave the room and speak to Senior Constable Bryant?

A. Yes, I did.

Q. At that time was Senior Constable Bryant the station officer?

35 A. Yes, he was.

Q. Had he had any prior involvement in the investigation of this matter?

40 A. He had none whatsoever.

Q. Did you take him into the interview room and introduce him to Mrs Folbigg?

45 A. Yes, I did.

Q. Did you and Detective Engdahl then leave the room to allow Senior Constable Bryant to ask her some formal questions at the end of the interview?

50 A. Yes.

Q. After Senior Constable Bryant had done that, did you go back into the interview room and give her a complete audio copy of each of the tapes of the interview?

55 A. Yes, I did.

Q. Was there another completed copy of the audio tapes that was sealed in her presence?

A. Yes.

Q. Did Mrs Folbigg sign for a complete copy of the audio tapes?

5 A. She signed the sealed copies of the audios to make sure that they were sealed in her presence.

Q. Did you then inform Mrs Folbigg that you were going to execute a search warrant at the flat where she had been living, and also at 8 Millard Close?

10 A. Yes.

Q. What did you say to her?

15 A. I said, "We are now going to execute search warrants at your flat at 2/32 Andrew Street, and your house at 8 Millard Close, do you understand that?" She said "Yes." I said, "We are looking for other diaries which relate to the death of your children. Do you have any more diaries?" She said, "I've just started a new diary and it's up at the house."

20 Q. Now, at about 6.27pm that night, did you go, together with a number of other police officers, to unit 2, 32 Andrew Street, Singleton?

25 A. Yes.

Q. At that address did you take possession of a number of items?

A. Yes, I did.

30 Q. At about 7.15pm that same night, did you go to 8 Millard Close, Singleton?

A. Yes, I did.

35 Q. Did Mrs Folbigg come with you and a number of other police?

A. Yes.

Q. Did you have a legally authorised warrant in relation to both the premises that you searched?

40 A. Yes, I did.

Q. At 8 Millard Close, Singleton, did you speak to both Mr and Mrs Folbigg and explain to them what was happening?

45 A. Yes.

Q. And give them a copy of the search warrant and an occupier's notice?

50 A. Yes. I showed the search warrant and gave the occupier's notice.

Q. Did you explain to Mrs Folbigg what you were actually looking for?

A. Yes, I did.

55 Q. What did you say to her?

A. "What we are actually doing here is that we are here to look for diaries, like we did at the last flat. Are there any diaries here?", and she said "Yeah, one that I

bought yesterday."

Q. Did she then go into a room and give you something?

A. Yes.

5

Q. What did she do?

A. Mrs Folbigg walked into the main bedroom of the house, where she opened the built-in wardrobe and removed a personal diary. She handed the diary to Detective Frith who then handed it to Detective Wells.

10

Q. Would you have a look at MFI 1 (shown)? Is that the personal diary she showed you?

A. No, it's not.

15

Q. The diary that she gave you, was that a diary for 1999?

A. Yes, it was.

20

Q. After she had given you that diary, a short time later did one of the police officers find something in the main bedroom of the house?

A. Yes, he did.

25

Q. Was that other police officer Sergeant Galton?

A. Yes.

Q. Would you tell the Court what happened?

A. I went to the main bedroom and saw Sergeant Galton, and he was holding another personal diary. I took Mrs Folbigg to the room and I said, "Sergeant Galton has just found another diary in your wardrobe. Is that something - would you like to make a comment in relation to that?", and she said, "I didn't know it was here. I thought it was gone."

35

Q. Would you have a look please at exhibit J (shown)? Was that the diary that was found by Sergeant Galton?

A. Yes, it is.

40

Q. Is that the diary that the accused said to you "I didn't know it was here. I thought it was gone."

A. Yes.

45

Q. Were there a number of other papers, including some medical blue books for children, taken into possession by the police that night?

A. Yes, they were.

50

NINE VIDEOS OF ACCUSED'S RECORD OF INTERVIEW AND TRANSCRIPT THEREOF TENDERED

55

CROWN PROSECUTOR: We have a copy of the transcript for each juror and one for your Honour. We have put in the front of it an index or contents list referring to broad topics and question numbers. It is very long. It goes for many hours. It might assist the jury later on to find any sections of it that they wish.

EXHIBIT #AH NINE VIDEO TAPES OF INTERVIEW BETWEEN
DETECTIVE SENIOR CONSTABLE RYAN AND THE ACCUSED ADMITTED
WITHOUT OBJECTION

5 EXHIBIT #AJ TRANSCRIPT OF RECORD OF INTERVIEW AND INDEX
THERETO ADMITTED WITHOUT OBJECTION

10 HIS HONOUR: Ladies and gentlemen, let me say a couple of
things about these exhibits. Both the video tapes, which
you will see played very shortly, and the transcript which
has been prepared, are evidence of what was said and done
during the interview.

15 It goes without saying, I suppose, that if you find any
discrepancy between what is printed in the transcript and
what you hear spoken by listening to the video tapes, you
will want to prefer what you hear. Anyway, whatever is
said is a matter for you, the jury, to find.

20 You just need to be a bit careful in using transcripts.
They are prepared by people who listen carefully to the
video tapes, or to the associated audio tapes, and they do
their level best to make sure that they are accurate, but
they are human and sometimes a mistake is made.

25 That is the first thing I wanted to say to you about these
documents. The second is this: This is not something
that you will notice for quite some time. It is a passage
up in the six hundreds, I think, in the numbers of
30 questions, but you will find some parts of the interview
have been cut out altogether. That has been done because
it would not assist you to know what happened at those
points. You are not to speculate about what might have
been included in the interview at those points.

35 CROWN PROSECUTOR: Could the Sergeant stand down and,
after morning tea, the interview be played?

40 HIS HONOUR: The next thing, ladies and gentlemen, is that
the Crown will play the tapes for you.

JURY EXCUSED

45 <WITNESS STOOD DOWN

SHORT ADJOURNMENT

IN THE ABSENCE OF THE JURY

5 ZAHRA: In relation to the transcript, your Honour had previously made an order excluding some of the questions in the record of interview relating to the entry "I'm my father's daughter." I understand the transcript was edited pursuant to that order.

10 When we were looking through this morning, after being handed the amended transcript, there were some questions in the middle of the references that did not relate to that expression. These were questions 638 through to 643 inclusive. They relate to an entry "wouldn't get a fourth chance"; nothing to do with "I'm my father's daughter".

15 We previously indicated we wanted those questions in. Your Honour's order has excluded those questions also. They do not relate to the diary. They should remain in.

20 CROWN PROSECUTOR: We have edited it in accordance with your Honour's order. I understand now my learned friend would like to have some additional questions in.

25 ZAHRA: 638 to 643 inclusive.

30 CROWN PROSECUTOR: We will attempt to do that. We probably will not get to that tape until tomorrow. We may be able to re-edit it and replace the pages of the transcript at the same time.

35 HIS HONOUR: I will just warn the jury that some additional questions and answers will be included in their final copies.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, the next thing to
happen is for you to watch the playing of the video tapes.
We shall commence now and run through until about 1
o'clock. I will try and make sure you get a break during
the middle of the afternoon. It is surprisingly tiring,
10 sitting and watching video tapes. It is essential that
you be alert and listen to everything that is being said.

15 Counsel have just told me that in relation to the editing
of the transcript, which I told you about before the
morning tea adjournment, some questions and answers were
taken out which are better included, so at some stage you
are going to be handed additional pages to insert in your
copies. It is in a section that we shall not be reaching
today. Those additional pages will be with you before we
get to their playing on the video tape.

20 VIDEO TAPE 1 PLAYED

LUNCHEON ADJOURNMENT

IN THE ABSENCE OF THE JURY

5 CULVER: I understand there has been a query as to whether
or not there is more on the video tape. I understand
there is a little more. I cannot be certain about that.

10 ZAHRA: I think there is. I have noted that tape 2 starts
at page 36 at 1809 on the tape counter. I think it is
fair "it was hard work but". My note is that the second
tape starts about page 36.

IN THE PRESENCE OF THE JURY

PLAYING OF VIDEO TAPE 1 CONTINUED

5 ZAHRA: The tape ends there. Tape 2 starts on the next page.

VIDEO TAPE 2 PLAYED

10 VIDEO TAPE 3 PLAYED

JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour had set aside 3pm this afternoon for my learned friend to have a voir dire in relation to Dr Beal's qualifications. Dr Beal is here. I do not think we will need an hour. Half an hour might do. Could we adjourn with the jury at 3.30 and deal with Dr Beal then?

10 ZAHRA: We have only had a general description given to us so far. It is difficult to understand how long it will take. I take my friend's word at this stage.

15 HIS HONOUR: You can work on that.

SHORT ADJOURNMENT

20 HIS HONOUR: A number of applications have been made by members of the news media for access to two video tapes, one of them being the video tape being played at the moment, showing the interview of the accused. The other is the short video tape of the child Laura in the paddling pool. The applicants may have access to the video tapes of the interview, if there are copies for them.

25 CROWN PROSECUTOR: Could we be heard on that?

HIS HONOUR: Yes, of course, you may, indeed, Mr Crown.

30 CROWN PROSECUTOR: The Director of Public Prosecutions has given a guideline, which does not apply to your Honour but to the Crown. The policy states that prosecutors are not to allow media to have access to copy video tapes of ERISP interviews, the reason being that it would discourage people in future from participating in such interviews in the future. I cite that as a friend of the Court but make no further submission.

40 HIS HONOUR: I should have given you an opportunity to be heard before. I will consider the matter further.

No-one may have access to the video tape of the child in the swimming pool.

45 I will consider overnight the question whether anyone will be allowed access to any copy of the video tape of the interview of the accused.

50 Mr Zahra, do you wish to say anything about any of these matters?

55 ZAHRA: Not at this stage. I think I have expressed my opinion previously that there appears to be no utility, and it has been the subject of quite some discussion as to whether that should be done.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, there is a matter of
law counsel require me to deal with this afternoon, so
when we get to about half past three, if there is a
convenient place at which we can stop the tape, we shall
do so. I shall let you go then until half past ten
tomorrow, and I shall continue on with counsel without
yourselves.

10

PLAYING OF VIDEO TAPE 3 CONTINUED

15 HIS HONOUR: Ladies and gentlemen, we will end the playing
of the tapes for today. We will resume at 10.30 tomorrow.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

<SUSAN MITCHELL BEAL(3.29PM)
SWORN AND EXAMINED

5

<EXAMINATION ON THE VOIR DIRE

10 HIS HONOUR: Doctor, if you want to refer to any notes of yours to answer any questions, you may do so.

CROWN PROSECUTOR: Q. Would you please tell the Court your full name?

A. Susan Mitchell Beal.

15 Q. You practise as a medical practitioner in South Australia?

A. That's correct.

20 Q. Do you hold the degrees of Bachelor of Medicine, Bachelor of Surgery, from Sydney University?

A. Yes.

25 Q. Do you also hold the degree of a doctorate in medicine from Flinders University?

A. That's correct.

30 Q. Are you currently employed as a paediatrician at the Women's and Children's Hospital in Adelaide?

A. Yes.

Q. Have you been employed in that capacity for over 35 years?

A. That's correct.

35 Q. During that time, have you made a specialty of studying and practising in the area of sudden infant death syndrome?

A. It is one of the things I have studied, yes.

40 Q. Have you also specialised in the area of cerebral palsy?

A. Yes, and physical disabilities.

45 Q. Have you been studying and practising in sudden infant death syndrome for over 30 years?

A. Yes.

50 Q. Have you published widely in professional journals in the area of SIDS?

A. Yes, very widely.

Q. Do you have more than 50 papers and book chapters on various aspects of SIDS?

A. Yes.

55

Q. Do your publications include an article on the recurrence of sudden unexpected infant death in a family?

A. Yes, several.

Q. Does it also include an article on the siblings of sudden infant death syndrome victims?

5 A. Yes, there would be several of those as well.

Q. Does it also include an article in the archives of disease in childhood on recurrence incidents of sudden infant death syndrome?

10 A. Yes.

Q. And a number of other articles on similar topics?

A. That's correct.

15 Q. Was your doctorate of medicine awarded to you for a thesis which you did on SIDS?

A. Yes.

Q. Are you also what is known as an epidemiologist?

20 A. Yes.

Q. Would you explain to the Court what an epidemiologist is?

25 A. An epidemiologist studies patterns of disease, things that surround a disease that give you, perhaps, the causes of disease, or something like that. That is when I first found that the sleeping position mattered so much in SIDS.

30 Q. When you say you found that, can you elaborate on that?

A. I first published my theory on sleeping position in SIDS in 1978. It was taken up by several others, and I spent many years persuading others that they include that in investigations and history of the child.

35 Q. Was your article on that suggestion one of the first, or the first, in the world on that suggestion?

40 A. There was a previous paper in the UK that said there seemed to be more children face down than would be expected. That was about the extent of it before that.

Q. Was yours the first journal article of any substance to recommend that doctors enquire into that in relation to SIDS?

45 A. Yes, but it was over the next five to ten years I actually went round personally and talked to people, to Hong Kong people and UK people and Tasmanian people, to make sure they did include it.

50 I myself then carried out a case control study, and then an intervention study to show how important it was.

55 Then I was invited to the big conference in Canberra, where that was the only topic of the conference, and the conference was not mainly to doctors but to statisticians and epidemiologists, to decide whether there was evidence sufficient to make a public statement about it.

Q. What was your role in that conference?

A. I was one of the three speakers. The others were from New Zealand and the Netherlands.

5 Q. Have you been involved in interviewing the families of over five hundred infants who have died suddenly and unexpectedly?

A. Yes.

10 Q. Have you also been involved in an analysis of the post-mortem results of such children?

A. I have gone through the post-mortem results with the parents very often. Not necessarily in every case, but, if the parents wished to, I would do so. I would go and see the pathologist; talk with him or her about what they had found. I would go back, and I would relay that information to the parents, with a proviso, from the original description, that things may be changed after histology.

20 Q. You hold the award of the Medal of the Order of Australia?

A. I don't think it's called a medal.

25 Q. It is an AM, whatever that is?

A. Yes.

Q. That is for your work in paediatrics and SIDS, in particular?

30 A. Yes.

Q. I think you have been included on what is known as the Honours List for Australian of the Year?

A. Yes.

35 Q. You also have a State recognition from the State of South Australia?

A. Yes.

40 Q. Are you a member of an association of loss and grief?

A. I'm not any longer, but I was for many years.

Q. Are you on a committee in South Australia known as the infant mortality committee?

45 A. The post neonatal mortality committee, where we study all deaths occurring between one month and 12 months of age. I have been on that since it started up; since 1989.

50 Q. Is that a committee sponsored by the South Australian Government?

A. Yes.

Q. Are you on the world committee of epidemiologists?

55 A. I'm on the global strategy task force, and I have been, since it began back in the eighties, in the epidemiological section. I'm on the committee.

Q. Could you explain to the Court what that committee

does?

5 A. It meets at the times of each of the world conferences on infant mortality and SIDS, usually following the conference, and sets up tasks that could be done on an international basis, rather than just a local basis, because SIDS has become so extremely rare now that you really, to get any results, need international cooperation. You will not get them from individual groups.

10

Q. Have you been invited to present papers to conferences in Australasia, Norway, the United Kingdom, the United States of America, Belgium and France?

15 A. Yes.

Q. That was by invitation?

A. Yes.

20 Q. Do you give lectures regularly here in Australia to paediatric registrars?

A. Yes. Paramedics, doctors - paramedics.

Q. Ambulance--

25 A. The ambulance.

Q. The police?

A. I do the paramedics course, so I am particularly involved in the ambulance, police, students, hospital ground rounds. Lots.

30

Q. Just very recently did you give evidence in a criminal trial in Western Australia involving multiple deaths of infants?

35 A. Two deaths, yes, but there were other things as well.

HIS HONOUR: Mr Zahra, before you ask any question, I have the document comprising four pages which the Crown handed me the other day. You had not long had that when it was handed to me.

40

ZAHRA: Yes.

45 HIS HONOUR: May I know now whether you object to any of the proposed questions and answers, and, if so, which ones?

50 ZAHRA: We object to evidence being given by this witness. Might I be permitted to ask some questions. In fact, the main foundation is as to what is the basis on which the opinion is given in answer to these questions.

55 There is really quite a gulf in understanding at this time. We have the qualifications. We have the answers to the questions. We need to understand what it is about her basis or qualifications that leads her to this conclusion. That is why I seek to ask her some questions.

HIS HONOUR: We are really going around in a circle. I am

prepared to let you go on. You must understand that I will not understand what the argument is about, if I do not know what is being objected to.

5 ZAHRA: Could I just generally give you a thumb nail sketch? I apologise for it being so oblique at this stage.

10 This witness will be giving evidence. From what I can understand, there have now been a number of statements that have been given to us, from which we have been asked to glean what it is that the Crown is going to lead in evidence-in-chief.

15 We have the particular questions that your Honour has referred to. We also have a statement that she has made of 8 December. In addition to that, we have a letter - I do not know whether your Honour has the letter - which is dated Wednesday, March 26, which contains a statistical analysis of the recurrence of SIDS. It then contains an overview report of Dr Beal's in relation to the case she has just mentioned of Scotchmer, together with transcript of her evidence.

20 In fact, we were given another document, again first thing this morning, a two page document, which again is a statement, which we presume my friend is going to lead evidence from.

25 The document your Honour has in relation to the questions and answers, as I understand it, is not intended to be the only evidence to be led by the Crown. Unless my friend is going to limit it to those, the question then remains as to what parts of the other evidence he is going to lead. Certainly I am proceeding on the basis that he intends to lead much of those reports.

30 From what we can glean from those reports, the doctor's evidence, in a sense, whilst referring to the body of material and all the medical reports and the post-mortems, her whole evidence, is based, in a sense, on recurrence of SIDS. The only foundation appears to be a foundation based in statistics. In other words, her own, or other research work, in relation to the recurrence of subsequent deaths.

35 If that is, in fact, the only basis, we would argue that it is an improper basis on which this doctor will give evidence, seemingly, of her opinion about various matters of pathology, which are not, in fact, that. They are only based on statistical studies of the recurrence of SIDS.

40 That is the essence of the argument: Whether the evidence that she gives, whether the answers that she gives to those questions, is based on any assessment of pathology which may or may not be within her area of expertise, or whether they are based merely on studies of the recurrence of SIDS.

Q. I understand from your statement of 8 December, from what the Crown has led from you, that you are presently engaged as a paediatrician?

A. Yes.

5

Q. As a specialist paediatrician?

A. Yes.

Q. But your work at the present time is not concentrated on SIDS?

10

A. No.

Q. It is a general practice?

15

A. No. I went to the last conference, where I was speaking in Florence, in October last year, and I am still involved on the international scene, but, locally, I have very little to do with it any more, except for being on the post neonatal mortality committee, so I deal with all the deaths with them.

20

Q. The international scene and the conference that you have spoken at, would they relate to epidemiology?

A. Not necessarily. I have presented papers on pathology as well.

25

Q. What papers have you concentrated on on pathology?

A. I wrote one on the incidence of thymic petechiae in SIDS. I presented it and published it in Sydney.

30

Q. When was that published?

A. I cannot remember exactly. It was following the big world conference in Sydney.

35

Q. Could you indicate, generally, how long ago that was?

A. I think it was the early nineties. I really don't know that. I have obviously been interested in the pathology and pathological findings--

40

HIS HONOUR: Q. Just answer the question please, Dr Beal?

A. I am sorry.

45

ZAHRA: Q. Is it to be understood, however, that your recent researches and studies in relation to SIDS have been, essentially, in relation to the recurrence of SIDS in particular families?

A. No. That's one of the things I have been looking at, yes. Most of my work has been on the position of the babies.

50

Q. Would this summarise your interest over the last ten years: The position of the child and the recurrence?

55

A. No. I think my interest is far more general than that. My interest in SIDS is actually in relation to infant mortality and lots of other things about it. I have written on just about every topic of SIDS. Everything. I tend to write more general types of articles.

Q. You are not a pathologist?

A. No.

5 Q. When you discuss post-mortem reports with families, you discuss those on the basis of having read them and communicate what the contents of the reports are?

A. Yes.

10 Q. You don't have any particular expertise in neuropathology?

A. No.

Q. You don't have any particular expertise in cardiology?

15 A. No, but I have presented papers on cardiological findings. I have been asked to present a paper in Brussels and speak on cardiological findings on SIDS. I have done a lot on that.

20 Q. In the present case, in relation to Laura, did you have a look at the histopathology slides?

A. No. No. I believe the pathologist on those.

25 Q. So, you don't have any particular experience in looking at slides in order, for example, to look at myocarditis, to determine its relevance in this particular case?

30 A. I have been to many, many pathological lectures. I am aware that Dr Carricks in New South Wales labelled most SIDS as myocarditis, although other pathologists did not agree with him, and I have seen the pictures of his slides and discussed them with pathologists, particularly Professor Roger Byard and Dr John Hilton.

35 We discussed the pictures in relation to whether they are, or whether they are not, myocarditis. In that sort of area, I have had general discussions in all fields.

40 My interest has been in sudden infant death syndrome. It is not narrow; it is very wide.

I was also on the committee of the pathology task force for a while.

45 Q. Would you believe that you are competent to be able to give expert opinion about the extent of myocarditis?

A. No. I would refer it to Roger or John or Peter Berry or somebody like that. I am not the expert on pathology.

50 Q. Similarly, in relation to encephalitis and the CT scans and other neurological reports, are you able to give an expert opinion in relation to those particular findings?

55 A. I did many of the air encephalograms for the children back when I was doing neurological work. As I said already, my main work is with cerebral palsy and physical disabilities; therefore, I have a great interest in the brain and its development. I certainly look at all CT scans off my parents and the magnetic resonance imaging.

Q. In this particular case, did you, say, look at the slides in relation to Patrick?

A. No, I have not looked at any slides.

Q. Would you consider yourself competent to be able to give an expert opinion about those?

A. No. I would prefer that the pathologist give those opinions.

Q. Is it the case that you believe, when you are looking at the causes of SIDS, macroscopic and microscopic examination is rarely helpful?

A. Over 80 per cent of the children who die of SIDS have thymic petechiae. They are not present - they are only present on about 40 per cent of other children, so it is not terribly useful, but it is another helpful point. There are a number of helpful points. Petechiae are intrathoracic, rather than in the neck. The argument about whether a little bit of pneumonia matters or not is always of interest to me.

The pathologist, John Emery, from the UK, came and looked at our data in Adelaide, and I looked at all the slides with him, and he was astounded at how clean our SIDS were. They did not have the SIDS found in the UK. I think our children are healthier than theirs.

I have been through many slides. When I lecture, I use pathology slides to demonstrate things. You cannot do without it. I cannot lecture to these people without pathological slides.

Q. As a general proposition, are you of the view that macroscopic and microscopic examination are rarely helpful?

OBJECTION. VAGUENESS.

CROWN PROSECUTOR: Helpful to what?

WITNESS: A. I am having trouble answering it.

HIS HONOUR: If you are having trouble, I will not allow the question.

Mr Zahra, ask another question please.

ZAHRA: Q. Do you have a copy of your statement of 8 December?

A. Yes, I do.

Q. Can you see page 2, at the bottom? Can you see, in fact, the last sentence there? Can you read that?

A. Uh-huh.

Q. Can you read it aloud?

A.

5 "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."

10 Yes, that's true.

Q. I was putting to you - not pulling this out of the air, as my friend might think. This is your statement - macroscopic and microscopic examination is rarely helpful?

15 A. It is helpful to exclude other conditions. That is the point. That is the exact point of it. That is why, when I first go to see the parents, after they have had their diagnosis, I say "We have to wait until all the histology and microbiology is through, because the diagnosis might change after that."

20 Q. Isn't your approach in the present case to, in fact, state, as you have in the statement, that macroscopic and microscopic examination is rarely helpful in the present case, and then you go on to, as a basis of your opinion, speak in terms of matters other than the specific pathology in the present cases? Do you understand what I am putting to you?

25 A. What I am trying to say is that there is no way, at autopsy examination, you can tell the difference between suffocation and SIDS, in the vast majority. Unless you have bruising or something like that, you cannot tell the difference on macroscopic or microscopic examination, but you may exclude other conditions. You just can't tell the difference between suffocation and SIDS.

35 Q. In the present case, in relation to the matter before this Court, what are, if any, the relevant pathology findings that you would--

40 A. I'm sorry, that's what I have said. I'm not the one to talk about that area. I look at what the diagnosis is that has been made by the pathologist, and then I look at the patterns of what has happened.

45 Q. So, in a sense, there is nothing that I can take you to, about the documents and reports that you have seen, from which you can indicate what pathology you found relevant to your ultimate opinion here?

50 A. I'm sorry, I find that question hard to answer. I'm not quite sure what you are getting at.

55 Q. Isn't it the case that you have based your opinion, in the present case, on this proposition: Knowing what you have studied about the recurrence of SIDS in cases where the children are lying prone or not, you have determined that there is a certain rate of the likelihood of the recurrence of SIDS if a child is prone or not prone?

A. Hmm. Absolutely.

Q. In a sense, that's how you have gone about giving your ultimate opinion in this case. The question of whether these children were prone or not is probably the most significant foundation to your assessment?

5 A. No. It is one of the - do you want me to tell you the other ones?

Q. Yes.

10 A. Three of them were: Outside the normal age range for SIDS, which is one to eight months of age. That is the first reason, and that is probably the most important reason. The second important reason is that there were four in a family of sudden unexpected deaths. The third
15 one is that none of them were prone or had their heads covered, and the fourth one is that two were actually found not breathing, but not dead. They are all things that would point me away from a SIDS diagnosis.

20 Q. Is there anything else than what you have just articulated?

A. No. Those would be the reasons.

Q. They are the reasons that you exclude SIDS and, in fact, base your ultimate opinion on?

25 A. Yes. The definition of SIDS is the death of an infant whose history does not show anything abnormal and whose autopsy does not show anything abnormal. I work on the first half of that: The death of a child whose history includes a whole lot of things, like the way the baby is
30 found; what other things have happened in families; all that sort of thing. That's my area.

Q. In that regard, you are essentially relying on your own researches, from speaking with, I think, five hundred
35 parents of children who have died of unknown causes?

A. That is one of them. I mean, I have been to world conferences year after year and have spoken with many, many epidemiologists and pathologists.

40 Q. Correct me if I am wrong, but the foundation of your opinion is based on an understanding of the recurrence of those particular factors that you have just mentioned?

A. Yes.

45 Q. And solely that?

A. No.

Q. I am asking you, in the particular cases here, whether there is anything else, apart from the matters that you
50 have just articulated as being the foundation of your opinion?

A. Am I supposed to say? Okay. I have just watched a video, where "I don't know" came in so often, and it is something that I have never - I mean, most of the parents
55 who have a SIDS death have said to me "It's etched in my mind", not "I don't remember whether my husband or I put the baby to bed. I don't remember whether it was pronounced dead at home or at the hospital. I couldn't

tell you. What did you dress her in? I couldn't tell you." It is usually etched in her mind exactly what the child has got on. There were a whole lots of things. "Couldn't remember".

5

HIS HONOUR: Q. I would just like to understand the import of the last answer. You have made reference to watching a video. I know that you have been seated in Court this afternoon while part of the video tapes of the accused's interview with Detective Senior Constable Ryan was played. That's the video to which you were referring, is it?

10

A. Yes.

15

Q. You made reference, if I may put it broadly, to the demeanour of the accused as she gave her answers in explaining the circumstances in which she found the children dead?

20

A. Not the demeanour; the fact that there were so many things about the actual time of the death that she couldn't remember, and yet she said she had done a police interview at the time. It is usually etched in somebody's mind. That whole situation is etched in their mind. I mean, the child has been found, and has gone to the hospital in certain clothes. Sorry, it doesn't hold.

25

Q. So, do you base your opinion partly upon your conclusion that the accused in the interview was claiming not to be able to remember the circumstances of one or more of the children's deaths?

30

A. I was asked if those four reasons were the only ones. This is one other example. I was asked to give other examples. There are lots, but that's one other example.

35

Q. So, the answer to my question is "yes", is it?

A. Yes.

40

ZAHRA: Q. Your statement of 8 December generally says: Well, I received quite a volume of material, including a number of reports, but you don't specifically refer to any of those reports as having any particular bearing on your ultimate opinion. Do you understand what I am putting to you?

A. Yes.

45

Q. What I am wanting to do is give you as much opportunity as possible to indicate to the Court, if there is anything about the particular pathology in relation to these four children that you have taken into account to give your opinion, to tell us?

50

A. Certainly. I took notice of the fact that one of the children had a little bit of myocarditis; was said by the pathologist to have had a little myocarditis, although I note it was not thought by the pathologist to be important enough to cause death.

55

You usually find a bit of something in children. I noticed the problem about the uvula that John Hilton

noticed, although he said it was not enlarged. It was a bit inflamed but not enlarged. He described the position.

5 I went to some ENT people, and asked whether they had ever heard of such a thing being a problem. They didn't know, and I don't know of a problem with that, so, yeah, I took notice of things.

10 I noticed which ones had petechiae. In fact, Mr Ryan is going to get me full copies of the autopsy reports. I have not been through full copies of the autopsy reports. They were not available when I first saw Detective Sergeant Ryan.

15 Q. Your opinion, as of today, is not based on, at any stage, a reading of the post-mortem reports?

A. Reading parts of the post-mortem reports; not full post-mortem reports of all four children, no.

20 Q. What do you call "parts"?

A. The summary of what the pathologist thought the cause of death was. I did have a bit about the uvula in one and a bit about the myocarditis in one. I did have comments of finding petechiae in some, but not in others. I do hope to have full copies of the autopsy reports of all four children. I hope to read them before I come here again.

30 Q. Your statement of 8 December seems to put aside very quickly any macroscopic or microscopic examination.

A. It is very rarely helpful in diagnosing SIDS and accidental or non accidental suffocation. It can be very important in diagnosing other conditions. I have said that already.

35 Q. So, is it to be understood that you have given your opinion that these children were murdered without reading the full autopsy reports?

A. That's correct.

40 Q. Isn't your process of reasoning here the same as your process of reasoning in the case that you have referred to of Scotchmer?

45 A. In that case the mother had admitted to killing the two children and lighting the fire under the bed of the other one.

HIS HONOUR: Q. Just wait for the question?

50 A. I'm sorry. That is what that one was about.

Q. Please wait for the question?

A. Okay.

55 ZAHRA: Q. You also gave some evidence generally about what you called, in this matter, a very high suspicion of filicide. This is at page 106, starting from about .5:

"The history of the family, the history of other

5 people around this, that's one fact, but also
some of the death scene things, the things that
surround it. For example, it has now been shown
that SIDS, generally speaking, occurs in babies
on their stomachs, so, if you are finding babies
that haven't been on their stomachs, that
immediately heightens my concern that something
has been done to that baby, unless the
10 pathologist finds a medical cause for that
death."

A. That's correct.

15 Q. Obviously, do I take it from your demeanour in
answering that, that that is, in fact, your very firm
opinion? If a child hasn't been lying on their stomach,
that immediately heightens your concern that something has
been done to that baby?

20 A. It heightens my concern. It still does not mean it is
the commonest cause.

Q. Do I understand from what you say here that it
heightens your concern that something has been done to
that baby unless the pathologist finds a medical cause for
25 that death?

A. That's correct.

30 Q. In other words, you would go on to conclude the
likelihood of suffocation, if a child dies who has not
been on their stomach and a pathologist does not find a
medical cause for the death?

35 A. I did not say it was likely. I said it would raise my
concern. That does not mean that it is most likely.
Sorry, you have misunderstood.

40 Q. See, that's the premise on which you have started, in
this particular case, isn't it? You have looked at the
recurrence of deaths where children have been prone and
that, in fact, is one of the significant foundations of
your opinion?

A. Yes. It is one of them, yes.

45 Q. You then go on, at page 107 - you were asked this
question at about .2 by Mr Cannon:

"Of course, we know from the post-mortem report
in respect of Melissa, who was the 13 month
child, the cause of death was not known."

50 You say: "Yes, that's correct." "Q. It was only in
relation to the two week old Shane that the conclusion was
that it was SIDS." You answered:

55 "Yes, that's the common thing. The first one is
called SIDS. The second one is undetermined and
the third one should be considered murder, until
it is proven not to be. Several of the
pathologists have said that these days because

it is very recurrent, and there are many cases of five to eight babies being murdered in the same family."

- 5 A. That's correct.
- Q. Do you still adhere to that evidence that you had given?
- 10 A. Oh, yes.
- Q. You rely very much on that formula?
- A. No, I don't rely very much on that formula. That is one thing. One thing. Not everything. As I have said, there are many other reasons.
- 15 Q. But it is a very significant part?
- A. Oh, yes, very significant.
- Q. It is a very significant part of your reasoning?
- 20 A. Absolutely.
- Q. It is a very significant part of your reasoning in the present case?
- A. Absolutely.
- 25 Q. It is on that basis that you have concluded that all four cases here are murder?
- A. On those other points that I have discussed, already presented to you, on all those things, added together,
- 30 yes.
- Q. However, as a significant part of your reasoning, the first one is called SIDS, the second is undetermined, and then from then on it's murder?
- 35 A. No, from then on I wouldn't have said it's murder; I would have said murder, unless shown otherwise. I would not have said murder definitely. Absolutely not.
- Q. In a sense, you conclude it is homicide unless there are positive findings to your satisfaction that could exclude SIDS?
- 40 A. That is a medical diagnosis, not a legal diagnosis. That is what I would put in my medical file.
- 45 Q. Do you understand what I put to you: That you work on the basis of this formula? If there is, in fact, no pathologist that gives us any other condition, you would conclude that they are murder?
- A. No, that that is the most likely cause of death.
- 50 Q. So far as Professor Hilton's post-mortem report is concerned, you do not record whether you have read that fully at all?
- A. I have not read the full reports. The full autopsy reports should be two to three pages long, or even longer. I have read summaries of some of the reports.
- 55 Q. So, when you have answered certain questions that the

Crown had posed to you in recent days as to your opinion whether Professor Hilton has properly diagnosed SIDS, you have done that on the basis of not reading his post-mortem report?

5 A. I have done that on the basis of reading Professor Hilton's statement. If Professor Hilton says it is SIDS, it is SIDS. He is a pathologist. That is, if he has not seen the history. He is a pathologist, in the same way as I'm an epidemiologist. He takes account of the
10 pathological findings. He is also interested in the history. I take into account the history, but I am also interested in the pathology.

15 Q. Can I ask you the question again? When you have answered these questions in recent days, you have answered the questions about whether Professor Hilton was right or wrong on his diagnosis based on a reading of the summary and not the full post-mortem report?

20 A. Yes, I have said that.

Q. You have proffered opinions as to whether he should have taken photographs or not in the circumstances?

25 A. That is not my field at all. The pathologist chooses that sort of thing. I think pathologists usually have either slides or photographs of just about everything, so far as I know. Certainly they do in Adelaide.

30 Q. Can I just ask you, in relation to Sarah, this question appears on the second page of the questions and answers, as I have them? You were asked this question at about .7:

35 "Moving now to Sarah, if you had conducted the post-mortem examination of Sarah, again without any knowledge of what had happened to the other children, what in your view would have been the diagnosis of her cause of death?"

40 And you answered:

45 "Most likely diagnosis was that this child had been intentionally suffocated, as not found prone, and her head wasn't covered and no hard lesions found."

Do you recall saying that?

A. Hmm, hmm.

50 Q. Is that your opinion as to why you would disagree with Professor Hilton's finding that Sarah died of SIDS?

A. I'm happy to accept SIDS. That's fine. I've always known that SIDS includes some murders. That has always been so, ever since I started working in SIDS.

55 Q. The statement that is recorded as being attributed to you here is that "the most likely diagnosis was that this child had been intentionally suffocated as not found prone, and her head wasn't covered and no hard lesions

found", so that was the answer that you had given as to what your view would be if you had conducted the post-mortem?

5 A. If that was in isolation, and there wasn't a history of the other two deaths, you mean?

Q. Yes.

10 A. With the history of the other two deaths, the most likely is murder. Without the other two deaths, it would probably be diagnosed as SIDS, but I would have a high index of suspicion for something other than SIDS. It is around 20 per cent of those found supine, without findings, that have later been thought to be murdered.

15 Q. Can I also take you to Patrick's death and, again referring to the questions and answers that were asked in the last few days - this again also is at page 2 - again, in relation to Patrick's death, at about .3, you were asked this question:

20 "Looking now at Patrick's death, again if you were now looking only at Patrick on his own, without any knowledge of what had happened to the other children, if you had conducted the
25 post-mortem examination on Patrick, what would your diagnosis have been?"

And you answer: "Unknown. Undetermined." Then you have, in brackets here, "but would say intentional suffocation was likely cause because of the original event." By "the original event", do you mean the ALTE?

30 A. Yes. I am not interested in why he died; I am interested in the ALTE attack, which to me is the most significant thing in this child. Whether he died of
35 epilepsy or SIDS, once again you cannot tell that at autopsy. There is no way you can tell.

Q. So far as the foundational pathology in relation to Patrick's ALTE and the death is concerned, you are relying
40 essentially on the reports or the statements of the expert witnesses, not from any experience that you have?

A. I have written several papers on ALTE. I was invited to Palm Springs to talk at the ALTE conference. It was
45 then called "Prolonged infant apnoea". It is one of the areas I have written about quite widely.

Q. Again, in relation to the ALTE and subsequent SIDS diagnosis, as a question of statistics or occurrence?

50 A. Yes, I think.

Q. Why would your opinion be preferred to that of Professor Hilton?

55 OBJECTION. QUESTION WITHDRAWN.

Q. Can I ask you, in relation to Laura, again going to these questions and answers at page 3:

"Q. In relation to the diagnosis, it was that her cause of death was undetermined?

A. Would think that diagnosis was on history.

5 Q. That it was consistent with smothering?

A. Yes. They all are.

Q. Including deliberate smothering?

10 A. Absolutely.

Q. And that she probably died from an acute catastrophic asphyxiating event of unknown causes?

15 A. Think she probably did. Can't tell you about the myocarditis. I would depend on a pathologist

Q. Now, putting these four individual children together, is this correct: That they all died from what in your view should have been diagnosed as undetermined causes?

20 A. No. First SIDS, probably. Second undetermined. Third, suspect intentional suffocation. Fourth proven."

25 A. That is about what I would say, yes.

HIS HONOUR: Q. Do you have a copy of the document in front of you?

30 A. No, I don't.

Q. Would you be more confident in giving your answers if you did?

35 A. I possibly would.

(The witness was shown a copy of the questions and answers to which Mr Zahra had been referring.)

40 This is a telephone interview, is that correct?

ZAHRA: Q. Yes. Are you familiar now?

45 A. Yes. I know what you are talking about. It's much more difficult on a telephone interview to be specific, but I remember this interview.

Q. Do you see at the bottom of page 3, and on page 4, the questions and answers I have just read to you?

50 A. Yes. Yes. I still - I agree with all those, yes.

Q. There is nothing you want to add to that?

55 A. No. They all died from an acute - I'm sorry, they all died from an acute catastrophic asphyxiating event of unknown causes. In that one, I'm taking Patrick's to be that initial ALTE. That was really responsible for his problem.

And they were all acute. I was asked if I thought they

were acute catastrophic asphyxiating events, and I said they were. These were all acute catastrophic asphyxiating deaths. Two actually had a heart beat after they were found. One was bradycardic and Patrick had been resuscitated. They all had heart beats, although they were not described as breathing.

5
10 Q. Could I just show you a one and a half page document which was handed to us this morning (shown)? Is that a document that you had prepared?

A. Yes. Yes.

15 Q. You prepared that in recent days?

A. Yes. In the last 36 hours, 48 hours, or something, I think.

20 Q. Does that, in essence--

A. It was in reply to questions that I had been sent.

20 Q. Does SIDS run in families?

A. Yes. They were much longer questions than that, but that was the summary of them.

25 Q. Could I just take you to about three-quarters of the way down the page, to the paragraph that starts with "The family concerned"?

A. Yes.

30 Q. "There are at least three reasons why the fourth death would not only be called SIDS but would alter the thinking"?

A. Yes.

35 Q. By "would alter the thinking", do you mean would lead you to conclude that this was murder?

A. One, it would lead you to consider that very strongly. It wouldn't tell you that. It would lead you certainly to consider that very strongly. Because it is not SIDS. It could be an emCAD deficiency, but I gather that has been looked for and excluded.

40 Q. You then go on to give reasons?

A. Yes.

45 Q. Is that, in essence, the evidence that you would give?
A. I have given three of the four reasons there. I added a fourth after that that I told you about today.

50 Q. That would summarise the foundation for your opinion?

A. On the question "Does SIDS run in families", yes. That is my opinion on the question, that particular question, only.

55 ZAHRA: I follow.

CROWN PROSECUTOR: Q. In one of your answers to my learned friend, Mr Zahra, you said that one of the things that you and a pathologist does, as a basis for either

finding SIDS or excluding SIDS, is to get a history which includes a history of the child and a history of the family?

A. That's correct.

5

Q. Is that something which only you do, or is that something which is generally accepted in the medical community?

10

A. It is generally accepted in the medical community that you have a death scene investigation and a history. It is virtually absolute these days. It used not to be so good. Few miss out now. Some of the aboriginal children we don't get very good histories on. It is more or less accepted.

15

In my case, in my State, I took that history and did that death scene examination and transferred that information to the pathologist before the autopsy was done. I then went and discussed the whole situation with that pathologist.

20

Now, of course, it has changed, because I was retiring and we needed something else to happen. It is done differently, but we have the post neonatal infant mortality committee that now reviews - that includes the pathologist and myself, as paediatrician, and many others - that review every single death between one month and 12 months that happens in our State.

25

Q. Is there some sort of policy in the medical community that has been adopted?

30

A. Absolutely. There is a death scene investigation that has been accepted.

35

Q. By whom?

A. By the global strategy task force and a pathology examination that has been accepted. That is not saying that everybody gets that, but it has been recommended, and it happens.

40

It is diagnosed in France, in some countries, without even an autopsy. It is really quite frightening, but, fortunately, in Australia, I do not think there would any longer be any child, except, as I say, for a few aboriginal children, where it is really hard to get information - you are not allowed to - you get a really good history, death scene investigation and pathology report for all of them.

45

Q. You mentioned four factors which in your view in this case enable you to exclude SIDS as a cause of death for these children. Those factors were the fact that they were not prone; that they were supine when found. The fact that three of them were outside the normal age range. The fact that there had been four unexpected deaths or ALTEs; and the fact that two of the children were found moribund; that is, still with a heart beat.

55

5 You then went on to mention that there were some other factors, and you included what you had seen of the interview earlier today. Are you able to give your opinions that you have advanced both in your statement and in your telephone conversations and in your supplementary report of the last couple of days, are you able to give those opinions based only on the four factors that you have identified, and putting aside things like the video?
A. Sure.

10

Q. And any other factors?

A. I am able to give an opinion on those four factors, yes.

15

<WITNESS STOOD DOWN

20

CROWN PROSECUTOR: What I would like to do next, when your Honour resumes, is identify which parts of her evidence I would seek to lead.

HIS HONOUR: You might let Mr Zahra know, as well, in the meantime.

25 Then, Mr Zahra, you can let me know precisely what it is that you will be objecting to; some, or all of it.

30

ZAHRA: I have spoken briefly to my friend. We all know how difficult the video can be. Maybe during tomorrow, we can address this during some breaks.

35 HIS HONOUR: Mr Zahra just made mention of a one and a half page document which recently came into existence that was shown to Dr Beal. I do not have a copy. I do not know whether I need a copy.

35

CROWN PROSECUTOR: Yes, you do.

40 (A copy of the one and a half page document shown to the witness Beal during the examination on the voir dire was handed to his Honour.)

45

ADJOURNED PART HEARD TO TUESDAY 29 APRIL 2003

oOo

EE:RT:8

D16

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

SIXTEENTH DAY: TUESDAY 29 APRIL 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: I am informed that counsel want to seek leave to make an application. In fact, I was informed that counsel was making an application.

20 (Ms Rees appeared.)

REES: I appear for the applicants, Channel 7, Channel 9, Channel 10, the ABC and John Fairfax Publications.

25 My instructing solicitor contacted your Honour's Associate this morning. I was informed that your Honour did not want to hear the application this morning.

30 HIS HONOUR: I said I would not hold up the trial to hear any application.

35 REES: What I would like to do, with your Honour's leave, is provide to your Honour's Associate, during the course of this morning, some short written submissions which outline the relevant authorities, if it is convenient for your Honour to perhaps allocate five or ten minutes of your time at some point during the day, perhaps shortly before the trial resumes after lunch, to hear the application, which is an application for access to two of
40 the exhibits in this trial.

HIS HONOUR: Are they the ones I was told about yesterday?

45 REES: They are.

HIS HONOUR: I have already refused one.

50 REES: I understood - I may be wrong about this - that your Honour was going to consider the application in respect of both exhibits overnight.

HIS HONOUR: No. I said, in any event, the media should not have access to the video of the child in the swimming pool.

55 REES: The application would simply then be in respect of exhibit AH, the ERISP interview. I understand that there is an objection to that of a very short nature by my

friend for the prosecution. It should not hold up the trial.

5 HIS HONOUR: I will deal with the matter at 1 o'clock if it will not take long.

REES: It will not take long.

10 HIS HONOUR: On this understanding, that you provide my Associate, the Crown and the defence with copies of your short written submissions during the course of the morning. One of the things that you will need to take account of is the question whether - I will not say that. I will leave that for argument.

15 HIS HONOUR: Mr Crown and Mr Zahra, this is not a matter of obligation for yourselves so far as I am concerned, but I would be assisted if you were present at 1 o'clock when Miss Rees wants to say something about the matter.

20 Mr Crown, you suggested yesterday - or Mr Zahra suggested - at any rate I thought it sounded like a good idea - that we try to embark at some stage during the course of the day on the argument on the material upon which we embarked late yesterday. What do you see happening during the course of the day?

25 CROWN PROSECUTOR: Initially I will have to indicate the parts of the evidence I seek to lead. Then, if there are any areas of objection, the defence can indicate that.

30 HIS HONOUR: Has that not yet been done?

35 CROWN PROSECUTOR: No, it has not been done. It might be that there are not that many objections, because there are some parts of the report that I will not rely on.

40 HIS HONOUR: Those two steps need to be done first. You need to say precisely what it is that you want to get from Dr Beal. Then Mr Zahra needs to say precisely what he objects to. I do not think I can really come into it until after that.

45 CROWN PROSECUTOR: What we might do is, subject to what your Honour feels, if the jury is looking a bit overborne at some stage, to send them out for half an hour.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Mr Crown, are we to continue straight on with the playing of the video tape?

5

CROWN PROSECUTOR: We are.

10 I thought, just before we do recommence the interview, I might just indicate that in the folders that have been given to the jury, tendered in evidence and provided to your Honour, just behind the index of the contents, there are three plans that are referred to in the interview that were drawn by the accused. Each of them has an address on it. What I thought I might do, if there is no objection, 15 is to suggest to the jury that they might like to write the names of the appropriate children on to each of the three plans.

20 HIS HONOUR: I see the name "Caleb" is written on the first one.

CROWN PROSECUTOR: Yes. That first plan should have both "Caleb" and "Patrick" written on it. That was the home where both of those children died. "Pat's room" and 25 "Caleb" are both written on the plan.

The second plan is the one of Dower Close at Thornton that has "Bed second Sarah's". Perhaps, up the top, if they write the name "Sarah". 30

The third plan, which has "Laura's" written on it, should have Laura's name written on it at the top.

35 HIS HONOUR: The second plan, Dower Close, is the one we have just arrived at in looking and listening to the video. It is referred to at question 290.

PLAYING OF VIDEO TAPE 3 CONTINUED

40 VIDEO TAPE 4 PLAYED

JURY EXCUSED

SHORT ADJOURNMENT

45

PLAYING OF VIDEO TAPE 4 CONTINUED

VIDEO TAPE 5 PLAYED

50 HIS HONOUR: Ladies and gentlemen, there is a matter that the parties have raised that I must deal with. I think, if we enter upon it now, it is going to make your day less interrupted. For you we will take the luncheon adjournment now, and we will resume at 2 o'clock.

55

JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Firstly, might I substitute tape 7, which has been re-edited in accordance with the wishes of the defence.

I have some additional pages for the jury to insert in their folders, and for your Honour. I hand them up.

10 HIS HONOUR: Tape 7 will be substituted for the existing tape 7 in exhibit AH. The original tape 7 can be returned to the Crown. That does not need to be marked, does it?

15 CROWN PROSECUTOR: No.

(The original video tape 7 of the ERISP between Detective Senior Constable Ryan and the accused was returned to the Crown.)

20 HIS HONOUR: Pages 175, 176 and 177 will be added to exhibit AJ.

25 EXHIBIT #AJ SUPPLEMENTED BY THE ADDITION OF PAGES 175, 176 AND 177 OF THE ERISP TRANSCRIPT TENDERED, ADMITTED WITHOUT OBJECTION

30 CROWN PROSECUTOR: That brings us to Dr Beal. I might, in the few minutes before lunch, set out the evidence I would seek to lead from Dr Beal.

35 After eliciting from her her qualifications and the other evidence she gave about what she has done professionally, I would seek to lead evidence from her of some of the material taken from the fax which was handed up to your Honour yesterday. It is headed "Attention"; then the name of my learned junior. I would seek to lead that part of it where she explains, in effect, why there is no real increase in the risk of a second SIDS death.

40 HIS HONOUR: I had better have these documents marked. Are you using any part of the original report of Dr Beal of 8 December?

45 CROWN PROSECUTOR: I will be, yes.

HIS HONOUR: The report of Dr Beal of 8 December 1999 is exhibit B on the voir dire.

50 EXHIBIT #B ON VOIR DIRE REPORT OF DR BEAL OF 08/12/99 TENDERED, ADMITTED WITHOUT OBJECTION

CROWN PROSECUTOR: There is a fax dated 24 April 2003.

55 HIS HONOUR: The one and a half page fax apparently sent on 24 April 2003 is exhibit C on the voir dire.

EXHIBIT #C ON VOIR DIRE ONE AND A HALF PAGE FAX OF 24/04/03 TENDERED, ADMITTED WITHOUT OBJECTION

Do you want also marked the model questions and answers?

5 CROWN PROSECUTOR: Yes.

EXHIBIT #D ON VOIR DIRE MODEL QUESTIONS AND ANSWERS
TENDERED, ADMITTED WITHOUT OBJECTION

10 ZAHRA: There was material I referred her to in
cross-examination.

HIS HONOUR: A letter and a transcript were mentioned. I
do not have them. Do I need to have them?

15 ZAHRA: Yes. They were matters that I cross-examined her
about.

HIS HONOUR: The letter and the transcript referred to
will be exhibit E on the voir dire.

20 EXHIBIT #E ON VOIR DIRE LETTER AND TRANSCRIPT REFERRED TO
IN VOIR DIRE EXAMINATION OF DR BEAL BY MR ZAHRA TENDERED,
ADMITTED WITHOUT OBJECTION

25 Can somebody find me a copy?

CROWN PROSECUTOR: We will provide that.

30 There is some other material that has not been handed up
to your Honour. If there is any objection to it, then I
will hand up some further relevant material.

Might I also hand up to your Honour a copy of a letter to
my learned junior from Dr Beal dated 14 April 2003?
35 Perhaps that might also be marked?

Exhibit #F ON VOIR DIRE COPY LETTER FROM DR BEAL TO MS
CULVER OF 14/04/03 TENDERED, ADMITTED WITHOUT OBJECTION

40 I have the Scotchmer material here.

(The Scotchmer material was handed to his Honour
by the Crown Prosecutor.)

45 I would not be seeking to lead any of this in exactly the
same form as is in the fax of 24 April.

HIS HONOUR: You are going from the fax of 24 April now,
are you?

50 CROWN PROSECUTOR: Yes.

HIS HONOUR: That is exhibit C.

55 CROWN PROSECUTOR: The material in that that I would seek
to lead from her is that there is a higher incidence of
subsequent SIDS because the environmental factors which
tend to cause a first SIDS death are generally also there

with a second SIDS death. So, she would, in effect, explain that there is no increased risk of a subsequent SIDS death if you take those environmental factors into account. There is an increased risk compared to the community generally, but that is because, generally, with the first SIDS death those factors are already in existence, particularly since the back to sleep campaign.

10 HIS HONOUR: Would that be right? We have evidence that one of the factors is the young age of the mother.

CROWN PROSECUTOR: Yes. It is a very slight factor.

15 HIS HONOUR: What if a first child is born at a young age and the second child is born at an age not considered young?

20 CROWN PROSECUTOR: As I understand it, the younger the mother, the greater the risk. It would work the other way. There would be a lesser risk for an older mother, but it is only a slight factor.

25 HIS HONOUR: I understood you to be saying, family for family, the factors stay about the same.

CROWN PROSECUTOR: Yes. As I understand it, she will explain - I can only put it in the same words as I just put it.

30 HIS HONOUR: I follow. This is from exhibit C. Where do we find this?

35 CROWN PROSECUTOR: It is in the first four paragraphs. What I would not seek to lead is the statistics for the incidence of SIDS.

Then we go to the last paragraph on page 1 of that document.

40 HIS HONOUR: That is the one numbered 2.

CROWN PROSECUTOR: No, the last full paragraph.

45 HIS HONOUR: "In the family concerned".

CROWN PROSECUTOR: Yes. Perhaps that is not quite correct.

50 Could I now take your Honour to exhibit D?

HIS HONOUR: Yes. I am on exhibit D now.

55 CROWN PROSECUTOR: I would seek to ask her all the material that is in exhibit D, in which she goes over the five incidents, one by one, looking at them individually.

Then, on the fourth page, she goes to consider all of them together. I would seek to lead that, together with the

last full paragraph on page 1 of exhibit C.

5 HIS HONOUR: I understand you to be saying that you intend to adduce evidence of the whole of the model questions and answers, exhibit D.

CROWN PROSECUTOR: Yes, that is correct.

10 HIS HONOUR: Together with--

CROWN PROSECUTOR: The last full paragraph on page 1 of exhibit C.

15 HIS HONOUR: That is the one beginning "In the family concerned".

CROWN PROSECUTOR: Yes.

20 HIS HONOUR: Including three numbered subparagraphs?

CROWN PROSECUTOR: Yes, and the last paragraph on page 2.

25 HIS HONOUR: In addition to the three numbered subparagraphs, you said another paragraph.

CROWN PROSECUTOR: Yes, the last paragraph on page 2.

HIS HONOUR: "I have been attending".

30 CROWN PROSECUTOR: Yes.

I would also seek to lead evidence from her of the material which is referred to in exhibit B, which is her statement; the last paragraph on page 2.

35 HIS HONOUR: Does the Crown have a spare copy of the statement, exhibit B?

40 CROWN PROSECUTOR: Yes.

(A copy of the witness statement of Dr Beal, exhibit B, was handed to his Honour by the Crown Prosecutor.)

45 CROWN PROSECUTOR: The last paragraph on page 2.

HIS HONOUR: "When an infant dies suddenly".

50 CROWN PROSECUTOR: Yes.

55 There are references to this topic and similar topics in the Scotchmer material that is exhibit E. That concerns these topics: The difficulty of distinguishing between suffocation and SIDS; and I would also ask her questions about the time taken to smother a baby, and whether you would necessarily see marks of force upon a smothered baby. That is referred to also in the Scotchmer material. What I would not be doing is asking her to express an

opinion on the likelihood of what she calls filicide, namely murder.

5 HIS HONOUR: I had not seen that word before.

CROWN PROSECUTOR: I would certainly be asking her to concede the consistency of the findings with deliberate smothering. I would not be asking her questions about the percentages of cases in which there is a suspicion of filicide, or the clues to suspecting filicide. Neither would I be asking her questions along the lines of what my learned friend has called the mantra.

15 Paragraph 5 in her statement, exhibit B, I would not be asking her in that form; certainly not whether, in her view, all four children were murdered by their mother. But I would be asking it more in the form that I have already mentioned.

20 She would certainly be referring to the age range of the children, which is referred to in paragraph 5, and to the fact that two of the infants were found moribund. But she would not be referring to the frequency of the mother needing to go to the toilet, and the reluctance of the mother to use the cardiorespiratory monitor.

25 I expect she would give evidence along the lines of the last sentence in her statement; namely, that, so far as she is aware, there has not been another family with three SIDS deaths that are now accepted as being SIDS deaths, although there were some at the time that were thought to be SIDS deaths but were later proven not to have been SIDS deaths.

35 HIS HONOUR: Mr Zahra, you are hearing this for the first time, are you?

ZAHRA: Yes.

40 HIS HONOUR: You have heard what the Crown says. You will need to consider that and let me know what your response is. We will deal with that at a convenient time.

45 Miss Rees, you want to make an application.

REES: Yes, your Honour.

50 Might I hand up to your Honour a set of submissions and a draft order for your Honour's consideration? I am just circulating them at the Bar table. I did not think it appropriate to interrupt my friends when they arrived at the Court earlier.

55 As I said earlier, I appear for the parties listed in the opening paragraphs of those submissions.

HIS HONOUR: I grant you leave to make this application. I will just read these documents, if you do not mind.

(His Honour read the documents handed to him by Miss Rees.)

5 I have read that material.

CROWN PROSECUTOR: I do not know if your Honour has made any final ruling in relation to the Laura tape.

10 HIS HONOUR: Yes. I said yesterday that I would not let the media have access to that tape.

15 REES: In respect of the authorities which I have outlined in the written submissions, it is my submission that the ERISP interview clearly falls within those principles and is an exhibit to which, under practice note 97, access would normally be granted.

20 In my submission, as I understand it, other than the objection raised by the prosecutor set out in the closing pages of my written submissions, the parties do not raise any other particular issue in relation to the ERISP interview which would cause your Honour to have concerns about its release.

25 HIS HONOUR: I do not know. I have not heard them yet.

30 REES: They may well say something in addition. That was my understanding when I spoke to my friends this morning.

My friend tells me that that is not the case.

35 The submission for the applicants is that it is important, in the administration of justice, that documents which are exhibits in proceedings, and therefore material which the jury has seen and heard, are similarly material which members of the public are entitled, should they wish to attend the courtroom, to also see and hear. It is those documents and that evidence to which the press should
40 similarly be granted access under the various authorities which I have set out in my written submissions.

45 Unless there is anything particular about the authorities I have there set out, I assume they are fairly straightforward.

50 In respect of the concern raised by my learned friend, the prosecutor, about releasing the ERISP and the effect that that may have on persons in the future who may be discouraged from giving evidence, or giving interviews to the police, that consideration was dealt with by Hulme J in the case of O'Grady. What his Honour there said applies with equal force here. That concern, whilst it should be weighed by your Honour, should not cause your
55 Honour to refuse access to that exhibit.

Might I just address the draft orders which I have handed up to your Honour? Your Honour may well have some other

thoughts and so on about how best to frame that order. In terms of the proposed logistics to deal with the tapes - they may be of interest to your Honour in formulating any order - what is proposed is that one of the applicants, being Channel 10, has a machine which can be brought to the Court, or just outside the Court, which can copy portions of exhibit AH which have already been played to the jury. It is not proposed that they would make copies of any of the tapes which have not yet been shown. That copy would then be taken to Channel 7's premises in Pyrmont. It would be distributed electronically from that point to the other applicants for whom I appear.

I originally thought that it may be of assistance to add to the proposed order in front of your Honour an additional order that a copy of this letter be attached to any copies of exhibit AH, to make sure that the persons who have the copies know the circumstances in which they can be broadcast. However, given that the proposed mechanism for distribution is that there will be one copy made, and then that that will be electronically distributed, such a mechanism may be impractical, although I am open to suggestions from my friends or your Honour in that respect.

Other than that, the draft order takes into consideration the interests of the open administration of justice and also the proper administration of justice in this matter, effectively also protecting the interests of the accused to a fair trial.

Unless there is anything further I can assist your Honour with, those are my submissions for the applicants.

HIS HONOUR: Does any counsel wish to say anything about the matter? I will hear counsel if they wish but, of course, they are not directly concerned. They may address the Court, if they wish to do so.

CROWN PROSECUTOR: No. We take a neutral position. We do not have any interest in the outcome.

ZAHRA: I do not wish to suggest otherwise than the rationale that is behind the decisions is a proper one. Clearly the Court must be open, as it has been. Anyone can come in and watch this video. The media is free to report, as it has been doing. There has been no restriction on it doing that. The rationale about the record of interview being open is quite clearly manifest, in the sense that the reporters are here to report on it also.

So far as the rationale of accuracy is concerned, I have given consent for a copy of the transcript to be given to the media on an approach by my friend so that that accuracy can be preserved. That is obviously recognising their right to report on the record of interview and obviously to get it accurate; to accurately report it.

5 The concern that I have is that this is, in fact, a very
lengthy record of interview. It is likely to be played in
what would be no more than a few seconds grab here or
there, one where your Honour has no control over what is
reported. Your Honour does have control within the Court
but outside, once it is given to them, we do not know how
they are going to report it; the juxta position of various
parts that might give it really quite a different meaning.
10 There are real concerns in such a long record of
interview, with only various portions played, that your
Honour is no longer in control over the way in which that
is portrayed to the public.

15 Again, the public is not restricted from walking into this
Court at any time and watching the record of interview, as
my friend has suggested, but, in the particular
circumstances of this case, with such a long record of
interview, as we know and come to accept, it is likely to
20 be played in small portions; in small grabs. It is likely
to be of limited use to the public in those circumstances.
The press is free to report widely on the contents of the
record of interview, and they have the transcript to do
so. It may be that they may concentrate on inappropriate
25 responses, for example laughter in certain circumstances,
without the full context of those responses being
reported.

30 I have not seen the media reporting myself but I
understand that there was, in fact, some reporting in the
ABC yesterday evening to suggest - again I cannot vouch
for the accuracy of this because I was only told this this
morning - that a heading was given to the item that "The
accused laughs whilst explaining or whilst relating deaths
35 of children". I have not been able to verify that. If
that were the case, it would clearly heighten or show the
concerns that we are expressing now.

40 REES: Might I just respond to the concern which my friend
has raised? The same argument could readily be applied to
oral evidence which is given in the trial by either the
accused or any other witness. The Court readily permits,
and so it should, the press to print portions only of oral
evidence. It is submitted that the same principles should
45 apply with respect to exhibits which have been shown to
the jury.

50 The fact that the press may select portions which they
consider to be of more interest to the viewer than others
should not prevent this Court from granting access to the
media to the exhibit to use as they consider appropriate.
Were it otherwise, this Court would similarly require
print media to cite large portions of the transcript of
oral evidence and not be permitted to use only small
55 sentences or portions of that evidence. The concern
raised by my friend should not prevent your Honour
granting access as the applicants seek.

FOR JUDGMENT ON APPLICATION BY MEDIA FOR ACCESS TO EXHIBIT
AH SEE SEPARATE TRANSCRIPT

LUNCHEON ADJOURNMENT

5

HIS HONOUR: Gentlemen, I am sorry to raise this with you, my attention was attracted to the possible existence of a problem. When the Crown edited the record of interview by deleting questions, I think, 637 to 659, the defence then sought, contrary to the literal terms of the order I made, to have a part of that material brought in. That was done by agreement.

10

I have just looked at the transcript and reminded myself of the circumstances in which I heard argument and gave judgment about this matter. It is recorded in the transcript in various passages ending at page 23.

15

The Crown was wishing to open its case to the jury on a particular expression used in one of the diary entries. That expression was picked up by Detective Senior Constable Ryan as one which appeared to merit explanation and answers were given throughout the answers to the questions whose numbers I have recently mentioned.

20

25

I did not give detailed reasons for judgment, for two reasons: First, I did not want to delay the commencement of the trial. The jury was then waiting, having been empanelled, for the Crown to open the case to it. Secondly, I did not wish to take the risk of committing to print a judgment which used words which I took to carry with them a particular risk of prejudice.

30

Counsel are aware of the words. I am speaking obliquely because there are members of the public present in the Court. What I said is this:

35

"I shall defer giving reasons for the moment because I want to get on with the trial, but I do not propose to admit evidence included in questions 637 to 659 inclusive of the record of interview."

40

I have prepared a judgment but it remains in my Chambers and will not be published, for the second reason I have given, until this jury is discharged. I am concerned, however, that the literal meaning of my words was far wider than my intention. What I intended to do was to delete from the record of interview any question about, and explanation of, the expression to which I have referred, and no more than that.

45

50

I say this now because, on one view, at any rate, there has been deleted from the record of interview much more than I intended should be deleted, even taking into account the material that has been reinserted at the request of the defence.

55

I do not wish this matter to go off on a misunderstanding about what my intention was. I must take the responsibility for having expressed myself too shortly and without the necessary precision.

5

This is a matter that the defence and the Crown may raise again. I do not think that I need to say more for the moment, or that I should say any more for the moment.

10

CROWN PROSECUTOR: On reviewing again the latest edited version that has been made, it occurs to me that much of question and answer 637 should have remained in the version to go to the jury.

15

HIS HONOUR: What drew it to my attention was that at lunchtime I sat down and began reading the odd pages which you handed up this morning and they started off with an explanation of a passage that has been cut out.

20

CROWN PROSECUTOR: That is correct.

HIS HONOUR: It was never my intention that it be cut out and I do not know that Mr Zahra asked me to cut it out.

25

CROWN PROSECUTOR: I do not think it was ever our intention that it be cut out.

30

Might I suggest that we edit it again and only take out the sentence that begins on the fourth line on page 175 from the word "obviously" up to the word "daughter", and that the remaining parts of question and answer 637 remain in?

35

HIS HONOUR: Mr Zahra, I do not want you to be taken by surprise here. I want to give you every opportunity to respond to what the Crown is now suggesting. That was the material that I was anxious to see out of the explanation in the record of interview and, as I later came to the view, out of the diary entry. I did not understand you to be objecting to any other part of the diary entry, or to any other part of the explanation at answers 637 to 659.

40

CROWN PROSECUTOR: On reflection, there is another part.

45

HIS HONOUR: It appears in more than one place; the explanation. Every time it is touched on, that must go out.

50

CROWN PROSECUTOR: Question 657. There is a question that contains a reference to the excluded comment in the diaries, and a part that is included in the diaries.

HIS HONOUR: Yes.

55

CROWN PROSECUTOR: But the answer relates only to the included part; the answer to 657 and to 658. So what I would suggest there is that the question 657 be amended so it reads "In the entry you've got 'I think losing my

temper stage and being frustrated with everything has passed'. So there are two parts of the question that get deleted, and the answer can remain as is.

5 658, the question and answer, and 659, the question and answer, can remain as is.

10 ZAHRA: It is very difficult to excise the second part of it. As the second entry in 657 makes clear, there is a link between those two propositions. That is the difficulty that I have. One really cannot remove one without the other. I think, for more abundant caution, I would agree with my friend. Starting from the word
15 "obviously", those sentences to the end of 637, and, similarly, 657, should remain as it is; deleted.

HIS HONOUR: We will have to go through this systematically. My copy is so annotated I am making notes on notes, deletions on deletions.
20

Can we start at 637?

25 CROWN PROSECUTOR: 637. We are suggesting that the only words that come out are the words on page 175, line 4, from "obviously", until line 5, "daughter".

HIS HONOUR: Probably the best way to do it, I think, is one question and answer at a time.

30 The whole of question 637 goes in and the whole of the answer, except for the passage that the Crown has identified, beginning on the fourth word of the fourth line and ending with the second word on the fifth line.

35 Mr Zahra, if you want some time to think about this at any time, you only need to say so.

ZAHRA: Yes.

40 I would submit that the part which should be deleted, because they are linked, in a sense - the answer is given in the context of some suggested interpretation of that phrase being in propensity, so I would ask that the sentence be excluded to the words "next one" or ending in
45 "one"; in other words, to the end of 637.

CROWN PROSECUTOR: It has been left in the diary. Then the answer does not make sense.

50 ZAHRA: I think my friend is right, on reflection. I am sorry.

HIS HONOUR: Very well. Answer 637 will stand, except
55 there will be deleted the sentence which begins "obviously" in the fourth line, or the portion of the sentence beginning "obviously" and ending after the second word of the next line.

There is no difficulty with 638.

5 CROWN PROSECUTOR: The only other suggestion is in relation to 657.

HIS HONOUR: Just let me ask Mr Zahra about that, Mr Crown.

10 CROWN PROSECUTOR: Yes.

HIS HONOUR: Do you see any difficulty, Mr Zahra, with the material from questions and answers 638 through to 656? Is there any reason why they should not go in?

15 CROWN PROSECUTOR: We are in agreement that they should stay out.

20 HIS HONOUR: You are working from the edited version. I am sorry, I am working from the whole thing.

CROWN PROSECUTOR: We are in agreement that 638 to 643 stay in and 644 to 656 go out.

25 ZAHRA: That is correct.

HIS HONOUR: Do you agree, Mr Zahra, with what the Crown is suggesting in question 657? It is an indirect reference to this subject matter.

30 ZAHRA: Yes.

35 HIS HONOUR: Very well then. Question 657 should be edited by removing all the words in the first line after the word "got" and all the words in the second line before the word "but".

40 CROWN PROSECUTOR: So it will read "In the entry you've got 'I think losing my temper stage and being frustrated with everything has passed'".

HIS HONOUR: "But" should go out as well as. "The entry you've got 'I think losing my temper stage'", et cetera.

45 CROWN PROSECUTOR: But deleting the last line of that question.

HIS HONOUR: Yes.

50 CROWN PROSECUTOR: So it will read "In the entry you've got 'I think losing my temper stage and being frustrated with everything has passed'." Answer. And then the complete answer should go in, and 658 and 659 should go in.

55 HIS HONOUR: Mr Zahra, do you have any difficulty with that?

ZAHRA: No, I don't. I think it is important, because it

explains the answer to the other one. It qualifies it.

Would your Honour allow me a chance to read it down, just for more abundant caution?

5

CROWN PROSECUTOR: I do not think we will get to it this afternoon.

10

HIS HONOUR: If there is a difficulty for the jury, it is in relation to the lack of it at the moment, so there is no danger.

CROWN PROSECUTOR: There is no danger.

15

ZAHRA: We are up to the time 135257. At the top of page 174 it is at 153133, one and a half hours. I do not think there are any breaks in it.

20

HIS HONOUR: I have to apologise to the parties. It is my fault.

CROWN PROSECUTOR: No.

25

ZAHRA: No.

HIS HONOUR: I hope it is now clear.

30

Mr Crown, could I ask you to produce a set of pages from the relevant passages at 637 to 659 edited as we three all now think it should be edited? Let Mr Zahra have a copy, and let me have a copy.

CROWN PROSECUTOR: Yes.

35

Could I suggest your Honour's Associate hands back the pages and the video I handed up just before lunch?

40

(The copies of pages 175 to 177 and the substituted video tape 7 were returned to the Crown Prosecutor.)

45

ZAHRA: We could possibly stop after question 636, where there is a change to Detective Senior Constable Engdahl. There is probably about one and a half hours, which will suit us this afternoon.

HIS HONOUR: I will make sure we do not go past 636.

IN THE PRESENCE OF THE JURY

PLAYING OF VIDEO TAPE 5 CONTINUED

5 VIDEO TAPE 6 PLAYED

10 HIS HONOUR: The next tape is tape 7 that needs some addition. We can play a part of it, if you like, Mr Crown, or, if you prefer, it can be dealt with before we recommence.

CROWN PROSECUTOR: There is only three and a half pages. Perhaps it is a good point to stop.

15 HIS HONOUR: Ladies and gentlemen, we will end today's proceedings there. I think counsel have something for me to deal with in your absence in any event. We shall start at 10 o'clock tomorrow.

20 JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Might I hand up the edited transcript pages to your Honour?

(A copy of the re-edited pages 175 to 177 inclusive was handed to his Honour by the Crown Prosecutor.)

10 Would your Honour like to do transcript corrections now?

HIS HONOUR: All right. I will just have a look at this first.

15 (His Honour reviewed the re-edited pages.)

Mr Zahra, that transcript seems to accord with what was agreed at 2 o'clock.

20 ZAHRA: Yes.

HIS HONOUR: Mr Crown, would you mind having copies made of that, and they can be distributed tomorrow.

25 CROWN PROSECUTOR: Yes.

HIS HONOUR: Will it be possible to deal with the audio/video tape overnight?

30 CROWN PROSECUTOR: Yes.

THE FOLLOWING ERRATA WAS NOTED:

- 35 1. At page 236, line 2, "disagree" amended to "agree".
2. At page 324, line 17, amended to "let us split it up" by the word "it" being inserted between the words "split" and "up".
- 40 3. At page 656, line 49, "for name" amended to "full name".
4. At page 619, line 42, "disparate" amended to "desperate".
- 45 5. At page 498, line 44, "differ" amended to "different".
- 50 6. At page 708, line 24, "significant" amended to "significance".
7. At page 708, line 54, "next" amended to "neck".
- 55 8. At page 762, line 27, delete the word "is".
9. At page 865, line 6, "thing" amended to "things".
10. At page 867, line 20, "parted" amended to "part".

11. At page 872, line 1, "their" amended to "there".

5 12. At page 907, line 51, "significant" amended to "significance".

13. At page 898, line 15, "like" amended to "look".

10 14. At page 988, line 43, "hard" amended to "heart".

HIS HONOUR: The fact that there are so few corrections just underlines what an excellent reporting service we are fortunate to have.

15 ADJOURNED PART HEARD TO WEDNESDAY 30 APRIL 2003

20

oOo

EE:BOW:RT:8

D17

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

SEVENTEENTH DAY: WEDNESDAY 30 APRIL 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: Are you ready with the edited tape 7?

20 CULVER: We have just noted one slight glitch with the
amendments on the transcript. That will take no more than
five minutes to correct.

Mr Tedeschi has also asked if he can be excused this
morning. He will be here about 11.

25 I anticipate that the difficulty with the transcript will
take no more than five minutes. It is just a matter of
photocopying one page a number of times.

30 HIS HONOUR: Is there anything you would like me to do
now?

35 ZAHRA: I can take part of that time. We have a witness,
Professor Busuttil, who ordinarily is from Edinburgh. We
would hope to have his evidence via video link. We have
been in contact with the Registry. There has been some
suggestion that we would need to put on a notice of
motion. We have prepared that if that is the appropriate
course.

40 Our recent communication with the Registry indicates that
we can make a verbal application to your Honour. We can
comfortably at this stage - again much depends on how the
Crown's case will run and finish - we can confidently
45 indicate that maybe next Wednesday we could take the
evidence of Professor Busuttil by way of video link.

HIS HONOUR: I was told a few days ago that the Crown case
would finish this week.

50 ZAHRA: Yes.

HIS HONOUR: Is that still the likely position?

55 CULVER: Given that the Court will not be sitting on
Friday, as I understand it, that estimate may need to be
pushed back until early next week.

HIS HONOUR: Would Mr Zahra be safe until next Wednesday?

CULVER: I would think so.

5 ZAHRA: Doing our best, I understand Wednesday is possible. I understand courts 7 and 3 would be available for that purpose, and Mr Escott would be available to, in fact, assist us.

10 HIS HONOUR: What about timing? There is a nine hour difference between Edinburgh and here.

ZAHRA: I have myself had to wake up at 3am in the morning to speak with Professor Busuttill.

15 Probably 2 o'clock in the afternoon. I would estimate probably two hours.

20 HIS HONOUR: Two in the afternoon here would be 5 in the morning there.

ZAHRA: It is better than 7 in the morning here.

25 We may be able to sit on shortly after that to complete the evidence.

HIS HONOUR: Do there have to be any formalities? Do I have to make any particular order or direction?

30 ZAHRA: We thought a few days ago the process is by way of notice of motion. We have prepared that. We were told yesterday and this morning that that is no longer required. If your Honour makes an order that that evidence be accepted by video link--

35 HIS HONOUR: I take it that the Crown has had notice of the intention of the defence to call Professor Busuttill's evidence by video link?

40 CULVER: I cannot recall that. I do not know if Mr Tedeschi understood that.

45 ZAHRA: I mentioned in Court the other day that we had such a small window of opportunity in relation to Professor Busuttill that we would have to proceed that way.

50 HIS HONOUR: I would hear anything the Crown had to say in variance to what you are putting, Mr Zahra. Assuming the Crown consents, about which I would ask you to satisfy yourself during the course of the day, I will say that I will make arrangements for us to sit in either of the other two Courts at this courthouse next Wednesday for the purpose of taking the evidence of Professor Busuttill.

55 CULVER: I can indicate that the Crown will be in a position to indicate the Crown's attitude by morning tea.

The transcript is now ready. I can give you the amended version. I have 12 copies for the jury and one for your

Honour, and I hand one to my friend.

5 HIS HONOUR: Yesterday morning we handed out to the jury the copies, or did we?

CULVER: I do not believe they were handed out. In fact, they were returned to my instructing solicitor.

10 I can hand to your Honour now the edited tape 7.

HIS HONOUR: That can be put into exhibit AH in substitution for the previous tape 7. The previous tape 7 I think has been returned to the Crown already.

15 CULVER: That is correct.

20 HIS HONOUR: Just remind me, because I am just losing track of this a little, which, if any, of these new pages does the jury have? We have pages 174 to 177 inclusive and 180 and 181. Will they need to remove any pages from their binders?

CULVER: I will just check with my instructing solicitor.

25 I understand the first page to be removed from the existing folder will be page 174, and then they will need to remove their current page 181. This stapled bundle should then be inserted in sequence.

30 HIS HONOUR: So, they remove pages 174 and 181 and hand them back.

CULVER: That is correct.

35 HIS HONOUR: And insert this batch that they will then be handed.

40 CULVER: That is correct. Their current pages 174 and 181 do not have extra material.

HIS HONOUR: I am just concerned, in case any of the jurors have made notes on their existing pages, they should be confidential. I suppose there is no reason why they should hand them back at all.

45 CULVER: No. They can be destroyed.

50 HIS HONOUR: For example, if they had two page 174s one would have more information than the other. I do not think I will ask the jury to return any of their pages.

55 Mr Zahra and Madam Crown, one of the things I was informed by the ABC television the other night is that this case was going to last at least another six weeks. Did that come from either of you?

CULVER: No, not from the Crown. I would anticipate probably another three weeks I would think.

EE:BOW:RT:8

D17

HIS HONOUR: I am comforted.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, we are going to resume watching and listening to the remaining tapes in the interview of the accused, exhibit AH, but before that happens, you are going to be handed, each of you, a batch of pages to insert in your binders in the transcript, exhibit AJ. The pages are numbers 174, 175, 176, 177, 180 and 181.

10 CULVER: I hand those up.

15 HIS HONOUR: Before they are handed to you, just let me say this: Some of those pages you already have, but it is possible that some of you have made marks or notes on one or more of those pages. It is important that any such mark or note remains confidential. I am therefore not going to ask you to remove those pages from your binders and return them to the officer. They can stay with you. 20 The only changes between any page you now have and any amended page of the same number will be that the new page has more information on it. So those pages will now be handed to you, and would you mind inserting those pages.

25 (Jury handed pages 174 to 177 inclusive and 180 to 181 inclusive.)

30 ZAHRA: I think, as may have become apparent yesterday afternoon, the tape cut out. As the transcript notes, it ends with the word "still" at page 618. There were some words.

35 The jury may be a little confused about the process of this transcript. As I understand it, the machine that was operated here is both a video recorder and a tape recorder. They are not synchronised, in the sense that the tape finishes at the same time as the video. The transcript is taken from the audio, not the video.

40 HIS HONOUR: Unless I am mistaken, Detective Senior Constable Ryan said in his evidence - and if I am wrong I am sure he would say it if he were asked - there are simultaneous recordings going on of what is being said. One is on an audio tape. I think it is from the audio 45 tapes that these transcripts are prepared.

CULVER: That is so.

50 ZAHRA: What happens is when the video tape comes to an end - sorry, sometimes when the audio comes to an end the video picks up what is said and the audio does not pick it up. I think this is what has happened here. There are some additional words. I have listened over and over again. Doing my best, I think after the word "still":

55 "I still had to try, I still had to be cautious and careful and keep things in perspective. Look for signs...look for...

Q. Signs of what?

A. Any other problems that the other three might have had."

5

I understand that has been written in now.

HIS HONOUR: Yes, it has been written in. Are you satisfied about the accuracy of that?

10

ZAHRA: From reading that, yes. That might explain why it is not there.

HIS HONOUR: You do not require the end of tape 6 to be played?

15

ZAHRA: No.

HIS HONOUR: I will ask the officer now to insert tape 7 and play it, please. It should pick up, I think, at the top of page 171.

20

VIDEO TAPE 7 PLAYED

VIDEO TAPE 8 PLAYED

25

HIS HONOUR: It seemed to pick up, ladies and gentlemen, at the top of page 200, whereas it should come in at question 712 on page 199.

30

VIDEO TAPE 8 REPLAYED

SHORT ADJOURNMENT

RESUMPTION

VIDEOTAPE 9 PLAYED

5 ZAHRA: Your Honour--

HIS HONOUR: Stop the tape.

(Accused left dock.)

10

HIS HONOUR: Just a moment.

ACCUSED: Sorry.

15

HIS HONOUR: Let the accused enter the dock, please.

(Accused returned to dock.)

20

HIS HONOUR: Ladies and gentlemen, you see what is happening. We will take a short adjournment now. If you would go to the juryroom.

JURY EXCUSED

25

IN THE ABSENCE OF THE JURY

HIS HONOUR: Please let me know, Mr Zahra, when your client is ready.

5

ZAHRA: Can I say one thing: I think my instructing solicitor would like me to indicate that it was not her that attempted to leave; it was my instructing solicitor that asked her to step outside the dock.

10

SHORT ADJOURNMENT

LUNCHEON ADJOURNMENT

15

HIS HONOUR: Yes, Mr Zahra.

ZAHRA: Sorry, I have not been able to keep your Honour informed. They keep their phone off in the out-patients. I understand she is on her way back and will be here in a couple of minutes. The doctor has recommended, in fact, that she not sit - in fact, that we not sit - this afternoon, and, in fact, suggested that that also be for tomorrow, but said it is preferable that she see another doctor and be looked at by him. She has, in fact, I think a letter coming from the doctor.

20

25

HIS HONOUR: I better leave the Bench until you can better inform yourself about it, because you may want to make some application.

30

ZAHRA: Yes, your Honour.

CROWN PROSECUTOR: The difficulty that I have is that I have two overseas experts here, Professor Herdson, who is at the back of the Court, and I was going to ask if he could be intervened after the videotape finished, which would have been after another five or ten minutes, and Mr Jem Berry from the United Kingdom, both of whom must get away at the weekend. I think they will be probably about half a day each, so I would be very anxious about not sitting tomorrow, particularly with your Honour having other obligations on Friday.

35

40

HIS HONOUR: I have already told the jury that we will not sit on Friday. Well, let us just see what happens in the next few minutes.

45

CROWN PROSECUTOR: Yes.

50

HIS HONOUR: Thank you for letting me know that, Mr Crown.

Mr Zahra and Mr Crown, will you send me a message when you are ready to resume?

55

CROWN PROSECUTOR: Yes.

SHORT ADJOURNMENT

HIS HONOUR: Yes, Mr Zahra?

ZAHRA: The accused is here actually. She is on her way in.

5 HIS HONOUR: We will just wait for her to come.

(Accused entered dock.)

10 Yes, Mr Zahra?

ZAHRA: During the luncheon adjournment Major Harmer had taken the accused to outpatients at the St Vincent's Hospital. She has been given a sedative and I have a letter from St Vincent's Hospital, from a doctor - I can't identify the name from the letter, but it is dated today, and I have shown it to my learned friend.

CROWN PROSECUTOR: No objection.

20 (Relevant letter handed to his Honour.)

HIS HONOUR: The medical certificate dated 30.04.03 will be marked for identification 31.

25 MFI #31 MEDICAL CERTIFICATE OF 30/04/03

Mr Zahra, you are asking that the trial stand over until tomorrow?

30 ZAHRA: Until tomorrow. May I say that I sense the accused is very keen to have the matter proceed. She fears it will become more stressful if there is a delay than if there is not.

35 HIS HONOUR: Mr Crown, you mentioned before that you would have wished to interpose the evidence of Professor Herdson and Dr Berry?

40 CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: If that cannot be done until tomorrow, will their evidence be able to be finished tomorrow?

45 CROWN PROSECUTOR: I think so, yes.

HIS HONOUR: Do you want to put anything against Mr Zahra's application then that the matter stand over until tomorrow?

50 CROWN PROSECUTOR: No, I do not, your Honour.

HIS HONOUR: I would have said, just to make sure that we can complete the evidence of Professor Herdson and Dr Berry tomorrow, because I know that they have come a long way to Sydney to give their evidence, I would have suggested a 9.30 start. However, I have set down another case for hearing at 9.30. I will list this case for 9.45, if that is convenient for counsel, and if that is

convenient for the Court Reporting service. I will hope
to start it at 9.45 but I cannot guarantee that. It may
begin as late as 10, but it will begin no later than 10,
so I will be telling the jury 9.45.

5

Very well then. May we have the jury.

10

ZAHRA: May I express something to your Honour to allay the
concern of the accused. She wanted to make sure the Court
was aware that she was sorry and wanted to apologise if
there was any impression that she may have conveyed by
making to leave the Court.

15

HIS HONOUR: Thank you, Mr Zahra, I will say something.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Good afternoon, ladies and gentlemen. Thank
you for your patience. The accused is not well and counsel
have put before me some medical evidence. The accused has
been seen by a doctor during the adjournment and I have
decided that it is not appropriate to continue the trial
today, because it is necessary that the accused be present
and fully taking part, insofar as she must take part, at
10 every stage of her trial.

15 I am going to stand the trial over until tomorrow. The
indications are that the accused will be able to take her
place in the trial tomorrow and there is nothing else to
stop the trial going on.

20 I want, however, to ensure that the witnesses whom the
Crown will call tomorrow will be able to complete their
evidence, because they are coming a long way to give their
evidence, and, as you know, their evidence cannot run over
into Friday because we are not sitting on Friday.
Therefore, I would like, if we can, to start at a quarter
to ten. Is there any one of you who would have a problem
with coming a few minutes early?

25 NO AFFIRMATIVE RESPONSE FROM JURY

30 HIS HONOUR: Then the official start time tomorrow will be
at a quarter to ten. Things never run smoothly, and I have
agreed to hear another case at half past nine in this
Court. I was told that it would take half an hour. I am
going to try and hurry up the people concerned in it. So
it is possible that I may not be able to start at a
quarter to ten, but I can assure you that it will start no
35 later than ten tomorrow. So with that I will let you go.

40 One more thing. You saw the accused was upset when we
adjourned for an early lunch, and the accused made to
leave the Court. Now, she can't do that, of course; she
just can't walk out of your presence, because she is in
your charge, and that is why I stopped her in a rather
precise fashion, you might think. The accused didn't
intend any disrespect in the way she acted, and Mr Zahra
has asked me to convey that to you.

45 Well, I think that is all I need to say today, ladies and
gentlemen. I wish you an early afternoon and I look
forward to seeing you at quarter to ten, if I can,
otherwise no later than ten. Thank you.

50 JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Might I hand up to your Honour a
document which is headed "Summary of medical evidence
concerning the deaths/ALTE". Your Honour, that is a
10 document which at some stage during the Crown case the
Crown will be seeking to tender under s.29 subs 4, but I
just thought - we have provided the defence with a copy,
the first version, some days ago. It will obviously need
some revision, as there is some further evidence, but I
thought it useful for your Honour to have it at this
stage.

15 HIS HONOUR: Yes, thank you, Mr Crown. It is useful to
have a document like this where it is going to be
necessary to categorise the evidence. I am sure that the
20 jury and I will find that very useful.

We will adjourn then now until a quarter to ten tomorrow
morning.

25 ADJOURNED PART-HEARD TO THURSDAY 1 MAY 2003 AT 9.45AM

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BOW:EE:RT:8

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION5 BARR J
AND A JURY OF TWELVE

EIGHTEENTH DAY: THURSDAY 1 MAY 2003

10 70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: There is a delay with the jury.

CROWN PROSECUTOR: We are not quite ready for the jury.

20 HIS HONOUR: Yes, I understood there was a matter that you
wanted to raise.25 ZAHRA: Yes, your Honour. We may be able to address a
certain issue that I think has a sense of inevitability
occurring during the course of Professor Herdson's
evidence and this became apparent in the conference that
we had with Professor Herdson, so it may be convenient,
your Honour, to address this issue now.

30 Can I give your Honour an overview of the issue?

HIS HONOUR: Do I need to have Professor Herdson's report?

35 ZAHRA: Yes.

HIS HONOUR: This is exhibit D on the voir dire?

ZAHRA: Yes.

40 HIS HONOUR: Yes, I have that.

45 ZAHRA: Your Honour is, no doubt, now familiar with the
format of these questions and answers, so they follow the
same format in relation to each of the proposed expert
witnesses.50 Your Honour now appreciates that at a certain point the
witnesses are going to be asked, looked at in isolation,
in other words, each individual looked at in isolation,
what would be your diagnosis. Then, in fact, they are
asked, taking into account, in a sense, the others, what
would be your particular diagnosis.55 Your Honour can see the questions and answers in relation
to Professor Herdson on the last page, the second
question. That is probably where the mantra appears.

HIS HONOUR: "Now, putting those four individual children

together."

ZAHRA: Yes.

5 I have spoken to my friend and clearly my friend does not,
as he has clearly indicated, intend to lead evidence of
that mantra.

10 It became clear, during the course of our conference with
Professor Herdson, that, in a sense, when he is asked to
look at the cases, firstly, even individually, putting
aside the others, and the second step of taking into
account the particular diagnosis in relation to the other
15 matters, he does apply this mantra at those two particular
steps.

When we put to him the question whether the Crown has
raised with him the need, obviously, not to apply that
process of reasoning, but what, otherwise, would be, so
20 far as the court is concerned, an impermissible process of
reasoning, he has indicated to us various things: That he
cannot do that; that he believes that this mantra has a
strong foundation in over forty years of research; and, in
his capacity as a pathologist, I think at one stage he
25 indicated the words that he would be considered to be a
nincompoop if, in fact, that was not applied in those
particular questions.

30 Now, your Honour, that raises a real concern because, no
doubt, we have asked the witness really to, in a sense,
not apply that and to look at essentially the medical
evidence alone.

35 There is what we would submit is a real danger that his
evidence is permeated with this mantra in this
impermissible process of reasoning.

40 HIS HONOUR: Well, if Professor Herdson's evidence is that
he is not prepared to give an opinion about a death taking
into account only the circumstances surrounding that
death, if he says that he cannot do that, then that is
where his evidence will fall, isn't it?

45 ZAHRA: Yes. I understand that that will be his evidence,
so it may be necessary to hear some short evidence about
that on the voir dire.

HIS HONOUR: Yes, Mr Crown?

50 CROWN PROSECUTOR: Your Honour, I do not have those
concerns. In the questions and answers that have been
handed up to your Honour, Professor Herdson has shown,
quite clearly, that he is capable of giving a diagnosis
for each child individually, when asked to, as though that
55 child were the only child.

Your Honour, my intention would then be to ask him,
towards the end of his examination-in-chief, when

5 considering all of the children together, whether, excluding all of those illnesses, diseases and conditions, that can be excluded because of the testing of the children in their life times and the testing that was done after their deaths; whether he can think of any illness, condition or disease that may have accounted for all of these deaths, and I anticipate that he will say, no, that he can't.

10 HIS HONOUR: Evidence along those lines has already been given.

CROWN PROSECUTOR: Yes.

15 HIS HONOUR: Without objection.

20 CROWN PROSECUTOR: Now, I will not be asking him questions that will, I anticipate, elicit what my friend calls the mantra. I have told Professor Herdson that that sort of evidence is evidence that your Honour has excluded. He is well aware of that. I do not perceive that there is going to be any problem, and Professor Herdson is sitting in the back of the Court now and, no doubt, has heard my remarks; but, your Honour, one of the questions that I will ask
25 him, for instance, is this - Professor Hilton has given evidence by way of support for his diagnosis of SIDS for Sarah. One of the questions that I am going to ask him is that, if he had been the pathologist and had performed the post-mortem on Sarah, in the knowledge that there had been
30 two previous deaths and a previous ALTE in the same family, and in the knowledge that there had been two punctate abrasions found below the lower lip and a scratch on the arm, what his diagnosis would have been.

35 Now, that question, of necessity, implies taking into account that there have been two prior deaths and a prior ALTE.

40 HIS HONOUR: Yes, it does, and I do not think that you should do that.

CROWN PROSECUTOR: But, your Honour, one of the things that I have got to do is to deal with Professor Hilton's
45 diagnosis.

HIS HONOUR: No. I raised this problem the other day and Mr Zahra responded, and I think Mr Zahra was correct. I think I misunderstood the evidence of Professor Hilton.

50 There were three questions and answers. They appear at page 648 of the transcript. This was after you had introduced him to the American policy document, and I won't read out the questions and answers, but they begin at line 18 and end at line 44.
55

The operative part of the questions, which proposition was agreed with, was that the factors listed there should indicate to a pathologist the possibility of intentional

5 suffocation. All I take that to mean, and if it is
necessary to do so I shall so instruct the jury, is that
all that does, all that evidence does, is indicate that
the existence of those factors, to the knowledge of the
10 pathologist, should indicate the possibility; in other
words, alert him to the possibility of intentional
suffocation. That is all the evidence means. It does not
mean, and I do not take Professor Hilton to have been
agreeing with the proposition, that, in coming to a view
15 about the cause of death of any child, one may factor in
the fact that there have been prior deaths of siblings
within the same family, within the same carer.

20 CROWN PROSECUTOR: Your Honour, my question at line 46 is
predicated on there being a difference between a diagnosis
of SIDS and a diagnosis of undetermined causes, the
difference being that SIDS is death from natural causes,
whereas undetermined causes implies that it could be from
25 natural or unnatural causes.

30 I anticipate that any pathologist would give evidence that
if he suspected the possibility of suffocation, of
deliberate suffocation, or of accidental suffocation, that
the appropriate diagnosis would be undetermined rather
35 than SIDS.

40 What I have put to Professor Hilton at line 46 is that
because of that difference between the two diagnoses he
ought to have found that Sarah died from undetermined
causes rather than that she died from SIDS.

45 What I wish to elicit from Professor Herdson is his view
that if he had conducted that post-mortem - firstly, that
he agrees with that difference between SIDS and
50 undetermined; and, secondly, that if he had conducted that
post-mortem, and in the knowledge that Professor Hilton
had found the physical findings that Professor Hilton had,
he would have found a diagnosis of undetermined causes
rather than SIDS.

55 There is not much difference between the two, but the
difference is of great significance. They are both death
from undetermined causes, but one acknowledges that it is
death from undetermined natural or unnatural causes,
60 whereas the other one does not.

65 Now, the knowledge that there have been two previous
deaths and a previous ALTE in the same family is, of
course, relevant to that diagnosis. It does not mean that
the pathologist finds, as a fact, that there has been
70 death from suffocation, or even that it is likely. It is
the diagnosis of undetermined causes which is an
acknowledgement of the possibility, as your Honour has
mentioned, the possibility, of death from unnatural
causes.

HIS HONOUR: I wonder whether you can maintain that
distinction any longer, in the light of Dr Beal's

5 evidence? That evidence, of course, has only been given in
the absence of the jury, but she made - most of Dr Beal's
statements were strong statements, but one particularly
that impressed itself upon me was that "We recognise that
a number of SIDS deaths are murder". Now, that does not
10 sound like SIDS being so restrictively defined.

10 CROWN PROSECUTOR: I understood Dr Beal's evidence to be
this, your Honour: That inevitably--

HIS HONOUR: Well, it is an answer she gave.

15 CROWN PROSECUTOR: Yes, I know, but the way, if she gave
that in front of the jury, the way that I anticipate I
would address the jury on it, would be that inevitably -
if I was to address them at all - would be that it was an
acknowledgement that some of the deaths that are
considered by the pathologist to be deaths from natural
causes, namely SIDS, in fact may be homicides, because it
20 is almost impossible to distinguish SIDS and homicide from
suffocation; and that the medical profession recognises
that there is this crossover. It does not mean that SIDS
is the appropriate diagnosis where homicide is suspected
as a possibility. It is just an acknowledgement of the
25 difficulty of distinguishing the two different causes of
death.

30 There are also, no doubt, some diagnoses of undetermined
causes that are pure SIDS deaths; that are deaths from
natural causes, so there is definitely a crossover between
them. But the point that I am trying to make in the
evidence, and the point that I want to make in my closing
address, is to suggest to the jury that Dr Hilton,
Professor Hilton, was not justified in finding SIDS as the
35 cause of death, because of previous deaths and ALTE and
the physical findings on post-mortem.

40 I have put that to him, in fairness. Now, what I want to
do is to lead some positive evidence that will enable me
to say to the jury that there is some evidence to support
what I put to Professor Hilton. It was not just something
that I made up. And the evidence is from some eminent
pathologists that, if they had conducted that post-mortem,
45 there is no way that they would have diagnosed SIDS,
because of that possibility of homicide; and the
possibility of homicide is because of previous deaths and
ALTE, the punctate abrasions and the scratch.

50 HIS HONOUR: Yes, I follow what you are saying but I won't
let you do it.

CROWN PROSECUTOR: If your Honour pleases.

(Court awaiting on one juror.)

55 HIS HONOUR: Is there anything else that needs to be dealt
with in the absence of the jury?

CROWN PROSECUTOR: Not for my part.

HIS HONOUR: I will adjourn then. We will just have to wait until the jury is here.

5

SHORT ADJOURNMENT

CROWN PROSECUTOR: Your Honour, Detective Ryan, at my request, has left the Court to attend to some other business. I should have formally asked your Honour if he might be temporarily excused, but he will be back in about two hours.

10

HIS HONOUR: I quite understand that. That is quite all right, Mr Crown.

15

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Good morning, ladies and gentlemen, one of your number is probably feeling a little flustered. I would assure that member of the jury, whoever it might be, that there is no reason for that at all. We will get through all right today, you will see. Just relax.

10 Yes, Mr Crown?

15 CROWN PROSECUTOR: Perhaps I could indicate that we have two expert witnesses from overseas who have actually been waiting several days to give evidence, and what we propose to do is to complete the playing of the interview tapes, which is only I think about another 10/15 minutes and then to seek to intervene these two overseas witnesses and then, after them, to recall Detective Ryan.

20 HIS HONOUR: Very well. Thank you, Mr Crown.

Now, I think the tape has been left in the position at which it stopped yesterday.

25 Mr Crown, do you have a precise note of where we are? I think it is part way through - I think it is at 902. Anyway, we are on page 241, ladies and gentlemen.

30 CROWN PROSECUTOR: Yes. Perhaps it might be wound back one or two questions. I think that is where we had finished, but just a little bit would be fine.

TAPE 9 CONTINUED TO BE PLAYED

35 HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: I call Professor Peter Herdson.

40 <PETER BARRY HERDSON(10.35AM)
SWORN AND EXAMINED

HIS HONOUR: Q. Please be seated. If you have notes and would like to refer to them in order to answer any question you may do so?

45 A. I have left some notes in the back of the Court, but I imagine we can proceed without them.

Q. Don't hesitate to call for them, if you would like them?

50 A. Thank you.

Yes, Mr Crown?

CROWN PROSECUTOR: Q. Professor, would you please tell the court your full name?

55 A. My full name is Peter Barry Herdson.

Q. Professor, do you currently reside in New Zealand?
A. I do.

5 Q. Do you tell the Court that you are a qualified and registered medical practitioner?
A. I am.

10 Q. And a professor of pathology?
A. Correct.

Q. And a consultant forensic pathologist?
A. Correct.

15 Q. Do you tell the Court that you have been a pathologist now for over 40 years and a forensic pathologist for the past 31 years?
A. That is correct.

20 Q. Do you hold the following qualifications: You are a member of the Pharmaceutical Society of New Zealand, you hold a Bachelor of Medical Science; a Bachelor of Medicine and Bachelor of Surgery from New Zealand. You are a Doctor of Pathology from the North-Western University in Chicago
25 in the United States, a fellow of the Royal College of Pathologists of Australasia, an honorary fellow of the Royal Australian and New Zealand College of Radiologists, and a consultant forensic pathologist?
A. Correct.

30 Q. Whereabouts are you a professor of pathology?
A. I am a professor emeritus in the University of New Zealand, Auckland, and honorary professor of pathology at University of Sydney.

35 Q. Professor, have you practised as a forensic pathologist in a number of different parts of the world?
A. I have.

40 Q. Whereabouts have you practised?
A. In the United Kingdom; in the United States, particularly in Chicago for approximately eight years; and then in Durham, North Carolina for a year.

45 I was foundation professor of pathology in the new medical school in Auckland, appointed in 1969, and I held that post for 17 or 18 years.

50 I was then director of pathology at the King Faisal Hospital and Research Centre in Riyadh, a thing that I didn't know when I went there first, and I was there for approximately six years, including the end of the first gulf war.

55 I was then appointed director of pathology at what was then the Royal Canberra Hospital, and remained director of pathology for the Canberra hospital system for 12 years.

Q. And, doctor, when you were first consulted about this

case, were you the head pathologist for the Australian Capitol Territory?

A. I was.

5 Q. Did you first come into contact with this matter at the instigation of Detective Sergeant Bernie Ryan?

A. That is correct.

10 Q. And was that in November 2001?

A. I believe so.

Q. And did you discuss with Detective Ryan the deaths of Caleb, Patrick, Sarah and Laura Folbigg?

15 A. I did.

Q. And did Detective Sergeant Ryan leave with you a large dossier of material containing medical records for the four children, including their post-mortem reports?

20 A. That is correct.

Q. And including a number of pathological slides that were taken during or shortly after the post-mortem examinations on the four infants?

25 A. That is correct.

Q. And did you look carefully at that material in order to provide some expert evidence, initially to Detective Sergeant Ryan but eventually for the Court?

30 A. That is correct.

Q. And is there any other material that you have had regard to in coming to your opinions?

35 A. Well, apart from - obviously in coming to these sorts of opinions there is a certain amount of research in the literature, but apart from that I have concentrated on the material that you have just summarised.

40 Q. Could I turn first, please, to the first child, Caleb Folbigg. You are aware, are you, that during his lifetime Caleb was said to have had a floppy larynx?

A. I am.

45 Q. You might just tell us the technical medical term that is sometimes applied to that condition?

A. The term that has been used is laryngomalacia.

Q. Could you spell that please?

50 A. I don't think I can, but it is l-a-r-y-n-g-o-m-a-l-a-c-i-a, a big word like marmalade, to confuse the issue.

Q. And, professor, have you, in your own experience, ever had a child that has died from laryngomalacia or floppy larynx?

55 A. No.

Q. Have you ever had any of your colleagues, in any of the positions that you have held over the years, who has

told you of a child who has died from laryngomalacia or a floppy larynx?

A. Not that I am aware.

5 Q. Have you conducted a search in the literature to see if there has ever been a child who has died of a floppy larynx?

10 A. I have, but I have also taken note of some comments by Professor Roger Byard, who did refer to some published work on this matter.

Q. And to your knowledge has there ever been a child who has died from a floppy larynx?

15 A. Not that I am aware.

Q. Could you explain to the Court why, in your view, there has never been a child that has died of a floppy larynx?

20 A. Well, it is my understanding that the concept of a floppy larynx is distinct from inflammation or infection involving the larynx. It is my understanding that it is said to be a congenital abnormality in which there is less cartilage in the larynx than normal, making it less stiff and, therefore, floppy. I have no doubt that there are 25 examples of severely inflamed larynxes, laryngea, which could obstruct breathing; but I am unaware of this concept of floppy larynx ever being established.

Q. As a cause of death?

30 A. As a cause of death, yes.

Q. Now, doctor, I want to ask you to consider this: If you had been the pathologist who examined Caleb's body and you found the things that Dr Cummings found, looking at 35 his case entirely in isolation, what would your diagnosis have been?

40 A. I would make the comment that it is uncommon, certainly not unheard of, but uncommon for a sudden infant death to occur so young.

Q. Caleb, of course, was 19 days?

45 A. He was 19 days, as I understand it; and that would just slightly worry me in coming to the otherwise quite reasonable conclusion of SIDS. I don't really think I can take it much further than that.

Q. Doctor, what do you say about how difficult or easy it is to differentiate at post-mortem between SIDS and deliberate suffocation?

50 A. I would like to include accidental and deliberate suffocation.

Q. Please?

55 A. In my experience it would be virtually impossible. In both instances, there may be virtually nothing defined. It is obvious that in some circumstances of suffocation there are marks, or the circumstances, for example of a body getting wedged into the bottom of a bed or into the back

of a sofa, it is those sorts of things which can help you in coming to a diagnosis of suffocation.

5 It is often mentioned that the presence or absence of particular haemorrhages, which are tiny, the haemorrhages which can occur in the conjunctivae, or on the lining of the lungs, or the heart, and the thymus, various other places, it is often said that that can lead you one way or the other. In my experience it is not helpful.

10 Q. So, you can't distinguish between SIDS and suffocation based on the petechiae?

A. Given nothing else to find, I find it extremely difficult to make that distinction.

15 Q. Now, the findings on post-mortem in relation to Caleb, are you able to say whether or not those findings are consistent with deliberate suffocation?

20 A. I think that - again, I would say consistent with suffocation, because I don't think, in the circumstances, I can distinguish between deliberate or accidental.

25 Q. And what do you say to this proposition: Did Caleb die from a sudden catastrophic asphyxiating event of unknown causes?

A. Given the circumstances and the pathological findings, I think that is the one thing we can be quite sure about.

30 Q. I would like to move now to the second child, Patrick Folbigg. You are aware, from the medical material relating to Patrick, that at about four months of age he had an apparent life threatening event, an ALTE?

A. I am.

35 Q. Are you able to say whether or not that ALTE was consistent with him having been deliberately smothered or accidentally smothered?

A. I think it is consistent with that.

40 Q. And are you able to say whether or not that ALTE arose from a sudden catastrophic asphyxiating event of unknown causes?

45 A. Yes. It is using other words to describe the same thing, yes, that's right.

50 Q. Looking at Patrick's death, again I want you to assume that you were doing the post-mortem examination and that you knew nothing about any other children in the same family. If you had conducted the post-mortem examination on Patrick alone, without any knowledge of other children in the family, what would have been your diagnosis?

55 A. Patrick, as I recall, was eight months old and, therefore, is in the age bracket where SIDS occurs. But I personally wouldn't have come to a conclusion of death from SIDS in any child that had had such a catastrophic medical history.

Q. So, what would have been your diagnosis?

A. I think, at least at the time of autopsy, it would have been undetermined.

5 Q. Are you able to say whether Patrick's death was consistent with having been caused by smothering?

A. In my opinion it is.

10 Q. And are you able to say whether Patrick's death appears to have been the result of a sudden catastrophic asphyxiating event of unknown causes?

A. Yes.

15 Q. Moving now to the third child, Sarah, you are aware, are you, that on post-mortem examination of Sarah, she was found with two punctate abrasions or marks in the skin below her lower lip?

A. Yes, and a scratch on her arm.

20 Q. If you had conducted a post-mortem on a child, on any child as Sarah died, would you have photographed those marks?

25 A. I would have photographed them or had the police photograph them. In my practice in Canberra over the last 12 years it has been pretty common to have the police take the photographs, but I think that any physical abnormality, be it recent or old, in a baby dying in these circumstances should be recorded photographically.

30 Q. Again, if you had been conducting this post-mortem examination on its own and you knew nothing about what had happened to any other children in the same family, so that you are looking only at Sarah's death on its own, what would your conclusion have been in relation to Sarah?

35 A. I think, without knowing exactly what those lesions that you have mentioned are, it is almost impossible to answer that question. If those lesions had not been present, this case of all four fits the--

40 Q. Sorry just pause there. I am asking you to look only at Sarah's death at this stage. At this stage I want you to imagine that you only knew about Sarah?

45 A. Sure. Then leaving out any of the others, this case is close to the criteria for SIDS, but as soon as there is evidence of any trauma, that would ring alarm bells in me. I am lost because I don't know really what the nature of that trauma was.

Q. You are referring to the two marks on the lip?

50 A. Yes, particularly those. Any marks around the mouth or nose or this general area, in the circumstances which we are discussing, can be of vital importance.

Q. What is the significance of Sarah's age? She was ten months when she died?

55 A. She is right in the correct age group for SIDS.

Q. So, what would have been your diagnosis if Sarah was considered on her own?

5 A. Again, it hinges on the nature of those injuries. If they are, what is the word - if they were obvious and apparently significant, then I would be unable to give a diagnosis of SIDS.

10 Q. So, would your diagnosis have been "undetermined"?

A. I think it would have been undetermined, and I would have asked the police to take further measures of investigation.

15 Q. And if you formed the view that the marks were not of any significance--

A. I am sorry?

20 Q. If you formed the view that the marks below the lower lip were not of any significance and considering Sarah's death on its own--

A. I think certainly the possibility of it being SIDS would be high on the list.

25 Q. Would you explain to the Court the practical difference between a diagnosis of SIDS and a diagnosis of undetermined?

A. A diagnosis of SIDS, sudden infant death syndrome, is a diagnosis of exclusion. There may be no positive findings whatsoever. There may be very minor findings, as we have already described; the petechial haemorrhages. There may be minor congestion and fluid in the lungs and a number of other things, which are pretty minor; but they may not be present at all.

30 For example, if there is evidence of an obvious respiratory infection in the child, a pneumonia or an obvious tracheal bronchitis, I would not entertain a diagnosis of SIDS. If there is obvious evidence of trauma I would not entertain a diagnosis of SIDS. But if there are none of those things there I am left wondering. I am secure in saying that there is no other possible cause of death. If I feel insecure in that, then I would say the death is undetermined; the cause of death is undetermined.

35 Q. To summarise what you have just said, is this correct, doctor: That death from SIDS is a diagnosis of death from some unknown natural cause, whereas death from undetermined causes implies a death from some unknown natural or unnatural cause?

40 A. That is correct, and I would make the comment that I hate giving that diagnosis to parents, because I think it leaves everyone up in the air.

45 Q. Which diagnosis?

A. Undetermined.

50 Q. And why do you hate doing that to parents?

55 A. For just the reasons I have said, it leaves everything up in the air.

Q. Does it also bring into play the coronial system?

A. Well, I think it is very unsatisfactory for the coroner.

Q. And?

5 A. All these cases, in most jurisdictions, come to the coroner.

Q. And from your discussions with colleagues, both in Australia and overseas, are you able to say whether many of your colleagues also have the same discomfort about finding death from undetermined causes, because of the effect on the parents?

10 A. I really can't comment on that. I know that a number of very good colleagues do use that diagnosis more frequently than I do.

Q. Now, you are aware, are you, that Sarah was found to have a reddened uvula?

20 A. Mmm.

Q. In your view was that of any significance in causing her death?

A. I don't know, but I doubt it.

25 Q. And you are also aware that Professor Hilton took out the throat area and, after dissecting it, he found that the uvula was displaced. You are aware of that?

A. I am aware of his finding, yes.

30 Q. And he was of the view that that was probably an incidental finding; in other words, that it was not related to the cause of death. What is your view about that?

35 A. I think he is probably correct in that assessment.

Q. Is a displaced uvula something that may have been caused during resuscitation?

A. It is quite possible, yes.

40 Q. Is it also something that may have been caused during the process of removing the throat from the body?

A. I think that's also possible. It is a very - I think you have got to be terribly careful using the term "displaced uvula".

45 Q. The findings in relation to the post-mortem of Sarah, are they consistent with suffocation?

A. I believe so.

50 Q. And what do you say to the proposition that Sarah also died from a sudden acute catastrophic asphyxiating event of unknown causes?

A. I think, given the circumstances, that is true.

55 Q. Might I move now to the fourth child, Laura. The post-mortem on Laura was conducted by Dr Allan Cala?

A. Yes.

Q. Are you familiar with Dr Cala?

A. I am. He was a trainee of mine in Canberra before he came over to Sydney.

5 Q. You are aware, are you, that he found what he described as some mild myocarditis, probably of viral origin?

A. I am.

10 Q. Are you aware that Dr Hilton also looked at the heart and observed the areas of myocarditis?

A. Correct. I have observed them myself.

15 Q. Did you, yourself, look at some slides taken from the heart showing those areas of myocarditis?

A. I did.

Q. And were you able to see the myocarditis?

A. Yes.

20 Q. In your view, what was the significance, if any, of the myocarditis?

25 A. Given the total circumstances, I don't think Solomon, with all his wisdom, can really differentiate the cause of myocarditis from other possible causes of death.

We are well aware that a viral myocarditis, which this almost certainly was, can be lethal. Also, we are well aware that many children with a viral myocarditis do not die, are not particularly ill and recover completely from it. One can only postulate that the findings are consistent with what I understand was a relatively minor respiratory infection in this child a few days before death, and that was probably a viral infection.

30 You can tell I am suffering from one now and I hope not to drop dead in front of you from myocarditis. But I just don't think you can say "yea" or "nay" as to the significance in this particular case.

35 Q. You are aware, are you, of a difference of opinion between Dr Cala on the one hand, and Professor Hilton on the other?

A. I am.

40 Q. Do you prefer any of those two views over the other?

45 A. At the risk of never being allowed to visit Sydney again, I favour Dr Cala's interpretation, given all the circumstances. In other words, he believes that this was an incidental finding.

50 Q. Why is it that you prefer that view?

55 A. It is a definite viral myocarditis but it is not a roaring one. It is fairly diffuse. I have seen sections from various parts of the heart, and in most of those there is this evidence.

There is a little cell necrosis. That means that

individual heart muscle fibres have died, as part of the viral infection. If that were not present, I would be very much more confident in saying that it was totally incidental, but the presence of those occasional necrotic or dead fibres prevents me from saying, categorically, that it wasn't important; but, given the total circumstances, I think it is most likely to have been incidental.

10 Q. And, by "incidental", do you mean not a cause of death?

A. That it wasn't the cause of death.

15 Q. And, doctor, in your experience, as a pathologist, have you had cases where you have found myocarditis completely coincidentally, where it has not been the cause of death, in both adults and children?

A. I have, as well as the opposite, where I am sure that the viral myocarditis was the cause of death.

20 Q. Can you give us a typical sort of scenario of the first category?

A. Where it is incidental?

25 Q. Yes?

A. Well, the cells that we are talking about that are infiltrating the heart, they are called lymphocytes. They are--

30 Q. I mean more of the factual circumstances leading to death, just to give--

A. Well, for example, I have done cases of car accidents where people have been killed at the scene, and I find an underlying viral myocarditis. Now, you might immediately say: Was that the cause of the accident? In other words, did the person have what amounts to a heart attack when they hit the telegraph pole, or were they going to hit the telegraph pole any way? So, it can be very difficult, but there are certainly many examples where people die and subsequently I have seen evidence of viral myocarditis from histology, where I believe it had nothing to do with the cause of death.

45 Q. And some of those examples of myocarditis are more serious and more obvious than the myocarditis in Laura's case?

A. Yes. As I have tried to describe, if in Laura's case there had not been any cell death of heart fibres, then I would be much more confident in writing it off as being totally incidental, but as soon as there is evidence of some cell necrosis, then it raises a question of a possibility.

50 Q. Was the cell necrosis very slight?

55 A. Yes. It was - it was there, and I think each of us who have looked at these slides have seen it, but it wasn't raging.

Q. Now, Professor, you are aware, from the material that you have been provided with, that these children were tested during their life times for a very wide spectrum of diseases, illnesses and conditions?

5 A. I am.

Q. And that all of that testing failed to come up with any disease, illness or condition that these children were suffering from?

10 A. Correct.

Q. Now, putting aside all of those diseases, illnesses and conditions that they were tested for, and that they did not have, can you think of any disease, illness or condition that could have accounted for the deaths of all these children?

15

A. No, I can't.

<CROSS-EXAMINATION

20

ZAHRA: Q. Professor Herdson, you were asked some questions about the floppy larynx?

A. Yes.

25

Q. And you were asked, in your own experience, whether you have come across a condition of floppy larynx which has caused death, and I understand you say you haven't?

A. No, I haven't.

30

Q. And you have had some discussions with colleagues and you don't recall anyone indicating that they had had such a situation?

A. I haven't personally had that.

35

Q. You, however, refer to a published work of Professor Roger Byard?

A. No. It is not his work. From some of his comments, he refers to a publication, which I have not read myself.

40

Q. Professor Roger Byard is a paediatric forensic pathologist?

A. Correct.

45

Q. And he has some world standing?

A. He would be one of the best in Australia.

Q. And in the world?

A. Obviously, if you are the best in Australia, you are the best in the world.

50

Q. You say that, so far as infection to the larynx is concerned, that an inflamed larynx may, in fact, obstruct an airway?

A. Yes. I think that can occur.

55

Q. In the sense that, if it was inflamed, it may obstruct an airway?

A. By being inflamed, it is possible that it is swollen,

and in that way could obstruct an airway.

5 Q. Could it be also so, that if, for example, the larynx was floppy because it had less cartilage, then it may obstruct an airway?

A. I don't believe in that. I'm sorry, I just don't believe in that.

10 Q. But can it be ruled out?

A. If Byard has found someone writing about it, then I suppose you can't rule it out.

15 Q. The only factor that prevents you from making a diagnosis of SIDS is the age of the child, 19 days?

A. Yes. I didn't say that it prevented me making a diagnosis of SIDS, but I would just have my antennae up a little bit at such a young death.

20 Q. But it is, in fact, only that factor?

A. That is - that's the factor that I have alluded to.

25 Q. But you say, so far as the death of SIDS at that age, it is uncommon but not unheard of?

A. Correct.

30 Q. You have been asked questions about whether you can, in fact, tell the difference between a child who died of SIDS or a child who died of suffocation, and you say that, if there are no pathological findings, you can't tell one from the other; is that essentially what you are saying?

A. That is my understanding.

35 Q. So, when you were asked that question: Is it consistent with suffocation, you are, in a sense, answering the question in reference to that statement; in other words, because there are no symptoms, you can't rule out suffocation?

A. Yes. It is just putting words in a different - around the other way.

40 Q. Yes, but what it means, in a sense, when you can't exclude suffocation, is because if there are no symptoms, of course you can't exclude it?

45 A. It is not a lack of symptoms; it is a lack of signs of suffocation.

50 Q. In relation to Patrick and the ALTE, that ALTE, you say, may be consistent with a sudden catastrophic asphyxiating event?

A. Yes.

55 Q. And you cannot determine what the cause of that is, on its medical evidence?

A. No. It occurred when the child was, I think, about four months old, and it resulted in some devastating sequelae, which are consistent with that being the cause.

Q. But there is no medical evidence to indicate, one way

or the other, what the cause of that catastrophic asphyxiating event was?

A. Well, there is not too many causes.

5 Q. Did you understand the question?

A. Yes.

Q. I will ask you again?

10 A. As a child of this age, there aren't too many reasons for knocking off the oxygen supply to the blood - sorry, to the brain.

Q. Epilepsy may cause a seizure associated with - epilepsy may cause a sudden asphyxiating event?

15 A. It can, but one would expect a history of epilepsy before that occurred.

Q. Amongst other things, epilepsy may be caused because of a structural abnormality in the brain?

20 A. That's possible.

Q. And you can't exclude that in this present case?

A. Well, as I understand it, there was no evidence of such a structural abnormality, whatever that means.

25

Q. But it can't be excluded?

A. I really don't know what that means.

30 Q. In the sense that it does not necessarily follow that upon neuropathological examination such a structural abnormality may be found?

A. I'm no neuropathologist, but I would expect that, if it was so severe as to cause that sort of degeneration of brain tissue, it would be pretty obvious.

35

Q. You are not a neuropathologist?

A. I have just said so.

40 Q. And you are aware that Dr Kan, who was a neuropathologist, had, in fact, inspected the slides of the brain?

A. Yes.

Q. And proffered an opinion?

45 A. And - sorry?

Q. And he did proffer an opinion about those slides?

A. Yes.

50 Q. Would you defer to his experience as a neuropathologist?

A. I am not really aware of how good or bad Dr Kan is, and given the clinical situation occurring at four months and the catastrophic results over the next whatever it was, I think it was four months, and the findings at autopsy, I personally would remain to be convinced that it wasn't due to an acute lack of oxygen to the blood - sorry, to the brain.

55

Q. So far as the death of Patrick is concerned, against a background of seizures, the death could have been caused by a seizure?

5 A. Yes, it could have. One would normally expect to find evidence of an epileptic fit causing death; in other words, trauma around the mouth or the lips or whatever, and a variety of other findings, which, as I understand it, were not present; but one could not rule out an
10 epileptic fit.

Q. Particularly in such a young child where the marks, for example, biting her tongue or biting her lips, may not be apparent?

15 A. Well - yes, but they haven't got very many big teeth at that time.

Q. You indicate, in relation to the question of photographing the punctate marks of Sarah, that you would
20 have photographed them?

A. I would have either photographed them myself or caused them to be photographed. It is our normal practice, or at the time that I was working in Canberra it was our normal practice, to take entire body photographs of any
25 unexpected death in a child, and we usually took full body x-rays too. The x-rays were taken by hospital radiographers and read, both by me and by radiologists, and the clinical photographs of the body were taken by police photographers.
30

Q. Do you recall being asked a number of questions by my friend's learned junior approximately a week or so ago?

A. By telephone?

35 Q. Yes.

A. Yes.

Q. Can I just read to you a note of that. This is at page
40 392:

45 "Q. If you had been conducting Sarah's post-mortem examination and you had seen two punctate abrasions under her lower lip, would you have taken photographs of them?"

And the answer that is recorded here:

50 "I'm not a great photographer. I would have recorded it but would not necessarily have taken photographs. If I had noted punctate abrasions, it would have immediately worried me."

A. Well, I think that is putting it in other words; what I have just said.
55

Q. Yes.

A. I wouldn't necessarily have taken them myself, but I certainly would have caused them to have been taken.

Q. You would not necessarily have taken them. You say that that answer relates to not yourself?

5 A. This was a telephone conversation late at night and that was my response at the time. I can only say that if I were dealing with the unexpected death of a child, in which there were any marks, they would be photographed.

10 Q. So far as the punctate marks are concerned, you can't exclude those marks being caused by a person who may not have overly been experienced in resuscitation and those injuries being caused during the course of resuscitation?

15 A. I think it is most unfortunate that we are going around and around on what these marks may have been because, as far as I know, no-one in this Court knows what they look like and, without knowing what they look like, I believe my comments have to be very lacking in value.

20 Q. But, so far as the injuries are concerned, if they were described as extremely superficial injury involving the outer most layer of the skin, a pinpoint, could an injury that has that description be caused by a person who is inexperienced in resuscitation?

25 A. Well, how did Professor Hilton come to the fact that it was superficial in the skin. Did he cut them out? Because if he didn't, he wouldn't know.

30 Q. But you would accept that injuries of that nature could be caused by a person attempting to open her a mouth, for example, during the course of resuscitation?

A. Well, as I keep on saying, yes, of course, because I don't know what I am talking about.

35 Q. Well, in this particular case, would you consider that Professor Hilton is an eminent - an experienced pathologist?

A. Yes, he has had a lot of experience.

40 Q. And if he has indicated that he would place no significance on those injuries, you would respect that opinion?

A. I might disagree with it. He and I have had many disagreements over the years.

45 Q. Assuming that the punctate marks had no significance, or that they may have been caused by resuscitation, then you would say that the pathology in relation to Sarah most closely resembles that of SIDS?

50 A. You are, I think, bringing in comparisons with the other three; but, yes, I did say that - I did agree, I did say that.

55 Q. In isolation. Now, so far as your examination of the slides of myocarditis of Laura are concerned, do you recall whether, in fact, it was in all of the slides of the heart that you observed myocarditis?

A. I can't be positive about that. I can say that I was shown several, or was asked to examine several, slides of

the heart and certainly, in most of them, there was evidence of viral myocarditis.

Q. That is significant in itself.

5 A. Sorry?

Q. In other words, it is significant in itself because it appears to be diffuse?

10 A. Yes. It did appear to be diffuse, and, as I have tried to explain, relatively mild.

Q. If, for example, that myocarditis was in a conductive system of the heart, you would expect that that could, in fact, be fatal?

15 A. That is a very difficult one to come down firmly on one way or the other. I don't think it is well-established in cases of viral myocarditis why, in one instance, as we have already described, you have death arising from it and then in another apparently similar case the person
20 recovers completely. But, of course, if there is inflammation in relation to the conducting system, it has a potential and serious implication

q. And there could be sudden death with such a condition of myocarditis; in other words, there being absent any
25 prior indication of ill-health?

A. Oh, yes, I think so.

Q. When you were asked the question whether you would be
30 aware of any natural condition which could explain the deaths of the four children, you say that you are unaware of any natural condition which could cause the death?

A. That's correct.

Q. By that, is it to be understood that you are aware of
35 no single condition that could cause death?

A. That was the way I interpreted the question.

Q. Again, just turning to the questions and answers that
40 were asked over the telephone about a week ago, can I just read two questions and answers - sorry, three; it is at the bottom of the page, the last two questions and - three questions:

45 "Q. In your view did Professor Hilton, during his post-mortem examination of Sarah, exclude deliberate or accidental trauma?

A. I don't know about that. I would need to go
50 through records, reports he made; his diagnosis of SIDS. So then he did exclude those things. It is a diagnosis of exclusion. He had every right to make that diagnosis when looking at that case in isolation.

Q. In your view, what was the most likely cause
55 of Sarah's death, again looking at her death alone?

A. By herself I couldn't get past SIDS."

Are you aware of that?

5 CROWN PROSECUTOR: I object. I am going to have to make a submission in the absence of the jury. I am sure your Honour knows what my submission is.

HIS HONOUR: Yes, I do.

10 WITNESS: I wonder, your Honour, if I could circumvent the problem by simply saying that, when I said that, it was in the context, and goodness knows I have said it often enough in this Court, that I cannot distinguish between SIDS and suffocation.

15 HIS HONOUR: Now, do you wish to press the question or do you want to ask another?

ZAHRA: I have no further questions.

20 HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Your Honour, I will be coming back to that area that your Honour is aware that I am concerned about, and perhaps towards the end of my re-examination I might raise it.

HIS HONOUR: All right.

30 <RE-EXAMINATION

CROWN PROSECUTOR: Q. Professor, you were asked by my learned friend, in relation to Caleb, about whether an inflamed and swollen larynx could cause obstruction. Do you recall those questions?

35 A. Yes.

Q. Was there any suggestion in any of the material that you saw to suggest that Caleb's larynx had been inflamed or swollen?

40 A. No.

Q. In relation to Patrick, you were asked about - no, sorry, in relation to Patrick's ALTE, you were asked by Mr Zahra about an epileptic fit, possibly accounting for the brain damage that he suffered, and you said one would expect a history of epilepsy prior to the brain damage?

45 A. Yes, you would.

Q. And would one normally expect a first episode of epilepsy to cause the kind of brain damage that Patrick suffered?

50 A. Not in my experience.

Q. You have said that in your view the brain damage that was suffered by Patrick was caused by an acute lack of oxygen to the brain?

55 A. Correct.

Q. Over what period of time would the lack of oxygen have to have occurred to cause that degree of brain damage?

5 A. It would be a relatively short time, but it would
depend on the severity of the ischemia; in other words, of
just how much blood flow was restricted. Obviously, if it
was minorly restricted, it would take longer to cause the
trouble than if it was massively restricted. In the end, I
10 would have thought that, in the circumstances that we are
talking about, there would have been a lack of blood flow
and, therefore, of oxygen to the brain for a period of, it
could be as little as two or three minutes, and it could
be as long as ten minutes.

15 Q. You were asked questions in relation to Patrick's
death about whether death could have been caused by an
epileptic seizure. Were there any signs or symptoms
observed on the post-mortem, or observed during Patrick's
admission to hospital when he died, that were consistent
20 with him having suffered an epileptic fit?

A. Not as far as I am aware.

Q. And would those signs or symptoms of an epileptic fit,
if it had occurred, include things like a vomit in the
25 airways?

A. Very likely.

Q. Swollen airways?

30 A. Possibly.

Q. Are there any other signs of an epileptic fit that one
might see?

35 A. Well, as we have already discussed, there is commonly
trauma about the mouth and it is correct that your
colleague drew attention to the fact that in such a young
baby that may not be as obvious as in an older one. There
may be known specific findings, such as oedema or fluid in
the lungs, but those are the main ones that you have
40 mentioned.

There is also commonly in death from an epileptic fit -
there is a very catastrophic posture of the body in which
the hands are in spasm brought in and the feet, I can't do
it to demonstrate it, but the feet are similarly in spasm.
45

Q. Was there any evidence of any of those signs?

A. Not as far as I know.

50 Q. In your view, does the absence of any of those signs
make it highly unlikely that Patrick suffered from an
epileptic fit when he died?

A. I think that is a fair conclusion.

55 CROWN PROSECUTOR: Your Honour, I have only one further
area of re-examination but I have two further areas where
I would need to seek your Honour's leave; the two small
areas that I have omitted. The area of further
re-examination would be the area that your Honour is aware

of, which I would seek to do now.

HIS HONOUR: Can you relate it to something?

5 CROWN PROSECUTOR: It is the last sentence on page 2.

ZAHRA: I object to that, your Honour.

10 HIS HONOUR: No, I would not allow you to have an answer in that way, but you may have leave to embark upon the other matters.

15 CROWN PROSECUTOR: Q. Professor, in relation to Laura, if a child of her age, which was 19 months, had the kind of mild myocarditis that was observed around her heart, if she was deliberately smothered, what effect would the myocarditis have in relation to her death?

20 A. One would have to say that a heart with inflammation of the nature that we are talking about would be more susceptible to a period of anoxia.

Q. Anoxia being a lack of oxygen?

A. Being a lack of oxygen.

25 Q. So, is this the case: That she would die more easily than a child without myocarditis?

30 A. You would have to run a control trial to really establish that, but I think scientific thought and commonsense would lead you to conclude that a heart with viral myocarditis is certainly not a heart that can get by with less oxygen; it needs more.

Q. Would she be inclined to struggle less?

35 A. I really don't know about that.

40 Q. And, finally, doctor, one area that I omitted to ask you about earlier was: Are you aware whether, from your own experience or from your discussions with colleagues, or from reading medical literature, whether there has ever been three or more thoroughly investigated infant deaths.

ZAHRA: I object.

45 CROWN PROSECUTOR: As I understand it, your Honour has already ruled on this.

HIS HONOUR: Yes, you may ask this.

50 CROWN PROSECUTOR: Thank you. I will start again.

55 Q. Are you aware, from your own experience, from contact with your colleagues and from the medical literature, whether there have ever been three or more, thoroughly investigated, infant deaths from sudden infant death syndrome in the one family?

A. I am not aware of such a finding.

CROWN PROSECUTOR: Yes, thank you.

HIS HONOUR: Now, Mr Zahra, the Crown has entered upon new material; would you like to ask anything arising from that?

5

ZAHRA: Would your Honour excuse me. I don't think there is. Yes, there is no further cross-examination.

HIS HONOUR: Thank you, Mr Zahra. Mr Crown, would you like Professor Herdson to be excused?

10

CROWN PROSECUTOR: Yes, please.

HIS HONOUR: Thank you Mr Herdson you may step down. You are excused from further attendance.

15

<WITNESS RETIRED AND EXCUSED

HIS HONOUR: Ladies and gentlemen, that is a convenience time for us to take the morning tea adjournment.

20

IN THE ABSENCE OF THE JURY

CROWN PROSECUTOR: Just one matter.

5 HIS HONOUR: Yes, Mr Crown?

10 CROWN PROSECUTOR: Your Honour, I just wish to have placed
on the record - perhaps my learned friend might also
indicate his concurrence with this - that the defence have
notified the Crown that IGG and IL-10 are not issues
relevant to the conduct of this trial. The reason for the
importance of that being placed on the record would be
obvious to your Honour, that it is not - neither of them
are areas that the Crown intends to address in the Crown
15 case.

20 HIS HONOUR: Thank you, Mr Crown. Mr Zahra, you have
already made an announcement to that effect, I think,
about IGG.

ZAHRA: Yes. I can now make that same announcement in
relation to IL-10.

25 CROWN PROSECUTOR: The only remaining issue is this. It was
during the cross-examination of Dr Wilcken that I think
Mr cook raised both IL-10 and IGG as issues. I just wonder
whether it would be appropriate for some sort of
concession to be made by the defence in the presence of
the jury that those are not issues that they intend to
30 pursue in the trial.

HIS HONOUR: Do you wish to respond to that now, Mr Zahra?

35 ZAHRA: I don't believe it is necessary, and probably
unfair, to require us to do that in the circumstances. As
I had indicated before, we would not have wanted to have
run this in tandem while we are running the trial, and
because of the rule in Brown v Dunn certainly we had to
make a tactical decision at that point in time when we did
40 not have all the material available. It is only just
become available. It may easily be dealt with by your
Honour in a direction to the jury that no issue has been
raised - no significant issue has been taken, or words to
that effect.

45 CROWN PROSECUTOR: I accept that.

ZAHRA: Your Honour could cure it that way.

50 HIS HONOUR: The Crown accepts what you say. It is probably
one of those - of course we are going to have a mass of
evidence by the end of the trial, and the jury are going
to need summaries of it from counsel, insofar as they rely
on it, and from me; and I think the absence of any mention
55 of any such summary of IGG and IL-10, it is going to
remove it entirely from the jury's mind.

5 CROWN PROSECUTOR: Might I also hand up to your Honour a copy of a letter that we have received from the defence dated 28 January this year. I think that that is not in fact the correct date, it should be 28 April. Perhaps with the permission of the author, Mr Krisenthal, if I could change the month of January to April. It is self-explanatory.

10 (Relevant document handed to his Honour.)

HIS HONOUR: The letter from the solicitor for the defence to the solicitor for the prosecution dated 28 April 2003 will be marked 32 for identification, and will be placed with the file.

15 MFI #32 LETTER FROM THE SOLICITOR FOR THE DEFENCE TO THE SOLICITOR FOR THE PROSECUTION DATED 28.04.03

20 HIS HONOUR: Now, we should be taking the evidence of Professor Berry after the morning tea adjournment.

SHORT ADJOURNMENT

RESUMPTION

IN THE PRESENCE OF THE JURY

5 <PETER JEREMY BERRY(12.04PM)
SWORN AND EXAMINED

10 HIS HONOUR: (To witness) Please be seated. If you have
notes and you would like to refer to them, you are welcome
to do so.

WITNESS: Thank you, your Honour.

15 CROWN PROSECUTOR: Q. Professor, would you please tell
the Court your full name?

A. Peter Jeremy Berry.

Q. Professor, are you a consultant paediatric
pathologist?

20 A. I am a retired consultant paediatric pathologist.

Q. Did you, until quite recently, practise at the Bristol
Royal Hospital for Sick Children?

25 A. Yes. I was a consultant pathologist there since 1983.

Q. Have you been a professor of paediatric pathology at
the University of Bristol for a number of years?

30 A. Yes. In 1991 I applied for and was appointed to the
Chair of Paediatric Pathologists at the University of
Bristol.

Q. Is that a major centre in the United Kingdom for
paediatric pathology?

35 A. I would like to think so. Yes, it is.

Q. Have you practised in paediatric pathology for many
years?

40 A. Yes, indeed. I started a fellowship in the United
States in 1981. My practice has been purely in children's
pathology since then.

Q. Has that required you to carry out numerous
examinations of children found deceased in suspicious
circumstances?

45 A. I have had a particular interest in the investigation
and causes of sudden unexpected death in infancy, both
sudden infant death syndrome and those children that die
unnaturally, either by accident or deliberate intent.

50 Q. Professor, is this the case: You have regularly given
expert evidence in criminal courts?

A. That's correct.

Q. In the United Kingdom?

55 A. In the United Kingdom, that's correct.

Q. Is this correct: You have given evidence many times
for both the prosecution and the defence?

5 A. Yes. I have made it a point, in accepting instructions from whichever side - if I can use that term - approaches me first. I think in this way one maintains a very balanced point of view, and that is why I have done it.

Q. Do you regularly get consulted by both sides?

A. Yes, I do, but not, obviously, simultaneously.

10 Q. I did not mean simultaneously. In different cases?

A. Yes.

Q. Have you been invited, as a speaker, to numerous conferences?

15 A. Too numerous to mention, including - I was once, very nicely, the guest at the Royal College of Pathologists in Australasia when I came down here.

Q. Have you attended numerous overseas conferences on pathology?

20 A. Yes, indeed.

Q. Are you the co-editor of a book on SIDS?

25 A. I am a co-editor of a book describing probably the largest study of sudden unexpected infant death that has been undertaken; probably the most recent large study, yes.

Q. Sudden unexpected infant death, including both the condition that is known as SIDS and unexpected death from other causes?

30 A. Yes, although I should qualify the study slightly. It was a confidential inquiry. For legal and ethical reasons, we excluded those cases that were already under investigation by the police, but it included cases where
35 problems were found subsequently.

Q. I think you are a fellow of the Royal College of Physicians, a fellow of the Royal College of Pathologists and a fellow of the Royal College of Paediatrics?

40 A. And child health. That's correct, yes.

Q. And child health. So, you hold membership of three different colleges?

45 A. Yes.

Q. Professor, the back to sleep campaign is a campaign that commenced in about 1989?

50 A. Yes, it did.

Q. Was that a campaign to encourage parents of young children to put them to sleep on their backs rather than on their fronts?

55 A. That's correct, yes.

Q. Were you involved in the beginnings of that campaign?

A. In the northern hemisphere - I have to be careful here, because I am very aware of the excellent research

done in cot death in Australia and New Zealand - but in the northern hemisphere, the work that led to the back to sleep campaign, as we know it, grew out of some research that we did in Bristol, and we started a back to sleep
5 campaign locally in 1989, and the results were, as I am sure they were in Australia, so dramatic that the government instituted a national campaign two years later and, as you know, it has spread around the world.

10 Q. In Australia, does the name of Dr Susan Beal feature prominently?

A. Dr Susan Beal is one of the great figures of paediatrics and the study of infant death.

15 Q. She, of course, is based in Adelaide?

A. Yes.

20 Q. Now, doctor, at the request of Detective Sergeant Ryan of the New South Wales Police Service, did you have a look at the medical records involved in this case for Caleb Folbigg, Patrick Folbigg, Sarah Folbigg and Laura Folbigg?

A. Yes, I did.

25 Q. Did that include the post-mortem reports?

A. Yes, it did.

30 Q. Did you also study or examine the microscopic slides prepared from tissue samples collected during the post-mortem examinations of Caleb, Patrick, Sarah and Laura Folbigg?

A. Yes, I did.

35 Q. Did you also have access to a large amount of other material associated with this case, which you would be able to itemise, if required?

A. Yes, I did, although my focus was clearly on the medical records and post-mortem material.

40 Q. What can you tell the Court about the difficulty of differentiating at a post-mortem examination between SIDS and suffocation?

45 A. It's very difficult. It is often said it cannot be done, but in a minority of cases of suffocation there will be marks, pinpoint haemorrhages, fresh blood coming from the nose and mouth, these kinds of things, but that is a minority of cases, and so, in the majority, it is extremely difficult, and one is often thrown back on the history and circumstances to alert one to that
50 possibility.

55 Q. Would you explain to the Court the difference between a diagnosis of SIDS and a diagnosis of death from undetermined causes?

A. Yes.

SIDS is a very special diagnosis. It is one of the very few, or if only, occasions when we are allowed to record a cause of death as natural without having found any disease

process to account for it. It is a diagnosis by exclusion. The definition requires that death is not expected; it is sudden. It requires that a thorough post-mortem examination and review of all the
5 circumstances has taken place before that diagnosis is given.

I think you asked me to contrast that with "not ascertained", or - you have another word?
10

Q. Undetermined?

A. "Undetermined". "Undetermined" I would use where there are circumstances which prevent me from using the SIDS diagnosis, which may be factors, things I have found
15 in the post-mortem examination, or matters in the history, which lead me to suppose that death was not entirely unexpected or natural. It embraces the possibility that death could be due to natural disease, and I just was not clever enough to recognise what that disease was. It
20 could be that the death was unnatural, and that might be due to accident; for example, the baby becoming wedged between the mattress and the cot, or, in a few cases, it could be that death was due to a deliberate act. So, those are the three major possibilities that I include
25 within "undetermined".

Q. Doctor, I would like to come, firstly, to the first born child, Caleb Folbigg?

A. Yes.
30

Q. Caleb Folbigg was said, during his lifetime, to have had a floppy larynx?

A. Yes.

Q. What do you say about floppy larynx and about whether or not that, in your view, is recognised as a cause of death in infants?

A. To explain the concept of floppy larynx a little bit, the term is actually a misnomer. It is, I think, accepted
40 now it is not soft cartilage; it is just a little bit of loose tissue around the opening of the larynx, which causes the baby's breathing to be noisy.

It is a little like snoring. Snoring in most people causes stress to those listening to it rather than the
45 individual who is snoring.

There is a great range of severity. There is a very small number of children who develop significant symptoms. They
50 have sufficient difficulty eating that they lose weight, and there are periods of reduced air intake because the floppy larynx leads to changes in the heart and lungs.

Q. Was there any sign of that in this case?

A. No. I was going to come to that, if I may.
55

Q. Sorry.

A. I have searched the world literature to see if I could

find any cases of death at all attributed to floppy larynx, and I came up with none. I did come up with the same paper as Professor Byard cites in his evidence. I am sure he will speak to it. He describes, I think, six children who were admitted to hospital, because they were having periods, apparently, of stopping breathing. They were shown to have this condition, floppy larynx, so they were at the severe end of the spectrum, but none of these children died. They all recovered spontaneously and, so far as I know, according to this paper, were fine after a couple of months. So, the natural history of floppy larynx is that it is a benign condition and just gets better with time.

I am sure it will be put to me whether I think it is possible that Caleb could have died from a floppy larynx. I have a principle that I never say "never", but I think it is extremely unlikely, because he was seen by a paediatrician who judged his symptoms to be clearly not trivial because they were of concern to his parents, but they were not worrying to a doctor.

What I have heard does not lead me to suppose that anybody had missed very severe laryngomalacia.

Q. Sorry, laryngomalacia being floppy larynx?
A. Floppy larynx. I do apologise.

The autopsy did not show any features of severe floppy larynx; the things I have talked about. The baby had been growing normally. The heart and lungs were not adversely affected. I could find in the literature no examples of death due to floppy larynx. So, although I never say "never", it is not my opinion that Caleb died as a result of floppy larynx.

Q. In Caleb's case, an examination of his lungs showed haemorrhage or bleeding?
A. Yes.

Q. There was some testing done of his lungs by means of what is called a Perl's stain?
A. Yes.

Q. Could you please explain to the Court what that involves and what the significance of it is?
A. Yes. I will do my best to be very clear, but please stop me if I am not clear.

It is believed that, when some children are smothered, they may bleed into their lungs and they then may recover. What happens to the blood that was in the lungs is that it is picked up by scavenger cells and turned into a substance called haemosiderin, which stains blue with this magic stain called Perl's Prussian Blue. So, a period of, not accidental, but a period of complete, occlusion of the airway leads to bleeding into the lungs. The blood is converted, over a period of 36 to 48 hours, into

haemosiderin, which is recognised in the Perl's Prussian Blue stain as being blue. One of the explanations, therefore, for a positive Perl's Prussian Blue stain is that there may have been an episode of previous asphyxia.

5

I must quickly say that there are many causes of bleeding into the lungs that would also produce this same stain.

Q. Such as?

10

A. For example, pneumonia; a period on a ventilator. I could go on. Severe hypothermia might do it. There is a number of things. Most of them would be obvious from the history, or obvious from the autopsy findings. So, the belief that has come, in fact initially from some work in New Zealand, but now confirmed in work from the United Kingdom, a fairly recent paper from the United States, is that the finding of haemosiderin in the lungs of babies who have died suddenly and unexpectedly, without an explanation, should lead to investigation to see whether there might have been an episode of smothering or asphyxia.

15

20

Okay?

25

Q. Now, doctor, in relation to Caleb's case, the records that you were shown of his post-mortem examination and the testing that was done afterwards--

A. Yes.

30

Q. --did that disclose that this Perl's blue staining was done of his lungs?

A. It wouldn't have been done at the time, because the work that led us to realise the importance of this was not published until, I think, 1996, so I am not in any way being critical of the original pathologist when I say it was not done at that time.

35

Q. Was it done at a later time?

A. Yes, it was.

40

Q. Is that of any significance in the result; that it was done at a later time?

A. Well, I think it helps us to look at the death perhaps in a slightly different way.

45

Q. I am sorry, is it of any significance in discounting the significance of the result?

A. No.

50

Q. Because of the length of time?

A. No. It is extremely stable in microscope slides. No, the time-lag has no bearing.

55

Q. Was haemosiderin found on the staining of Caleb's lung tissue?

A. Yes, it was.

Q. To what degree was it?

A. I can't - I don't have it in front of me. I think I described it as probably moderate. There was a significant amount there; not the most I have ever seen by any means, but there was a significant amount.

5

Q. Have you, yourself, stained the lung tissue of something like 200 children?

A. It's about 150 out of a big study of 200 infant deaths. Within that group, there were about 130, roughly, SIDS cases. Just one of those had large amounts of haemosiderin in the air spaces of the lungs. So, it is a very unusual finding in SIDS and would lead me to exclude a case with haemosiderin from the SIDS group. I would not use the term "SIDS".

10

Q. So, is this the significance of the haemosiderin which you saw reported in Patrick's lung tissue--

A. Caleb I think.

15

Q. Sorry, Caleb's lung tissue -- that in your view it excludes SIDS as a diagnosis?

A. Yes. I think that when one looks into cases which are found to have haemosiderin in the lungs, a proportion of those will subsequently turn out not to have died naturally. Now, I want to be very clear--

20

Q. Could I direct your attention again to my question. Is the significance of haemosiderin, which is reported in Patrick's lung tissue, that in your view it excludes SIDS as a diagnosis?

25

A. Yes.

HIS HONOUR: You said "Patrick's" again. You meant "Caleb".

30

WITNESS: I apologise.

HIS HONOUR: It was the Crown, not you, Professor.

35

Q. Just so there is no misunderstanding, you understood the question, Professor, to ask about Caleb?

A. We are just talking about Caleb, your Honour.

CROWN PROSECUTOR: Q. In relation to the haemosiderin found in Caleb's lung tissue, was there any significance in which part of the lung tissue it was found?

40

A. Yes. The association with suffocation - and again it is not specific for suffocation; I make that point again - is, if the haemosiderin is found in the air spaces, if you imagine the lung is like a sponge and the holes in the sponge are the air spaces, we find the scavenger cells in that site are the ones associated in some people with a previous episode of suffocation. It does not apply, so far as we know, to scavenger cells that are found, if you like, in the tissue of the sponge itself, what medically is called the interstitia, but actually in the tissue of the lung.

45

50

Q. If you had conducted the post-mortem examination of Caleb yourself--?

A. Yes.

5 Q. --putting aside what happened subsequently to the other children, and if you had made the findings that were made in relation to Caleb, including the finding of the haemosiderin in his lungs, what would your diagnosis have been?

10 A. I would have given the diagnosis of not ascertained or undetermined, as you use it in Australia. I would have prompted further investigation to consider the possibility that there may have been an episode of suffocation previously.

15 Q. Just for the sake of clarity, the haemosiderin that was found in Caleb's lungs was in the air spaces?

20 A. It is actually in both situations. It is the haemosiderin in the air spaces on which I am placing the weight I am placing on it.

Q. And was in his air spaces?

A. Yes, it was.

25 Q. Moving now to the child Patrick, you are aware that at about four months of age Patrick suffered from an apparent or acute life threatening event?

A. Yes, I am.

30 Q. And that, as a result of that, he suffered severe brain damage?

A. Yes.

35 Q. Are you able to tell the Court what sort of period would be required to suffocate a child to death?

40 A. If the occlusion of the airway is complete - and clearly I have no personal or direct experience of this - the generally held belief is that it is a matter of a small number of minutes, perhaps three or four minutes.

Q. Is it known whether or not a child of a very young age, a baby of a very young age, would struggle during that period?

45 A. Yes, they do struggle. I have seen videos of carers actually smothering children. Obviously it is interrupted before it goes to its conclusion and, yes, babies do struggle.

50 Q. Those videos that were made using hidden cameras in hospitals--

55 A. That's correct. This was a technique. It is no longer used, I don't think - or certainly not widely used - as a last resort, when babies were suffering repeated collapses, without explanation. It was done with great reluctance, not by me I hasten to say, with great reluctance, with ethical approval by the police, and other things. It is a very moving video to see but, yes, in answer to your question, the babies do struggle.

5 Q. If the baby were to be suffocated and not die, are you able to say what period of time would be required for the suffocation to cause the kind of brain damage that Patrick suffered?

10 A. I think that's a very difficult question, but the difference between a child being smothered and recovering and being normal, being smothered and recovering with brain damage, and being smothered and not being able to recover, must be fairly small, a matter of minutes, I would suppose. I am not a clinician, but that is the belief of clinicians who work in this area. So, it is a fairly small window.

15 Q. So, are we talking about a period of seconds or a period of a few minutes?

A. I think the presumption is that it would be a period of a few minutes.

20 Q. What do you say to the proposition that Patrick's brain damage could have been caused by a first epileptic attack - a first epileptic seizure?

25 A. I think it is most unlikely that a first epileptic seizure coming out of the blue in an otherwise fit child would lead to this very severe brain damage. Fits are actually quite common in infants. Perhaps those of you who have had children of your own will know about febrile convulsions, where a baby gets a fever and has a fit. You sponge them down, cool them down, and they are fine.
30 There have been a lot of follow-up studies to see how these children get on. They do not suffer that type of damage for two reasons. I think it is very unlikely that a first fit would lead to such brain damage.

35 Q. Is there any significance in the fact that shortly after his admission, after the ALTE, Patrick was found to have a normal EEG and it was only subsequently at the second EEG that there was any brain damage disclosed?

40 A. I'm going to have to say that I'm not an expert on electroencephalograms, but pathologically there are good reasons why these injuries actually evolve. So, the injury is not at its most severe immediately after any asphyxial episode. It sets in chain a series of events that cause further damage.

45 Q. Do you have a view as to what was the cause of Patrick's ALTE?

50 A. I think medically no cause was ever found from a reading of the notes. I think one has to consider the possibility, even taking this case in isolation, that there was some kind of asphyxial episode that caused it.

55 Q. In terms of his death, if you had conducted his post-mortem examination and you knew nothing about what had happened to any of the other children, so you are looking at his death in isolation, what would have been your diagnosis of the cause of death?

A. In isolation I would have given the cause of death as

not ascertained or undetermined, ascribing it to brain damage following an unexplained collapse.

5 Q. When you refer to an asphyxial episode does that include deliberate smothering?

A. Yes.

10 Q. Moving now to Sarah Folbigg, you are aware that the examination was conducted by Professor Hilton and that he found a reddening of the uvula?

A. Yes, I am.

15 Q. And that after dissection of the throat the uvula was displaced?

A. Yes.

20 Q. What is your view about the significance of those two findings?

A. When I read Professor Hilton's report and I prepared my own, I thought it was of such little significance that I did not actually address it. I now realise that a great deal is being made of this uvula and I have thought about it a lot since.

25 First of all, I think the displacement of the uvula, as described, is due to dissection of the throat. I don't think - once somebody is dead, all muscle tone is lost, because the muscle is no longer working, and you remove the tissues from the body. Everything collapses down. I don't think any reliance can be placed upon it.

30 I'm struggling a bit because there is no photograph, so I don't know exactly what Professor Hilton is describing. However, I did again search the world literature, to the best of my ability, looking for fatal cases of displacement of the uvula, and I came across a single case in the French literature, the paper is in French, dating I think from 1963. So, there has been nothing since then. The uvula in that case was abnormal. It was long, and described as malformed, and it was split at its tip. I think there is a distinction here that the uvula in Sarah's case was described as normal sized. Indeed, I have seen it in microscope sections. So far as one can judge from microscope slides, it is of normal size.

45 I think you also asked me to address colour. Perhaps the jury would like to look at their own uvulas this evening to see the colour. They are very vascular, depending on what you are doing. I do not know what importance, to ascribe to that. In microscope slides it is due to dilatation of the vessels on the front side of the uvula. It could be a post-mortem change. It could be because somebody introduced something into the throat, perhaps during the course of resuscitation; perhaps just knocked the uvula, or something like that. I really cannot put any weight on it at all.

55 Q. If Sarah's uvula had been displaced in the period

prior to her death, then in your view might it have had some effect on her speech?

5 A. With respect, this is a lawyer's question, because uvulas, so far as I can determine, do not become
displaced. I cannot give you an answer to that, based on
evidence, on the literature. However, on first
principles, if the uvula was in some way obstructing the
larynx or obstructing the airway, yes, I would expect it
10 to have an effect on respiration, but I think I have to
say that is commonsense, rather than expert evidence.

Q. Would it have an effect on her singing?

15 A. So far as a child of this age sings, I think it is
difficult to envisage a child phonating, producing normal
sounds happily, with a uvula actually displaced and
obstructing the airway, I would have thought.

Q. Would it have an effect on her breathing?

20 A. That is the hypothesis advanced; that this uvula did
obstruct Sarah's breathing ultimately, and caused her
death. I would say, yes, if it was sitting there, it
would. I emphasise this is commonsense. There is not a
body of literature describing what happens if you have a
25 displaced uvula.

Q. If you were conducting Sarah's post-mortem examination
in isolation, and again you knew nothing about what had
happened to any of the other children, what would have
30 been your diagnosis?

QUESTION WITHDRAWN

Q. You are aware of the findings of punctated abrasions
below her lower lip?

35 A. Yes, I am aware of those. I too am struggling because
there is no photograph. I don't really know what I am
being asked to comment upon.

Q. In your view, ought photographs to have been taken?

40 A. I prepare photographs routinely in all cot death
cases. Yes, I think so, particularly if there is something
unusual. Again, in fairness, I must say that one does find
abrasions on the faces of infants who have died suddenly
and unexpectedly, because most of them have been
45 resuscitated. Often, initially in panic by parents, so
nail marks and so on are not infrequent, and the way one
sorts it out is by going into great deal as to what kinds
of resuscitation have been done, even if one had to go to
those extremes of getting the actual mask the ambulance
50 men placed over the child's face, to see if it fits any
marks or abrasions.

Q. Sarah, of course, was ten months of age when she died.
What do you say as to her age and the incidence of SIDS?

55 A. Again, with respect, I think she was about ten and a
half months, which shifts it. I think the figures are
about 80 per cent of SIDS have taken place by six months
of age and about three per cent or less take place after

one year of age, so she is in an unusual age group for SIDS, and that would cause me to look at it a little bit more carefully. It certainly would not exclude it from the SIDS category.

5

Q. If you had been conducting this case in isolation, this post-mortem in isolation, what would have been your diagnosis?

10

A. I probably would have, in isolation, given the cause of death of SIDS, but with the slight misgiving about Sarah's age.

Q. I think that you were in the back of the courtroom during the evidence of Professor Herdson?

15

A. Yes.

Q. You heard him say that he has a degree of discomfort ascribing "undetermined" as the cause of death because of the effect that that has on parents. Are you able to speak to that at all?

20

A. Yes, I can speak to it. My background is very much in helping parents. I came to all this via cot death, SIDS, and researching that. I know that to use the term "undetermined" or "unascertained", certainly in the jurisdictions I work in, and I believe here, will trigger an inquest, so one does this with great reluctance because it does cause distress to families. I know that the organisations that represent families do not like us doing it.

30

My reply to that, and please stop me if I am going into more detail than you want, is that what we must do is go as far as we can to protect those parents who have lost their children suddenly, tragically and naturally, that is with SIDS, from being tarred, as it were, with the same brush as those very small numbers of carers who may actually have harmed the child, so, for me, using "unascertained" or "undetermined" carefully and responsibly, actually protects SIDS parents, although I do know that it puts them through a certain amount of pain at the time of the inquest, and parents have said to me, if the inquest is presented to them in the right way, actually it is a comfort for them to have gone through that process and been thoroughly investigated, and that stops the kind of tittle tattle that goes in the community when a SIDS death takes place.

35

40

45

Q. Moving now to Laura, the fourth child, you are aware that there was a finding of myocarditis in relation to Laura?

50

A. Yes, I am.

Q. And you yourself saw slides of her heart?

55

A. Yes, I did.

Q. What, in your view, is the significance of the myocarditis?

A. It is extremely difficult. As with the other experts,

I entirely agree it is consistent with myocarditis consequent on the relatively mild viral infection that Laura had in the days before her death. I think its significance is that, in isolation, it presents an explanation for the death. It is not a certain explanation because it could be an incidental finding, but I think, in isolation, most pathologists would probably have ascribed Laura's death to myocarditis. That is in isolation.

Q. Is her death also consistent with suffocation?
A. Yes, in that there are no findings to exclude suffocation.

Q. If there was somebody like her who had myocarditis to the degree that she had, who had been suffocated, what would be the effect of the myocarditis?
A. Again, I am moving out of the area where there is literature. The classical scenarios of dying suddenly with myocarditis are young athletes, people swimming, people running, young servicemen doing strenuous activity. Suddenly their heart takes on an abnormal rhythm and they drop down dead. So, there is evidence of people having myocarditis as a result of a mild viral infection who are stressed. This may be the straw that breaks the camel's back and pushes the heart into an abnormal rhythm that causes their death.

I think it is highly possible, indeed probable, that if a child who had myocarditis was subjected to a severe stress such as an asphyxial episode, then this might precipitate an abnormal beat of the heart leading to that sudden death.

Sorry, that is a long answer to your question. Yes, it might facilitate death by suffocation.

Q. In relation to Laura, were the findings also consistent with death from suffocation?
A. Yes.

Q. And in relation to Sarah was the death also consistent with suffocation?
A. Yes, it was.

Q. You have said, generally, people die of myocarditis who are engaged in athletic activity.

OBJECTION.

HIS HONOUR: That can be clarified.

CROWN PROSECUTOR: Q. I think you said that the classic scenarios of people who subsequently die from myocarditis are young athletes, people swimming, people running, young servicemen doing strenuous activity. Suddenly their heart takes on an abnormal rhythm?

A. I think I should say a classical scenario. There are

also people who are clearly ill from myocarditis, and the heart muscle is so damaged the heart cannot pump properly, and those people will find their way to hospital and recover or not, as the case may be.

5

Q. If you accept that Laura showed no signs of that and that the day before her death she was acting physically in a normal manner so far as her parent, her father, was concerned and, as shown on a video, what do you say is the significance of a suggestion that she died during her sleep?

10

What I am trying to ask you, Professor, is this: It was said, according to the version of the accused, that she died during a sleep period, not during a period of abnormal activity. Is there any significance in that?

15

A. As a pathologist, that does not help me either way. I think people with myocarditis may die suddenly in their sleep, but I think a clinician might be better able to help you with that than I am.

20

Q. Now, Professor, you also are aware that there were an extensive array of tests that were conducted upon these children during their lives and, indeed, on their blood samples after their deaths, which excluded a whole host of illnesses, diseases, syndromes, conditions. Putting all of those aside that they were tested for, can you think of any condition or illness or disease or syndrome that could have accounted for the deaths of these children?

25

A. No, I can't think of any recognised medical condition that could have caused the sudden death or collapse of these previously well children in the context of this particular family and the investigations that have already been done.

30

35

Q. Professor, are you aware of any substantiated case where there have been three or more SIDS deaths in the one family?

40

A. There were some reports many years ago which now no longer stand scrutiny, but I am unaware of any families with - I think you said - three or more deaths from SIDS in what I might call the contemporary literature and up-to-date literature, nor have I encountered any in my practice or research.

45

Q. Putting aside the congenital or familial or genetic tests that were conducted on these children, are you aware of any case in which there have been three or more children who have died unexpectedly and suddenly from some other illness other than SIDS.

50

I think that question is a bit unclear.

A. I think I understand it. I'm personally not aware of any kindreds where there have been sudden deaths of previously fit children due to another medical condition that has affected three or more children. That's not to say they don't exist, but I'm personally unaware of any in the literature.

55

5 Q. Does that mean that you have not had any yourself, you are unaware of any of your colleagues having come across any and reported them to you, and you are not aware of any in the medical literature?

10 A. That's correct. My experience, knowledge of disease, is that fatal diseases are not 100 per cent instantly fatal in every case. So, some of the genetic conditions, for example, that were excluded, have very clear presentations. They don't, in fact, present with sudden death of a previously well child.

15 I could elaborate if you wish me to, but I will leave it there if you don't.

Q. I would ask you to elaborate, doctor.

OBJECTION.

20 ZAHRA: As I understood what Professor Berry was saying, I think his first answer was that there was no research that he was aware of. I'm unsure as to whether the question relates merely to his own experience or whether he has excluded - in other words, that he has excluded all other research; in other words, whether he has researched the literature to exclude multiple natural causes.

30 HIS HONOUR: That is a matter that can be investigated. I will permit the question.

CROWN PROSECUTOR: Q. You offered to elaborate on your last comment, and I would ask you to elaborate?

35 A. I wonder if you can help me if there has been discussion of emCAD in this Court, or not?

Q. No, we have not.

HIS HONOUR: Q. Yes, there has been.

40 A. Just, as an example of a genetic condition that might run in a family that causes sudden death, there is something called emCAD. We do not need to go into it. It has been excluded, as I understand it, in this case. But those children do not present, generally speaking, as SIDS; they nearly always have a prodromal, an illness preceding their death, which is very characteristic. Two times out of three I can diagnose emCAD before I start the post-mortem from the history alone. So, what I am trying to say is that most illnesses have a period of illness before the child dies. The death is not instantaneous.

50 Q. Is that what you meant when you said "prodromal"?

55 A. Yes, a period of illness beforehand, so children do not just drop dead, as it were, of diseases and produce kindreds with multiple SIDS-like deaths. So, in this case, one of my anxieties is that there don't appear to be significant illnesses before these children's collapses.

<CROSS-EXAMINATION

ZAHRA: Q. Professor, you referred to a paper, a research paper, that you have read subsequent to a statement by Professor Byard?

5 A. Yes, I read it beforehand. In fact, I allude to it in my report.

Q. That report, or research report, indicated that in six cases there had been the cessation of breathing with, in fact, a floppy larynx?

10 A. Yes.

Q. Could I take you to the issue of, perhaps, haemosiderin?

15 A. Yes, please.

Q. Do I understand the essence of what you are saying about haemosiderin is that, in a sense, it, itself, does not make the death suspicious?

20 A. Oh, if you find haemosiderin without a clear explanation in the history, or from the post-mortem examination, then, yes, it would make me suspicious.

Q. Do you recall giving evidence in a matter of Clarke?

25 A. Yes, I recall it very well.

ZAHRA: Would your Honour excuse me a moment?

30 HIS HONOUR: Mr Zahra, if you need a few minutes to gather your thoughts--

ZAHRA: I have found it.

35 Q. You were asked this question:

"Well, what are the unusual or would you say suspicious findings which led you, Professor Berry, to say, in this particular case, 'Christopher's death would not be regarded as SIDS'."

You have answered:

45 "The finding that would lead me to call Christopher's death unascertained is the finding of haemosiderin in the lungs, and when I used the 'unascertained' I was very clear. This does not mean that it is a suspicious death. It means that there is something unusual and I haven't determined the cause of death, which might be natural or unnatural or still, in fact, could be SIDS. But I'm just not prepared to use that term because there are unusual findings."

55 A. Yes. What I was referring to there is I said I would call it "unascertained", and I then went on to explain what I meant by "unascertained", which is that "unascertained" does not necessarily mean that the death

is suspicious. So I think I explained to the jury that it could be due to natural disease, accident, or some deliberate harm.

5 Q. What about the general proposition that I put to you a moment ago that the mere finding of haemosiderin does not make a death suspicious?

10 A. The mere finding. I will have to go into context with you on this.

15 Let me rephrase that. The mere finding does not make it suspicious, but I think, when you have eliminated things in the history and you have eliminated causes from the post-mortem, then this does raise suspicion.

20 In the particular case you allude to, and I am looking anxiously to see if I am allowed to refer to particular details of that case - there is no difficulty? The child had had an episode of bleeding from the nose and, I think, mouth that was a sufficient cause, in my view, for the haemosiderin in the lungs. The child had choked on that blood some days before death, so that's why my view in that case is that it was not suspicious. There was an explanation in the history.

25 Q. Bearing in mind the length of time that this post-mortem of Caleb was, in fact, carried out many, many years ago, is there a danger of applying present standards of post-mortem investigation in unexplained children's death in matters that would have occurred this period of time ago?

30 A. I think there is a danger of not applying present standards. I am sure you would not ask me not to apply present day standards.

35 Q. What I am putting to you is that in this particular case the pathologist is since deceased. What you are saying is that, in your current practice, if there was haemosiderin, you would undertake further investigations?

40 A. Yes.

Q. The question is obviously why was that not done in the present case, which obviously cannot be answered?

45 A. I did try to explain to the jury that I was not being critical of the original pathologist. I did not know that he was. I did say that I was not being critical because the research work that he had led us to do, these stains, was not published until 1996.

50 Q. It may be that, in fact, the original pathologist should have, in fact, undertaken some other inquiries and those inquiries may have given some valid explanation for haemosiderin?

55 A. As I said, I think they are obvious from the history, or from the post-mortem. I am trying to think of what investigation he might have done. The haemosiderin is really a screening test, I think, for picking out problematic cases.

Q. But, so far as the presence of haemosiderin is concerned, it makes you want to enquire further?

A. Absolutely.

5

Q. Rather than being a proof of suffocation?

A. Oh, absolutely. I wanted to make it quite clear. I think it is quite clear in my report. The significance of the haemosiderin is that it takes Caleb out of the SIDS group by contemporary standards. It is not diagnostic of suffocation. Because of the moderate nature of the haemosiderin and because of the absence of an episode I can point to as being a possible asphyxial episode before death, I have not put a great deal of weight in my report on - I am trying to phrase this correctly - I have not emphasised that as an indicator of suffocation in Caleb's case, but it is significant that it makes this an unusual death that should not be classified as SIDS and should be further investigated.

10

15

20

Q. But it should not be used as proof of suffocation?

A. It is not proof of suffocation, no, but it is a finding that is consistent.

25

Q. In the sense that the finding of haemosiderin is a matter that warrants further investigation and is not proof of suffocation?

A. No. I would absolutely concur with that. I hope I put some emphasis on that in my report.

30

JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: I do not know if Professor Berry is
aware of our practice, and if it is the same in England:
We are not able to confer with him during
cross-examination.

WITNESS: I would not presume to confer.

10 ZAHRA: That is only for the party calling him. I presume
we are able to speak to him during the adjournment.

LUNCHEON ADJOURNMENT

RESUMPTION

5 ZAHRA: Q. Professor, can I take you to Patrick's ALTE. Is it possible that that ALTE was the manifestation of a first epileptic seizure?

10 A. In my experience, it would be extraordinary, but my experience as a pathologist is that I don't see brain damaged children as a first presentation of epilepsy. I think, in a way, because the pathology in Patrick's case was some way down the line, that might be a question better put to a clinician but, in my view, it would be an extraordinary presentation of epilepsy.

15 Q. If it were the one and only seizure?

A. For a first seizure I think it would be extraordinary, yes.

20 Q. You understand the history of the child between the time of the ALTE and the time of death was that, in fact, there were multiple seizures?

A. Yes. I think that's quite a common manifestation of an hypoxic ischemic, that is shortage of oxygen and blood to the brain, type of brain injury.

25 Q. In fact, the brain damage that was observable at the time of death--

A. Yes.

30 Q. --may be attributable to the subsequent seizures, not necessarily the first of them?

35 A. I think the bulk of the damage, which I don't know if it has been described to the jury yet, is something called laminar cortical necrosis, but the damage at the back of the brain, which caused the blindness and so on, that appears to be consequent on the first episode and I think was well-documented as developing in various scans.

40 Q. You understand that there was, in fact, a seizure whilst the child was at the hospital after being taken there for the ALTE?

A. Yes. I would be surprised if a child who had suffered brain damage in such a profound ALTE didn't have subsequent fits.

45 Q. But what I am putting to you is that we can't differentiate between that brain damage being caused, for example, if there was a first epileptic seizure at the home, or whether it was caused by the first seizure in the hospital?

50 A. I think, and again you are drawing me slightly into clinical matters so please correct me if I have misunderstood it, but I think, very shortly after the first admission, the child was found to have blood protein and sugar in the urine. That is an indication of a child who has suffered severe hypoxic injury at that time, which is severe enough to damage not only the brain but also the kidney.

55

Q. You are not a neuropathologist?

A. No. I had some - I started my pathology career actually as a trainee in neuropathology but I would not call myself a neuropathologist.

5

Q. You would have to defer to the experience of the neuropathologist who examined the slides, Dr Kan?

A. I would defer to a neuropathologist in matters of findings and observation in the brain slides, but I would reserve the right to interpret those findings in the light of my specialist expertise as a children's pathologist.

10

Q. But, so far as interpreting the slides is concerned--

A. Yes.

15

Q. --you would defer to Dr Kan?

A. I don't know if it is Dr Kan.

Q. Dr?

20

A. I have a summary of a neuropathology report in my notes.

Q. You can't exclude the possibility that there was, in fact, a first epileptic seizure at the home that might have been caused by a structural abnormality of the brain?

25

A. I listened to your questioning of the previous witness. If there was a structural abnormality of the brain, then I would expect that the neuropathologist would find it. What I would accept is that in many individuals who have epilepsy, there is no structural abnormality of the brain that we can find.

30

Q. The neuropathologist in the present case has not excluded the possibility of there being structural abnormalities in existence that were not apparent in the examination of the slides?

35

A. I would be very surprised if a neuropathologist missed a structural abnormality of the brain because that is their forte.

40

Q. You would have to defer to his experience in that regard?

A. I will repeat my answer. I think what a neuropathologist is looking for is to find structural abnormalities in the brain. I don't understand his answer, if that is what it was, unless he is implying that it was so small he missed it, or he is referring to the situation where people who have seizures have no abnormality at all to be found, which is an electrical abnormality.

45

Q. The cause of death of Patrick may have been consequent upon a seizure?

A. It may have been.

50

Q. Given the history of seizures?

A. It may have been that is the ultimate cause of death.

Q. Yes.

A. All I would trace his death back to, that first ALTE episode, the final episode.

5 Q. It would be consequent upon a seizure?

A. Could be.

Q. Could be consequent upon a seizure?

10 A. It could be.

Q. You have been asked a number of questions in relation to each of the children that you could not exclude suffocation?

15 A. That's correct.

Q. Do I understand that your answer in relation to each of the questions is based upon a statement that in suffocation there can be no observable findings and consequently these deaths could be consistent with suffocation?

20 A. I think the answer is based on the absence of disease processes that - recognised disease processes, which lead to death, with the exception of Laura, and the possibility in isolation that each of those cases might have died from suffocation.

Q. But, again, so far as the positive findings of suffocation are concerned, in relation to each of the children we don't have those?

30 A. Confining myself to the pathology, that is correct, and taking each case in isolation.

Q. Can I ask you actually about the myocarditis? Do you recall whether, in fact, in all the slides that you saw before, myocarditis was present?

35 A. Yes, I think it was. I went back and relooked at all the slides before I came over, and I think I would describe it as a moderate myocarditis.

Q. But quite diffuse, in a sense, in that it was present in all the slides you observed?

40 A. Yes. I don't think - its significance is not related to the quantity that is found, but I accept your observation.

45 Q. It is significant that it is obvious?

A. I don't think it is, particularly. I don't think the patients who die suddenly with myocarditis necessarily have more or less than patients who survive.

50 Q. I was about to ask you that. It may be, in a sense, there could be a small amount of myocarditis, but if it is in, for example, the conductive system, it could be fatal?

55 A. Yes, it could be serious.

Q. There may be a very small amount of myocarditis, but if it is in an area such as the conductive system, then that could be fatal in itself?

A. I believe so. It just requires sufficient to set-off an abnormal beat of the heart. Similarly, quite diffuse myocarditis may not lead to death.

5 Q. You indicated that one scenario of myocarditis is, for example, an athlete who has stressed that person's heart, and the myocarditis might have been such as to cause sudden death?

A. Yes.

10

Q. However, at the same time you don't exclude the possibility of a person dying of myocarditis in their sleep?

15

A. I didn't exclude it. I think - again, I suggested it is a question perhaps more appropriately put to a clinician, but I personally, as a pathologist, could not exclude that.

20

Q. When you were asked to think of any recognised medical condition which could explain the deaths of her four children, is it to be understood that your answer was based on thinking of a single, recognised medical condition?

25

A. Yes. There are several elements to that single condition, so it has got to be a condition that causes sudden death, in a previously apparently well child, and it has got to be a condition that leaves no trace at post-mortem examination.

30

Q. You understood that question when you answered that question?

A. Single cause; something genetic; whatever.

35

Q. Single in the sense of a single cause, as distinct from separate causes?

A. Yes

<RE-EXAMINATION

40

CROWN PROSECUTOR: Q. Professor, you were asked some questions about some evidence that was given in the Clarke case?

A. Yes.

45

Q. That was a case, was it not, in which you gave expert evidence for the defence?

A. I was instructed by the defence, but, of course, I give my evidence to the Court.

50

Q. And you were asked some questions about Laura's myocarditis?

A. Yes.

55

Q. And the significance of it. And you said that it depends whereabouts, what part of the heart it is affecting, and how diffuse it is. Did you see any necrotic cells in Laura's myocarditis?

A. It is one of the reasons I went back. Some experts

say they have seen necrosis - I think Professor Byard says he has seen it in some slides, not others; and it is a bit like the Emperor's clothes: I couldn't convince myself actually that I could see any necrosis at all. Maybe I
5 got a blind spot. It may be that I have to have a higher level before I will diagnose necrosis of muscle cells, but my view is that I didn't see any. I may be wrong.

Q. Necrosis, of course, being dead tissue?
10 A. Yes. Yes.

Q. And Mr Zahra also asked you about the significance of myocarditis in an important part of the heart,
15 particularly the conductive centre?

A. Yes.

Q. Was there any myocarditis in Laura's conductive centre?

20 A. As far as I am aware, it was not specifically studied. A study of the conducting system is an extremely time-consuming and an elaborate affair, and I think it wasn't undertaken in Laura's case.

Q. You also, in relation to Patrick's ALTE, said that, in your mind, you would trace his death back to the ALTE?

25 A. Yes.

Q. What did you mean by that?

30 A. What I meant by that is that he, if one accepts that the death was due to an epileptic event, then that was due to the brain damage that was sustained at the time of the first ALTE. There is an alternative explanation, which is that death was due to the same type of event as caused the first ALTE. In other words, another episode.

35

Q. Another episode of asphyxiation?

A. Yes, possibly.

40 CROWN PROSECUTOR: Your Honour, I have one further question that does not arise from cross-examination. I think, for abundant caution, I should tell your Honour and my learned friend what it is in the absence of the jury.

45 HIS HONOUR: All right. Ladies and gentlemen, would you mind withdrawing just for a few minutes please. I don't think we will keep you long.

JURY EXCUSED

50

IN THE ABSENCE OF THE JURY

HIS HONOUR: Will it be all right for Professor Berry to remain?

5

CROWN PROSECUTOR: Yes. I would like to ask him on the voir dire.

HIS HONOUR: Yes, I understand.

10

<EXAMINATION ON THE VOIR DIRE

CROWN PROSECUTOR: Q. Professor Berry, in answer to questions of mine, towards the end of the examination-in-chief, you spoke about how most illnesses, diseases, et cetera, of children don't result in sudden death; they result in a pre death period of illness?

15

A. And then findings at the post-mortem examination.

20

Q. And then findings at the post-mortem. My question to you in relation to that evidence is this: To your knowledge have you ever, yourself, come across or have you read in the literature or have you heard of a case in which there have been three or more sudden deaths of young children from any illness or disease where there has not been a preceding period of illness or disease.

25

HIS HONOUR: Is this three or more children in the one family?

30

CROWN PROSECUTOR: Q. In the one family?

A. In the one family and from the same disease.

Q. From different diseases.

35

A. From different diseases?

Q. In other words, has there ever been a family, to your knowledge, in which there have been three or more sudden deaths?

40

A. Yes.

Q. In the one family, not preceded by any period of illness?

45

A. It would have to be a very strange disease, and about the only one I can think of is something that I think has been discussed and discounted, which is prolonged QT syndrome, where you might conceivably get one child, but in fact, looking at the literature, there aren't families of three, and many of the children who have apparently died - or there are very few children in the literature - but some of those who died suddenly and unexpectedly, when you go back and look at their history, they have clearly had episodes before. So, that is a roundabout way of saying, no, I do not know of any disease that causes instant death, leaves no trace, and leaves multiple deaths in the family.

50

55

Q. I am not just asking you about one disease?

A. Yes.

5 Q. In the one family. What I am asking you about is if, to your knowledge, you have ever come across, either yourself or in the literature, a single family where there has been three unexpected sudden deaths from any cause, from any natural cause?

10 A. I am struggling to think of one disease that could do this, let alone three separate diseases that could do it in the same family. And there will be families, for example, if one goes to Bangladesh or Africa or something, where one child dies of cholera, one dies of measles, and one dies of something else; they won't be unexpected
15 deaths, and they won't be deaths undetermined by post-mortem examination, but can I think of some obscure diseases where there have been three separate diseases or two or one in the same family? No.

20 CROWN PROSECUTOR: I would seek to lead that evidence, your Honour.

HIS HONOUR: Mr Zahra?

25 ZAHRA: Might I ask some questions?

HIS HONOUR: Yes you may ask some questions.

30 ZAHRA: Q. Doctor, has this proposition come as a surprise to you today?

A. Yes, I think that's fair to say, yes.

Q. So, you haven't particularly researched this issue in your preparation for giving evidence?

35 A. What I did do was search the literature for multiple infant deaths, multiple sudden infant deaths.

40 Q. You haven't looked for research papers in relation to whether there have been multiple deaths caused by different causes?

45 A. I think I would have, with respect, pulled them up. If the search is for multiple infant deaths, then "infant deaths" and "multiple" would come up in the search of the literature.

Q. So, in a sense, if, for example, there had been a research paper where one was looking at three deaths by different causes, that would have popped up?

50 A. I believe so.

Q. In a sense what you are relying on here is an absence of any research paper on this topic?

A. I think that was my - that was probably the question, wasn't it?

55

Q. Yes.

A. Yes.

ZAHRA: I have nothing further.

<CONCLUSION OF EXAMINATION ON THE VOIR DIRE

5 HIS HONOUR: What do you say about whether the Crown should have leave to ask?

10 ZAHRA: Your Honour, this witness, I understand, is expected to fly out. This is new to us. We have disturbed our own expert today, on holiday in Tasmania, three or four times - three times, with new material that has come to us today. I don't know how he tolerates us. In fact, we just left him at lunchtime, saying "We hope we will not ring you again" and he said "I expect you will call me in 15 two hours".

We have not complained much about this. It almost has a Pavlovian effect - whenever your Honour's tipstaff hits the door, at this time we get new material.

20 We can't research this, and the expert material is based on the fact that, really, there is no research paper, but the question is really quite loaded, and the answer would tend to suggest that literature or research has excluded it, when it does not appear to be the case, but your 25 Honour, at this late stage, we can't address this.

CROWN PROSECUTOR: Your Honour knows our submission. It comes directly out of the Professor's report. His 30 conclusion begins with the sentence:

35 "The sudden and unexpected death of three children in the same family without evidence of a natural cause is extraordinary."

HIS HONOUR: I think it also comes out of the model question that was posed for the three relevant experts, going to the question whether there was a single disease that--

40 ZAHRA: Yes. It is quite clear that up until now we have proceeded on the basis that we are talking about a single condition.

45 HIS HONOUR: I think that it is a matter that you can cope with, Mr Zahra. No doubt your expert will be troubled when you get in touch again, but I think you can manage.

50 May we have the jury, please.

You may cross-examine on that line, or any other lines.

ZAHRA: There was another question that I would seek to ask, but I need not ask it in the absence of the jury.

55 HIS HONOUR: Very well.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Q. Professor, in your
evidence-in-chief, in answer to questions by me earlier
today, you gave evidence that you had never come upon a
family in which there had been three or more SIDS deaths?
A. Yes.

10 Q. You also gave evidence that you couldn't think of a
single disease or illness that could account for the
deaths in this family. What I want to ask you now is this:
Have you, yourself, in your own experience, had cases, or
15 heard of cases from your colleagues, or read about cases
in the medical literature, in which there have been three
or more children in the one family who have suffered
sudden death, leaving no traces of obvious injury or
disease, and without any previous period of illness, from
20 any combination of diseases or variety of diseases - not
just the one disease - but any variety of diseases? Have
you ever come across that sort of situation yourself, or
through your colleagues, or in the medical literature that
you have searched?

25 A. I am struggling to think of conditions that cause
sudden unexpected death with no preceding illness and
nothing to find at post-mortem examination. If I could
think of three, these would be very rare diseases and I am
unaware - I have never encountered - a family where there
30 have been three or more deaths from such different
diseases, nor am I aware of any in the literature from my
reading of the literature on multiple sudden infant
deaths.

35 Q. What sort of a search have you made of the literature
prior to coming to Australia to give evidence in this
case?

A. This is a database called Mediline, which essentially
contains references to all the medical articles that have
40 been written since the 1960s, and you can select articles
by putting in particular words, and so one might put in
"sudden infant death" as one search criterion, and then
you would put "multiple", to pull up any paper that is
indexed under "multiple infant deaths", and some papers do
45 come up, as you will - Dr Susan Beal, for example, has
written on this subject, and I am sure you will hear from
her. A paper by Professor John Emery. There are other
papers on this subject. But diseases that really cause
sudden death, without preceding symptoms and without
50 leaving traces from which you can make a diagnosis at
post-mortem, three different ones in the same family, I am
unaware of that.

Q. And the Mediline database that you have spoken about,
55 is that one which is used by medical practitioners around
the world?

A. Yes. It is the standard database.

Q. And it is universally recognised as the best medical database in the world?

5 A. I think that's true. There are other medical databases, and one can look in others, but it is the absolute standard one that everybody uses, yes.

HIS HONOUR: Mr Zahra, do you wish to ask any questions?

10 ZAHRA: Q. Professor, I do understand from what you have just said that you have not researched this particular aspect yourself?

A. Are you asking me whether I have looked at it in my own cases?

15 Q. Yes.

A. I think these events are so rare that the answer to that is, no, I wouldn't have the material.

Q. Yes.

20 A. Obviously, I have looked through my own cases for multiple infant deaths, but it is not something - it would require a national study.

Q. But that is not something that, do I understand from what you are saying, you have researched particularly yourself?

25 A. Well, let me put it this way: The book that was referred to earlier, of which I am a co-author, looked at all the unexpected infant deaths from five health care regions over a period of three years. That is equivalent to every infant death taking place in England and Wales over a 12 month period, and I read all of those 450 post-mortem reports, with the histories and so on, and there were none of the kinds of cases you are talking about amongst those. So, if you say, have I researched it, that would be the sort of area I would research.

Q. Doctor, when you would say "I would research", what would be significant in a case like this, would that be, in a sense, quite a wider search or a wider study?

40 A. Because such events are going to be so rare, if they ever occur at all, one would have to do a research on all infant deaths, unexpected infant deaths, nationally, over a period of 20 or 30 years. People have done such studies and, to the best of my knowledge, the kind of extraordinary multiple lightning bolts that you are referring to do not come up in these kinds of studies.

Q. So far as your search on the database is concerned, you essentially have put in "multiple deaths" and looked for, in a sense, research papers?

45 A. Research papers, letters, and review articles will come up that way.

Q. Are you saying that when you attempted that search, there were no specific papers, in relation to the consideration of this particular issue?

55 A. There are certainly papers looking at multiple

unexpected infant deaths and, again, Dr Susan Beal, for example, is an author of one of those.

5 Q. But not necessarily unexpected death from different causes?

A. Well, they would come up in those papers because they go back and interview, or re-examine and speak to, families and so on, where multiple deaths have taken place.

10 Q. This fact in itself would not be proof of suffocation in the individual case?

A. I am trying to not lose you here in your train of argument.

15 Q. Yes.

A. No. I think what it means is that a natural explanation for three unexpected sudden infant deaths, in which thorough medical examination fails to come up with an explanation, is very unlikely to be due to three separate diseases.

20 Q. But in the individual cases here, when we look at the cases in isolation--

25 A. Yes.

Q. --we cannot conclude that there was suffocation?

A. I am struggling here because you asked me if there was a study of multiple infant deaths.

30 Q. Yes.

A. Then you asked me to consider the infants in isolation. I detect a non sequitur there.

35 Q. What I am asking you is, in a sense, that if we were to look at the cases individually--

A. Yes.

40 Q. --obviously you have given evidence about papers and studies in relation to looking at the possibility of other reported cases. Moving on to the individual examination of the cases in this case--

A. Yes.

45 Q. --we cannot find positive evidence of suffocation?

A. Oh, I am now with you. There is no strong positive evidence of suffocation in the individual cases but, as I explained, from the pathology alone, the diagnosis or the suspicion of suffocation is provided by a thorough review of the circumstances of each case, which does not fall within my particular evidence.

50 Q. So, your expertise is obviously in relation to pathology; your expertise?

55 A. No, I would say my expertise also extends to the precise individual circumstances of each case.

Q. So, from what you have just said, so far as the

individual pathology is concerned, there is no proof in the individual case of suffocation?

5 A. No. If we restrict ourselves purely to the pathology findings, there is no proof because, as a number of people have said, there are no pathognomonic autopsy findings in a large proportion, in the majority, of infants who are suffocated.

10 CROWN PROSECUTOR: Q. Can you explain pathognomonic?

A. I am sorry.

HIS HONOUR: It has already been explained.

15 ZAHRA: I thought so.

HIS HONOUR: The doctor has already explained.

CROWN PROSECUTOR: It was a few weeks ago.

20 HIS HONOUR: Q. Would you mind?

A. Diagnostic, yes. If you find something, I don't know what we might say, but some finding at autopsy that means it must be suffocation, say, so a pathognomonic finding is a diagnostic finding.

25 ZAHRA: There was one further question I was wishing to ask arising out of something my learned friend asked in re-examination. Might I be permitted to ask that?

30 CROWN PROSECUTOR: No objection.

HIS HONOUR: Yes.

35 ZAHRA: Q. You were asked some questions about whether there was any evidence on your examination of the slides where there was myocarditis?

A. Yes.

40 Q. In the conductive system?

A. Yes.

Q. Now, is it to be understood that the slides that you saw were, in fact, slices of the heart?

45 A. The very thin slices of the heart, yes. If I could elaborate that slightly, if there had been small bits of the conducting system in randomly taken slides of the heart, what there was not was a systematic investigation of the whole conducting system.

50 Q. That is what I was wanting to clear up. The slides that you saw would have had parts of the conductive system in them?

A. Yes, they would.

55 Q. And there was myocarditis in all of the slides?

A. Yes. I think we are in danger of getting at cross-purposes.

Q. Yes. I was about to ask you another question. You can't exclude that myocarditis was in the conductive system?

5 A. Absolutely not, no, but it is not necessary it should be there. It is sufficient, if I may say, for your purposes, that it was present at all.

10 Q. What I was seeking to do was to clarify a question that my friend asked about the presence of myocarditis, that you can't exclude that the myocarditis was in fact in the conductive system in the heart?

A. No, I can't exclude it but, as I say, I don't think I need to in this case.

15 Q. You don't think you need to in this case. Is that because you think that myocarditis is--

A. Is present, yes.

20 HIS HONOUR: Are you all finished and done?

CROWN PROSECUTOR: Yes. No further re-examination.

25 HIS HONOUR: Professor, you may step down and you are excused from further attendance.

<WITNESS RETIRED AND EXCUSED

HIS HONOUR: Yes, Mr Crown?

30 CROWN PROSECUTOR: I recall Detective Ryan.

<BERNARD MICHAEL RYAN(2.37PM)
RESWORN EXAMINATION EXAMINATION-IN-CHIEF CONTINUED

35 CROWN PROSECUTOR: Q. For the record detective, your full name, rank and station please?

A. My full name is Bernard Michael Ryan. I am a Detective Sergeant attached to Goulburn.

40 Q. Detective, would you have a look at exhibit H (shown). Is that something which was given to you by Craig Folbigg?

A. Yes, it is.

45 Q. If you could just hold that up so that everybody in the courtroom can see what we are talking about (complied). It is a one month page of a calendar with some writing on it?

A. Yes, it is.

50 Q. Can you hold that up so that his Honour can see as well?

A. (Complied).

Q. When did Craig Folbigg give you that?

55 A. I can't recall exactly when the date, I am afraid, right now. However if I could refer to my notes I may be able to assist.

Q. Yes, please?

A. It may be something that I need to refer to on one of Mr Folbigg's statement, Mr Crown.

5 Q. Yes?

A. And I don't have them with me here at the moment.

Q. Your statement?

10 A. No, one of Mr Folbigg's statements.

Q. Put it this way, did he give it to you either when you went to his home or one of the two occasions he came to the police station in 1999?

15 A. It was definitely after he made this original statement to me.

Q. After he made his original statement?

A. Yes.

20 Q. Was it in that same year?

A. No, it would have been the year after.

Q. Would you have a look at exhibit J?

25 A. (Shown).

HIS HONOUR: Q. So the year after the year of the original statement is 2000?

30 A. Yes, your Honour; and most certainly after the interview with the accused.

CROWN PROSECUTOR: Q. Is that the first diary that were you given of Kathleen Folbigg?

35 A. No. That's the second diary.

Q. The second diary. Is that the diary that you found during the search of--

A. Of 8 Millard Close, yes.

40 Q. Would you have a look at this diary, which is from July 1999 (shown). Is that another diary which you found during the course of that search?

A. Yes, it is.

45 Q. And is that the diary that Kathleen Folbigg, the accused, had told you was the one that she had just started very recently?

A. Yes.

50 Q. And that she had only written a few pages?

A. Yes, that's correct.

55 CROWN PROSECUTOR: I tender that. It is not alleged to have anything incriminatory in it. It is tendered to show her practice of writing a diary and what sort of things she wrote in it.

ZAHRA: Would your Honour just excuse me (Mr Zahra conferred with Mr Cook).

CROWN PROSECUTOR: I am happy to delay the tender for the moment.

5 HIS HONOUR: Is the diary distinguishable, is it marked?

CROWN PROSECUTOR: It is. I do not think it is necessary. It is a 1999 dairy.

10 Q. Sergeant, would you have a look at this document (shown). Is that a document which came into your possession during the course of your investigations of these deaths?

A. Yes, it is.

15

Q. That is not a document that you were involved in creating; is that right?

A. That's right.

20 Q. Was that a document created by another police officer and the accused?

A. Yes, that's right.

25 Q. Do you know the name of that other police officer?

A. Yes, I do.

Q. Who is it?

A. He is now retired from the police service. His name is Kerry Bryant.

30

Q. And do you believe that to be a statement that came into existence at the time of Caleb's death?

A. Yes, I do. It does not have a date.

35 Q. It does not have a date on it, but does it refer to, in the body of the document, to having been made on the day of Caleb's death?

A. Exactly, yes.

40 Q. Does that mean that it would have been made on 20 February 1989?

A. Yes.

CROWN PROSECUTOR: I tender that.

45

ZAHRA: No objection.

HIS HONOUR: This document is exhibit AK.

50 EXHIBIT #AK ABOVE IDENTIFIED DOCUMENT DATED 20.02.89 TENDERED, ADMITTED WITHOUT OBJECTION AND READ TO JURY.

CROWN PROSECUTOR: Q. Sergeant, on Thursday, 19 April 2001 did you and another detective, namely Detective Senior Constable Frith, go to the work address of Craig Folbigg at Singleton?

55

A. Yes.

Q. And did you speak to Mr Folbigg there?

A. Yes.

5 Q. And did you tell him that he was under arrest for the offence of hindering an investigation?

A. Yes, I did.

Q. And did he accompany you to the Singleton Police Station?

10 A. Yes, he did.

Q. And on that day did you interview Mr Folbigg in the form of an audio and video recorded interview?

A. Yes, I did.

15

Q. Of the same kind that was done with the accused?

A. Yes.

20 Q. Later that same day did you go to another address in Singleton and see the accused Kathleen Folbigg?

A. Yes, I did.

Q. And did you tell her that she was under arrest in relation to the murder of her four children?

25

A. Yes, I did.

Q. And was she then taken to the Singleton Police Station?

A. Yes.

30

Q. And on that same day was she charged in relation to the present matters?

A. Yes, she was.

35

<CROSS-EXAMINATION

COOK: Q. Officer, I want to deal with your dealings with Craig Folbigg in May 1999. Is this right, he came to the police station on 19 May and commenced to make a statement?

40

A. Yes, that's correct.

Q. And the statement proceeded a certain way; is that right?

45

A. Yes.

Q. And you had to leave it until another day because of his work commitments?

A. Yes.

50

Q. And how far did you get in making the statement on that day, 19 May?

55

A. If I have a look at the statement I can definitely show you the area where I got to; but to answer your question: It was before I started to record the details in regards to the death of Sarah.

Q. I show you this copy of a 31 paged statement in the

name of Craig Folbigg (shown). Is that the statement which was taken both on the 19th and 23rd May 1999?

A. Yes, it is.

5 Q. It started on the 19th and completed on the 23rd?

A. Yes.

10 Q. Would you turn please, in the statement, to page 17. You will see that commences with paragraph 43. Can you see that?

A. Yes.

15 Q. Now, having looked at that, are you able to tell us at what point in the statement things stopped on 19 May 1999?

A. I am afraid that I cannot state exactly. However, it is definitely before the commencement of paragraph 44.

20 Q. So, does that mean it is before any description given by Mr Folbigg to you of his alleged observations of Sarah on the morning of her death?

A. Yes, that's right.

25 Q. Now, can we take it from that that it was only later, that is on 23 May, in terms of written statements signed by Mr Folbigg, that he gave a version of his observations of where his daughter was on the morning of her death, Sarah?

30 A. That's when the information was recorded in his statement in regards to Sarah being in the bed, yes.

35 Q. Now, what was the procedure then on the 19th and the 23rd? He gave you a narrative, which you tried to keep in chronological order and make sense of; is that right?

A. Yes, that's exactly right.

40 Q. And you recorded it as it went along?

A. Yes.

45 Q. Can we take it from that that on 19 May 1999 he had not, in his narrative, got to the circumstances of where Sarah was on the morning of her death?

A. Yes, that's correct.

50 Q. You got to that part of the story on the next occasion, which was 23 May?

A. Yes.

55 Q. So is this right, that on the 19th he hadn't told you whether Sarah was either in her bed or not in her bed when he awoke at about 1am on the morning of Sarah's death?

CROWN PROSECUTOR: Your Honour, my friend hasn't made it clear. When he says "he hadn't told you", does he mean in the statement or--

COOK: On 19 May.

CROWN PROSECUTOR: -- or at all?

COOK: Q. On 19 May. Do you understand what I am getting at, detective?

5 CROWN PROSECUTOR: It is still not clear.

HIS HONOUR: Well, it is possible for Mr Folbigg, that he told the officer something, without it being recorded on that day?

10

COOK: That is what I am getting at.

Q. On 19 May, can we take it that he hadn't told you on that day about where he saw his daughter, or where his daughter was at about 1am on the morning of her death?

15

A. It is not recorded in the statement at that stage.

Q. Yes?

A. I apologise. I just need to explain this a little bit, I think. He most certainly was talking about the event on the 19th. The versions given to me on the 19th were entirely consistent with what was being told, or what was told to me on the 14th.

20

Q. Well, is this what happened: That if he had told you that on the 19th, or told you something about where his daughter was or was not, you did not record it in his statement on the 19th?

25

A. That's correct.

30

Q. Now, when he came back on the 23rd, did he go back and revise or correct certain parts of his statement which had already been created on the 19th?

A. Absolutely not.

35

Q. What happened on the 23rd in relation to the continuation of the statement?

A. Obviously, when Mr Folbigg attended on the 23rd, his version had changed. There was a discussion in regards to what points or what issues he wished to change, and then the statement was recommenced at around paragraph 44 with his new version.

40

Q. So he didn't go back and change anything that had already been record on the 19th?

45

A. No, he didn't.

Q. Didn't change the meaning or change words around or take words out?

50

A. No.

Q. Simply continued as before, started again?

A. Yes.

55

Q. At about paragraph 44, you think?

A. Yes.

Q. When you were recording his version, were you typing

it so it was visible on a computer screen?

A. Yes, I was.

5 Q. And was he in a position where he could read what was being typed on to the screen?

A. I would assume so, but I can't say one hundred percent. I just don't remember.

10 Q. And when you recommenced the process on the 23rd you didn't change anything that had been previously typed into the computer on the 19th?

A. I am absolutely sure of that.

15 Q. Now, I want to ask you about some matters in the record of interview. You discussed with Mrs Folbigg the contents of a diary relating to observations of the child Caleb created in February 1989. Do you recall that?

A. Yes.

20 COOK: Could the witness be shown exhibit L please, your Honour?

(Exhibit L shown to witness.)

25 Q. Now, that is an item which has showed her in the interview; is that right?

A. That's right. Yes, that's right.

30 Q. And you drew her attention to an entry which has "finally asleep". Do you recall that?

A. Yes, I do.

35 Q. Have you got the interview with you, officer, a copy of the transcript of the interview?

A. Yes, I do.

40 Q. If this helps you, if you look at question and answer 425 - sorry to burden you with so much stuff?

A. I am trying to get some room.

45 Q. At 425 on page 123?

A. Yes.

50 Q. You are recorded as having said to her: "Do you agree with me that there are no other entries in here that are the same, as in as in 'finally asleep', like that". Do you see that?

A. Yes.

55 Q. You have looked through exhibit L, the diary, haven't you?

A. Yes, I have.

60 Q. Do you agree that there is actually several entries during the lifetime of Caleb where "finally asleep" or "at last asleep", or something like that are recorded?

A. Yes, I do.

Q. So when you said to her at 425: "Do you agree with me that there are no other entries in here that are the same, as in 'finally asleep', like that", what were you referring to?

5 A. I believe, with the two exclamation marks after "finally asleep".

Q. I will just go through some of the entries in the diary. You can put the interview aside, if it helps you. 10 If you go to 11 February in exhibit L. You will see an entry at 12.30pm "Finally fell asleep". Do you see that?

A. That's on 11 February?

Q. But what I am getting at is that in this diary, in the 15 lifetime of Caleb, several observations are made "finally asleep" or "asleep at last". Something like that?

A. Yes. I totally agree with that.

Q. And if you go to 12 February, you will see that on 20 that page there are three such entries: One at 11am. Do you see that?

A. Yes.

Q. "Finally asleep". One at 5.30pm "finally fell asleep"? 25

A. Yes.

Q. And one, which I think is--?

A. "Asleep finally".

Q. Yes; I am not sure what time that relates to, maybe 30 11.30 in the evening, I am not sure. And if you look at the 14th, you see there is "Asleep" with an exclamation mark, which I think is at "1.30pm", I think, or maybe "a.m.", it is not clear. See that "Asleep!", with an 35 exclamation mark; do you see that on the right-hand column?

A. Is this at the top, a question mark after asleep?

Q. No. It is on the right-hand column about, a little 40 under halfway, it has got "Asleep!"

A. Yes (exhibit L returned).

HIS HONOUR: Mr Cook, when you reach a convenient point 45 will you let me know. I am going to take a short adjournment.

COOK: I have finished a topic and I will be moving to another topic so that is quite convenient now.

HIS HONOUR: All right, we will do this now. This is just 50 to allow the court reporters to change now, and to rest their fingers a little bit. Would you mind going to the juryroom.

55 JURY EXCUSED

SHORT ADJOURNMENT

RESUMPTION

COOK: Q. During the interview, detective, you showed Mrs
Folbigg a letter, and I will show you this document
5 (shown) - if you need to refer to the interview it is at
566 I think - just tell me whether or not the letter you
are about to be handed is the letter you showed her in the
interview referred to as a six-page letter explaining her
feelings about Craig Folbigg?
10 A. Yes, that's the letter.

MFI #33 LETTER REFERRED TO AT QUESTION 566 OF THE
INTERVIEW

15 Q. Now, also in the interview you discussed with Mrs
Folbigg her actions after the discovery of the daughter
Laura on
1 March 1999 and her calling for an ambulance. Do you
recall that?
20 A. Yes, I do.

Q. As part of your investigation in this matter, have you
obtained a copy of the tape recording of Mrs Folbigg
making a 000 call?
25 A. I have.

Q. Have you got it with you, or a copy of it, the tape
recording?
A. I believe the Crown has.
30

Q. Have you got it with you, sorry?
A. I believe the Crown has a copy.

Q. Would you look at this cassette tape please (shown)?
35 Is that a copy of the 000 recording relative to the call
by Mrs Folbigg on 1 March 1999?
A. Yes, it is, and it's my handwriting on it, and it is a
copy that I made.

40 COOK: I ask that it be played.

CROWN PROSECUTOR: Might it be marked for identification,
and I will have some discussions with my friend.

45 COOK: I would ask that it be played now. It is a
relevant piece of evidence and it is referred to in the
interview.

50 CROWN PROSECUTOR: I would need to address your Honour on
it.

HIS HONOUR: Very well. Ladies and gentlemen, this is a
matter that I have to deal with in your absence.

55 JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: What is the issue here?

5 CROWN PROSECUTOR: Would your Honour pardon me for one moment?

HIS HONOUR: Yes.

10 CROWN PROSECUTOR: Might I ask Detective Ryan a question about the 000 call?

HIS HONOUR: Yes.

15 <EXAMINATION ON THE VOIR DIRE

CROWN PROSECUTOR: Q. Detective, in the tape that you have produced to the Court of the 000 call, there is a gap in it where the accused refers to holding on whilst she does CPR. Do you know how long that gap is in the reel to reel original tape?

A. No, I don't.

20 Q. Would you like to hear it again?

25 A. Yes, I would.

CROWN PROSECUTOR: I would seek to play it. It is only about 30 seconds, 45 seconds long.

30 HIS HONOUR: Yes, please. Officer, would you play it for us please?

TRIPLE 000 TAPE RECORDING PLAYED

35 HIS HONOUR: The suggestion is that this tape is a copy taken from a reel to reel original.

CROWN PROSECUTOR: Yes.

40 HIS HONOUR: And that the gap was longer on the original than it is on this, or do you not know?

CROWN PROSECUTOR: I do not know.

45 Q. Detective, are you aware how long the gap is on the original?

A. That copy is an exact copy of the copy that was given to me by the Ambulance Service. I did not obtain the reel to reel, as it is described, from the Ambulance Service.
50 I was given a taped copy from the Ambulance Service, and that is an exact copy of the copy that I was given.

<CONCLUSION OF EXAMINATION ON THE VOIR DIRE

55 CROWN PROSECUTOR: I have nothing further. I do not have any objection to the tender. It just appears to me that somebody at some stage has switched off the reel to reel,

because there is a period of no conversation. We don't know how long it is. Just from the sound of it, it sounds like it has been switched off.

5 HIS HONOUR: That may possibly be the subject of an enquiry from the witnesses; it may even be the subject of address in due course. The tape may be played.

10 CROWN PROSECUTOR: If your Honour would allow me, I will indicate to the jury that I have no objection to it.

HIS HONOUR: Yes.

15 CROWN PROSECUTOR: Perhaps I might just indicate that there is a gap in it, and it is unknown at this stage whether that gap is on the original or not.

COOK: I oppose it.

20 HIS HONOUR: I do not think you should do that, Mr Crown.

CROWN PROSECUTOR: We have copies of a transcript for the jury, and one for your Honour.

25 HIS HONOUR: Do you wish to tender the transcript with this, Mr Cook?

COOK: Yes, your Honour.

30 HIS HONOUR: When the jury comes back in the tape will be exhibit 7 and the transcript exhibit 8.

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: We have no objection to the 000 tape going into evidence. We have copies of the transcript of the tape for each juror.

EXHIBIT #7 000 TAPE RECORDING TENDERED, ADMITTED WITHOUT OBJECTION

10 EXHIBIT #8 TRANSCRIPT OF 000 TAPE RECORDING TENDERED, ADMITTED WITHOUT OBJECTION

000 TAPE RECORDING, EXHIBIT 7, PLAYED

15 COOK: Q. Detective, that tape that you just heard, is that a copy of a tape that you obtained yourself?
A. Yes, it is.

20 Q. From the New South Wales Ambulance Service?
A. Yes, it is.

25 Q. There seems to be a break in the continuity of sound at about the point where Mrs Folbigg says "Hold on a minute I'm going to do CPR" at around that point. Do you recall that?
A. Yes, I do.

30 Q. Do you know why there is that break?
A. No, I don't.

Q. But the break is on the recordings that you obtained from the Ambulance Service?
A. Yes.

35 <RE-EXAMINATION

40 CROWN PROSECUTOR: Q. Would you be able to make enquiries of the Ambulance Service as to whether the original reel to reel tape is still in existence for that day and if the break is longer that it is on this copy?
A. Yes, I will.

45 Q. Detective, you were asked some questions by my learned friend Mr Cook about whether in his statement on 19 May Mr Craig Folbigg told you in the statement where his daughter had been at about 1am, and you said not in the statement on that day. Did he tell you orally on that day the information that he had given you back at his home on 14 May?
50 A. Definitely.

55 Q. That information was to the effect that he had woken up at about 1 or 1.10 and had noticed that his wife and his daughter Sarah were not in the room on the first occasion that he woke up?
A. Yes, that's right.

<WITNESS RETIRED

5 CROWN PROSECUTOR: The two expert medical witnesses from
overseas were rather quicker than we thought. We do not
have any further witnesses here today. I am very
confident that the Crown case will finish on Monday. We
have a further expert, Dr Susan Beal, who is coming from
Adelaide and one or two further witnesses. I am quite
10 confident we will finish the Crown case on Monday.

HIS HONOUR: Very well. Ladies and gentlemen, we will end
the day's proceedings there. Of course, we shall not be
sitting tomorrow.

15 JURY EXCUSED

ADJOURNED PART-HEARD TO MONDAY 5 MAY 2003

20

oOo

BOW:CAT:8

D19

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

NINETEENTH DAY: MONDAY 5 MAY 2003

10 70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

15 IN THE ABSENCE OF THE JURY

CROWN PROSECUTOR: Thank you for your Honour's indulgence.

HIS HONOUR: You are very welcome. Are you ready?

20 CROWN PROSECUTOR: Yes. I think there is an area of dispute
between my learned friend and myself in relation to the
evidence of Dr Beal. It might be most appropriate to deal
with it now, although we do have another witness to call
first.

25 HIS HONOUR: How long do you think it will take to deal
with it? I just want to let the jury know what is
happening.

30 ZAHRA: Quarter of an hour, half an hour.

CROWN PROSECUTOR: We do have another witness we can call
first if your Honour thinks that is more appropriate.

35 HIS HONOUR: I am just wondering about the flow of the
work, that is all. Obviously you need the time so you will
have the time, but if we deal with the - we finish with Dr
Beal's evidence before morning tea if we deal with the
objection and then take the evidence?

40 CROWN PROSECUTOR: I expect so. I have Dr Bailey here who
I know is anxious to get away. Perhaps I might call him
first and then your Honour could send the jury out.

45 HIS HONOUR: Now, Mr Zahra, are we still on track for the
video-link evidence on Wednesday?

ZAHRA: Yes, your Honour. It has all been organised and it
is ready for 2 o'clock.

50 HIS HONOUR: 2 o'clock in the afternoon.

55 ZAHRA: Yes it, has been organised from our end. I
understand from my instructing solicitor that the Attorney
General's Department needs to contact our office. The
Royal College of Physicians in Edinburgh which they have
not done but yes, we are on track.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Good morning, ladies and gentlemen. Yes, Mr Crown?

5

CROWN PROSECUTOR: I call Dr Bailey, Dr Brian Patrick Bailey.

10

<BRIAN PATRICK BAILEY(10.25AM)
SWORN AND EXAMINED

HIS HONOUR: If you want to refer to any notes in giving any answer you may do so. Yes, Mr Crown?

15

CROWN PROSECUTOR: Your Honour, I wonder if the monitor of the Court Reporter could be moved, perhaps over this way a little bit because I can't see the witness.

20

Q. Dr, would you please tell the court your full name?
A. Brian Patrick Bailey.

Q. And, Dr Bailey, your place of work?
A. Canberra, ACT.

25

Q. And are you a consultant cardiologist?
A. I am.

30

Q. And cardiologist is what sort of medical practitioner?
A. That is a specialist who specialise in diseases of the heart.

Q. And, doctor, have you practised for many years at the Royal Prince Alfred Hospital?
A. Since 1979.

35

Q. Is that in Sydney?
A. Sydney, yes.

40

Q. And have you been a consultant cardiologist at that hospital?
A. Yes; all that time.

45

Q. And during the time that you have worked at that hospital have you had patients who are both adults and children?

A. At that hospital I have had mostly adult patients because it is in a paediatric hospital but I have also seen a small number of paediatric patients with a syndrome of sudden death that I have a particular interest in.

50

Q. Do you have a particular interest in sudden death in children caused by a particular cardiac condition?

55

A. Yes. I have an interest in long QT syndrome which is a condition that can cause sudden unexpected death in both adults and children.

Q. Now, doctor, in this case, were you provided with some material by Detective Sergeant Ryan?

A. Sorry? Yes, I was.

Q. Were you given a copy of a cardiac rhythm tracing for Laura Folbigg from 1 March 1999?

5 A. Yes.

Q. And did you understand that to be a tracing that was made by ambulance officers who attended her home after a distress call?

10 A. I did.

Q. Would you have a look at this document (shown). Is that a photocopy or is that photocopy of the cardiac rhythm tracing?

15 A. That's the same as the one I was given.

Q. Were you also given a copy - perhaps that might be marked for identification, your Honour.

20 HIS HONOUR: The tracing for Laura is marked 34 for identification.

MFI 34 ABOVE IDENTIFIED DOCUMENT

25 CROWN PROSECUTOR: Q. Doctor, were you also given a copy of Laura's post-mortem autopsy report?

A. Yes, I was.

Q. And certain other documents?

30 A. Yes.

Q. Now, on looking at the heart rhythm tracing that was taken by the ambulance officers, have you been able to come to any conclusions about what it shows?

35 A. Yes. This showed for a children with an extremely slow heart rhythm, we call that a bradycardia. The rate was about 30 per minute. And the electrical complexes on it are a lot wider than the complexes that are seen in a normal healthy heart. The heart rate for a child of that age, I suspect the normal heart rate is about 120. So it is very slow and the width of the electrical complexes would be a lot narrower, perhaps a quarter or certainly less than a half of what these complexes are, so this is a very abnormal rhythm. Taken in context with the fact that, 40 of the ambulance officers report, which said that Laura had no pulse at this time, I would call this an agonal cardiac rhythm.

Q. Could you spell "agonal"?

50 A. A-g-o-n-a-l.

Q. What does that mean?

55 A. This is the last activity that you see in the heart before the heart dies. Basically it is the stage where the heart is no longer pumping any significant amount of blood but still retains a tiny amount of very slow electrical activity.

Q. Doctor, is that sort of agonal heartbeat consistent with injury due to lack of oxygen?

A. Yes. It is not specific for that but it certainly would be consistent with that, yes.

5

Q. Is it correct to say that breathing stopped before the heart stopped?

A. It is most likely that breathing stopped before the heart stopped, given this tracing but you can't be certain of that by something that clearly is being recorded you know some considerable time after the event occurred.

10

Q. Now, doctor, have you, in the course of your practice, treated patients for myocarditis?

15

A. Yes, I have.

Q. Are you able to tell us how common it is for patients who have had respiratory infections to have myocarditis?

A. It is. You have to define here what you mean by myocarditis. Clinical myocarditis is rare and I won't go into the symptoms that lead us to diagnose it, but pathological myocarditis is common. Now what I mean by that is that it is estimated that some five, perhaps even up to 10 percent of people with common viral infections may have inflammatory cells found in their heart, but in these cases there is not any, the patients don't have any symptoms of involvement of the heart. In other words, they would be thought to have a cold, the flu, but would not have chest pains or a lot of breathlessness or faint or die or do any of these things that would indicate a problem with their heart. But in these patients, this can be diagnosed because they have an abnormal electrocardiogram and it is in this way that it has been picked up. But a considerable proportion or small proportion of people with very common illnesses may have underlying myocarditis even though a doctor wouldn't diagnose it without some ancillary aid.

20

25

30

35

Q. Now, doctor, in this case, you have read Laura's autopsy report, which refers to her having localised areas of myocarditis?

40

A. Yes.

Q. Was this, in your opinion, probably related to a viral infection that she had at the time?

45

A. Yes. I think it most likely was.

Q. And are you able to say whether or not in your view it was of a sufficient extent to account for her death?

50

A. I would have thought it was unlikely to have accounted for her dying.

Q. And why is that.

55

A. Well, firstly because of what I have already said, that people with common illnesses are thought to often have or at least in say 5 or 10 percent to have myocarditis. And of course people with the flu or colds or similar gastric upsets, don't commonly drop dead.

Secondly, there are other cardiac conditions where inflammatory cells are found in the heart similar to this, cells similar to what were found in Laura's heart. One is a condition called pericarditis which is an inflammation of the lining outside the heart which causes often a lot of chest pain. But it also happens very often frequently after cardiac surgery and this can be accompanied by a myocarditis which is localised. But patients with pericarditis do not frequently drop dead. In fact they rarely drop dead, otherwise a lot of people would die after cardiac surgery. Another similar condition is transplant rejection. Patients who have had another person's heart put into them need to be on drugs that suppress their immune system because the natural tendency is for the body to reject the translated organ and in that condition there is also inflammation similar to myocarditis in the heart. But in the mild or moderate stages that is often asymptomatic.

20 Q. Asymptomatic meaning?

A. That the patients have no symptoms. The doctor can't detect anything. But if you were to obtain samples of the heart to look at under the microscope, then you would find they were quite abnormal, and sudden death is not a common feature of that.

Q. For those reasons, you are of the opinion that it is unlikely that myocarditis caused her death?

30 A. Yes. And I think the other thing to state is that it is found in a number of routine post-mortem examinations. It is not an unusual thing to find a degree of myocarditis in a perhaps four or five percent of post-mortem examinations. So for all those reasons I suspect that this was not likely to have been the cause of death.

35

<CROSS-EXAMINATION

ZAHRA: There was some fresh material there that we may need to seek expert opinion, material we have had no notice of but I can in fact commence my cross-examination. I may seek your Honour's indulgence for a short period of time but I can start now.

40

HIS HONOUR: Yes.

45

ZAHRA: Q. Doctor, did you look at the slides that were prepared on post-mortem?

A. No.

50

Q. So in a sense when you are relying on the extent of this myocarditis, you are relying on other persons statements as to the extent for myocarditis?

A. Yes, I am relying on Dr Cala's post-mortem report.

55

Q. What part of his report are you relying on, so far as his assessment of the extent of myocarditis?

A. Two parts. Well, obviously on the part that refers to the heart, but two parts to the post-mortem reports; the

first being his findings on what we call macroscopic examination, that is what you see before you put the heart under the microscope. That is what you see from examining the heart. And he found, when he sectioned the heart, that the walls of the heart looked normal and I would infer from his report that heart weight and other features of the heart were normal; and those findings would be inconsistent with a very extensive myocarditis involving all the tissues of the heart, at which you would expect the walls to be pale and flabby and the heart chambers to be dilated and he does not make any comment that that was so. The second part of the post-mortem report is the histological report where he mentions particular areas that were involved by, with inflammatory cells. The implication being that there were areas of the heart which were normal and, again, it would not be in my opinion, consistent with a very extensive involvement that the findings on non microscopical examination were normal.

20 Q. But did you not look at those slides?

A. But I am relying on his report, I did not look at his slides.

25 Q. You are relying on his assessment as to whether in his opinion this was moderate myocarditis or mild?

A. Yes, that's correct.

Q. So essentially you are relying on what he means by the use of the word 'mild myocarditis'?

30 A. I am not sure it is critical whether you call it mild or moderate because neither of my statements earlier would apply to either. If the myocarditis had involved the whole heart and if there are obvious abnormalities at the time that it was looked at without the microscope, then it would be more feasible that an arrhythmia can occur. But I wouldn't be too swayed whether one used the word mild or moderate to change what I have said already.

40 Q. You have indicated that you recall Dr Cala referring to the extent of the myocarditis. What specifically do you recall about Dr Cala's observation?

45 A. He made the observation that it was situated, I think predominantly - I can't recall his exact words but words to the effect that it was predominantly sub epicardial but that he also found areas of inflammation within the muscle. I think of the septum which is the middle of the heart but I am not positive about that now.

50 Q. If it were the case that out of eight of the slides, or eight of the samples of the heart are, that in fact myocarditis was observed in all of them, wouldn't that be significant?

55 A. It would depend on the extent of the inflammation because a small number of inflammatory cells might be regarded as myocarditis but might not be significant so it would depend whether there was a very heavy infiltration in ~~two~~ of ten slides. It would also depend whether those were taken at random clearly and not from particular

areas.

Q. And you don't know that because you haven't examined the slides?

5 A. That's correct.

Q. It would indicate if they were taken at random that the myocarditis was quite diffuse?

10 A. It would appear to be that unless they were just particularly unlucky in the areas they sampled, yes.

Q. Are you aware also that someone had made observation, that is, there was in fact necrosis?

15 A. Yes. That would be consistent with any degree of myocarditis, except a very mild degree.

Q. And that would be significant?

20 A. The more necrosis there was, the greater the disturbance to the heart. I think we should explain for other people in the court, that necrosis means cell death, it means they saw heart muscle cells that had actually died.

25 Q. It may be significant that even if there was only mild myocarditis, that if it were, for example, in the conductive system, that it could be fatal?

30 A. Yes. One of the mechanisms by which mild myocarditis can cause sudden death or is thought that it may cause sudden death, is that if the cells in the conducting system at a very tiny spot in the heart where the conducting system is very narrow, were all killed, then the electrical activity might not be able to get from the top to the bottom of the heart and this is one of the postulated reasons why people may die suddenly with myocarditis. However, as I have indicated already, sudden death with myocarditis is rare so I would expect that 35 equally that type of involvement, to the extent to which it would cause that problem, is also rare.

40 Q. You can't rule out the possibility that the myocarditis was in fact in the conductive system?

A. No.

45 Q. And if it were in the conductive system it could have fatal results?

50 A. It could have, but it would have to have either occurred in a very tiny area of the heart where the conductive system is small or else affected a very large part of the conducting system in the lower part of the heart where it spreads out like a fan, so it would have had to have affected it all to really have lead to that problem.

55 Q. You can't tell in this given case because you haven't seen the slides?

A. No. I haven't seen the slides.

Q. And therefore you can't tell?

A. No.

5 Q. You indicated, by looking at the tracer in relation to the heart rhythm, that you were of the view that the breathing might have stopped first rather than the heart?

A. Yes. I don't think it is possible to be too definitive about that by something that you have seen later on, but I would expect if the heart had stopped first, that we would more likely have seen no electrical activity at all.

10

Q. But you can't be certain about that?

A. I don't think I can be certain about that.

15 Q. Particularly when you have indicated that this tracer might have been some time afterwards?

A. Yes. I think this tracer would have certainly been considerably in a - at least five minutes after the event that caused death.

20 Q. It could quite equally have been arrhythmia leading to the stopping of the breathing, leading to cardiac arrest?

A. It could have been. I wouldn't exclude that possibility, but I think it would be less likely.

25 Q. But again you can't indicate with any certainty which one of those it was?

A. Well, in medicine we can rarely be certain about anything but you know we assign probabilities to things most often.

30

Q. But it is no higher than that?

A. Sorry, no.

Q. It is no higher than two alternatives?

35 A. If you have to pick between the two alternatives it is more likely that the heart stopped as a result of the breathing ceasing first but you can't be certain. You have got to qualify that on the basis of the time between what might have caused or?

40 A. Yes, the sooner you obtain the clinical information after the event clearly the more certain you could be about the cause.

45 Q. And similarly you can't exclude the process being arrhythmia, being the stopping of breathing, or cardiac arrest?

A. No, you can't exclude that.

50 Q. Now you have talked about myocarditis first being clinical myocarditis and then pathological myocarditis. You are referring, I presume, to the assessment firstly to the clinical manifestations and also the findings on death?

55 A. Yes, or biopsy.

Q. Yes. And there may in fact be no clinical manifestation prior to death of myocarditis?

A. Yes. That's not common, but sudden death can be the

first indication.

5 ZAHRA: I have no further cross-examination. It may be that we have no further cross-examination. For more abundant caution can I indicate that there are some things that the witness said that we were not aware of and we need, we may ask that he be recalled, but at this stage if he can be excused. We would need to seek some instructions, his Honour.

10 HIS HONOUR: Just for my benefit and perhaps for the benefit of the members of the jury, but would you mind explaining the differences between the expressions that you have used "clinical myocarditis" and "pathological myocarditis"?

15 A. Yes, your Honour. Myocarditis firstly refers to a condition in which it is found that the heart has inflammatory cells. These are white blood cells that come out of the heart that fight infection and produce antibodies. And pathological myocarditis, as I have used 20 the expression, means that if you were to look at the heart under the microscope at an autopsy, after an autopsy, or if you were to do a technique called cardiac biopsy where you actually put something into a vein and 25 you snip off a tiny little bit of heart muscle just the size, a fraction of a fingernail, obviously you can't take big pieces out and look at that under the microscope, you would find these inflammatory cells. They are the sort of cells that fight infection, for example, and that produce antibodies and you would find these under the microscope 30 and you might, in addition, you would want to see, in order to make the diagnosis some effect on the heart muscle cells that some of the heart muscle cells look dead or dying, so that these cells were doing something bad to the heart muscle. So that would be what pathological 35 myocarditis is. Clinical myocarditis - and it is thought that that is fairly common, as I have said in evidence earlier. Clinical myocarditis is definitely much more rare and in adults whom I primarily deal with I see lots of 40 people with heart attacks, for example, due to coronary heart disease but only a handful of people with myocarditis. And in the patients I have seen, that has taken two forms; one is patients come with chest pain and that is actually caused by the inflammation near the 45 surface of the heart that interferes with the smooth layer called the pericardium, that lubricates the beating of the heart. So

50 that when that gets inflamed that gets sore and people gets chest pain and that is often accompanied by some evidence of some myocarditis as well in that those patients often in fact usually have an abnormal ECG and then I have seen a very small number of patients, less than five, with what we call Fulminant carditis and this is where the heart has an overwhelming viral infection. 55 The whole heart is absolutely stuffed full of these inflammatory cells that I have talked about and the cells are all dead or dying, and that's a condition which leads to the heart not being able to beat properly and these

5 people usually die, or the ones I have seen have died,
with the heart just simply not pumping enough blood to
allow them to survive, and they in addition may get
arrhythmia, that is disturbances of the electrical system
10 of the sort we have talked about due to the interference
with the electrical system of the heart as well as the
muscle of the heart. Fortunately that's very, very rare
because it is a very nasty illness which it affects young
15 people. So it is fortunately very rare in that form. The
other form that I have described where people get some
chest pain and ECG abnormalities is more common and that's
a milder form, and then we believe that there is a very
large number of people that actually have no symptoms at
20 all but just have - you obviously can't do post-mortem
examinations with people with the flu because they don't
die. But on other evidence we believe that a small
percentage, you know, 5, maybe 10 percent of people with
various viral infections which include influenza, if you
were able to look at their hearts you would find that they
25 did have evidence of myocarditis there, but they don't
actually have any symptoms. The symptoms they have, the
symptoms, you know, we all get with the flu, the aches and
pains and a runny nose and a cough.

25 HIS HONOUR: Does anything arise from that, Mr Zahra?

ZAHRA: No.

30 HIS HONOUR: Yes, Mr Crown?

<RE-EXAMINATION

35 CROWN PROSECUTOR: Q. Doctor, were you asked some questions
which my learned friend, Mr Zahra, about your evidence
that in your view probably breathing stopped before the
heart stopped?

A. Yes.

40 Q. And you said that in medicine you couldn't be certain
of anything, but that in your view probably that was the
case. If you act on the assumption that the mother claims
that she heard the child coughing and 10 to 15 minutes
later went in to find the child not breathing and then by
45 the time the ambulance comes several minutes later, the
child was not breathing and then the monitor, the heart
monitor was put on. Does that assist you at all in your
assessment of the probabilities?

50 A. No. I think it only backs up what I have said, that
what we are seeing on the ambulance monitor is something
that has occurred at quite some time after the initial
event. I believe it is a little more probable that - well,
taking the whole situation into account, I think it is a
lot more probable that this wasn't a arrhythmia caused by
55 myocarditis. But purely taking that piece of evidence
into account, I would say it is more consistent that
breathing ceased, first because there was still cardiac
electrical activity going on long after breathing had
stopped, so it is certainly more consistent with that but

5 I would not like to be definite that this could not have
been a cardiac arrhythmia that started the whole thing off.
I say that because, you see, when doctors are present at a
cardiac arrest, we obviously do something about it. So we
10 don't usually know what naturally happens in the event of
an arrhythmia starting the whole thing off. But certainly
after you have been struggling to resuscitate a patient
unsuccessfully you may find this sort of rhythm is the
last event. So I don't think you can say it is impossible
15 that the initial event was an arrhythmia. But I think all
in all, it is more likely, even on this bit of evidence,
that it wasn't.

15 CROWN PROSECUTOR: Yes, thank you.

<WITNESS RETIRED AND EXCUSED

HIS HONOUR: Yes, Mr Crown?

20 CROWN PROSECUTOR: There is an issue of law that arises,
your Honour.

25 HIS HONOUR: Ladies and gentlemen, counsel have informed me
that there is a matter that I am going to have to deal
with in your absence. The most convenient time to do it is
immediately so that the evidence which follows can be
taken on without interruption. So would you mind going to
the juryroom now? I am not sure how long this is going to
30 take, but if it takes longer than I suspect, I will send a
message to you. It is possible that we will incorporate
this break for you with the morning tea adjournment. But I
will send a message to you about that. Thank you.

35 JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour, the area in which my learned friend has expressed concern is in relation to Dr Susan Beal's evidence. I have had a discussion with Dr Beal and I am confident that I can direct her evidence in the same way that I have directed Dr Cala's evidence and Dr Berry's evidence.

10 There is one area, as I understand it, where there is a dispute as to the admissibility of evidence, and perhaps I might take your Honour to that. It is in the, I think it was marked exhibit D on the voir dire; it is the telephone interview with her, conducted by my learned junior.

15 On the first page the last answer "yes, if he didn't have a heart lesions a catastrophic asphyxiating event is the most likely". As I understand it, my friend objects to the part "is the most likely".

20 Over the page, the first answer on page 2 again refers to likelihood. As I understand it my friend objects to that. Also answer 3 on that page, answer 4 on that page.

25 HIS HONOUR: Just a moment. Answer 1 on page 2.

CROWN PROSECUTOR: Answer 3 and 4, refer to "likelihood". Then again the answer at about .7 "most likely diagnosis was that this child".

30 HIS HONOUR: Just a moment. Yes, 1, 3, 4, 7 "most likely". Yes?

35 CROWN PROSECUTOR: I think that is all, your Honour. We would submit that the doctor is able to comment on each child in isolation as to the likelihood of a particular diagnosis. We would submit that it is within the rulings that your Honour has already given and we would seek to lead it.

40 HIS HONOUR: Well, it seems to be independent of the rulings that I have already given.

45 CROWN PROSECUTOR: Yes.

HIS HONOUR: But, Mr Zahra, has the Crown accurately stated the nature of your objections?

50 ZAHRA: I am not totally confident that he has. In fact I may address this issue first and go back to the other areas that my friend had indicated for more abundant caution. I have found this is a very, very difficult exercise because in a sense we are trying to navigate through four very desperate statements but all I can
55 address this issue first and then the rest of my objections might become quite clear.

Your Honour, this witness will go further than any other expert and that would include Professor Berry and Professor Herdson. If I can just put it simply at this stage. We have a witness who will go further and who has not read the post-mortem reports. This is the essential foundation of the bases upon which this evidence is given. So we know that confidently because that is what the witness said in the voir dire. So it is a logical exercise to then ask one's self well, what is it that she relies upon to say these things? When we go through the detail of the statements and we go through the evidence on the voir dire, it becomes apparent that in fact it is either on a statistical basis or either on a premise that if the child was not prone and had no heart lesions, then it would be homicide or, reliance on the mantra. In other words, taking into account the history of the others.

Your Honour, the danger is that my friend will lead from this evidence extensively her background and experience. Her qualifications, your Honour, are immense and are likely to persuade the jury about her opinion.

It is not to say that her field of study and her researches and her papers have not had a significant effect on the understanding of SIDS in the past and it is not to say that the basis of her research is in fact not meritorious. However, your Honour it is largely based on an examination of patterns, to use her expression "patterns" in relation to a number of cases that she has specifically looked at.

This has been an objection that we have obviously made more than once in relation to the use of statistical evidence as a foundation for opinion.

Now, it is not to say, for example, that the Bureau of Crime Statistics and Research also does not carry out worthwhile studies in relation to patterns of offending behaviour, but the Bureau of Crime Statistics does not come to court in an armed robbery case and say that because of 80 percent of armed robbers have a firearm that, therefore, this is more likely to be a case where a firearm was used. So it is a very important study that the doctor is involved in, the professor is involved in, but the question then remains to how much of that we can use in order, in the specific cases, to determine likelihood, probability, call it what you will, that this was in fact, to use her expression, "murder". That is the real danger in the present case, that my friend may lead the qualifications of this witness in longhand, the jury will be impressed; that we know, from looking at the whole of all the documents and the whole of the voir dire examination, as to what the doctor relies upon in coming to that opinion.

Now my friend might say, well, I can ask this in a very shorthand way and I can ask these questions similar to the questions that I have asked of Dr Cala and that she will

say "this is likely murder". Now, your Honour, your Honour
can then imagine in our eyes how we approach addressing
that in cross-examination. We would have to obviously open
up the whole of these particular statements to show in a
5 sense that this process of reasoning is not a permissible
process of reasoning to rely on a mantra, to rely on an
assumption his Honour which in itself has an element of
reversing the onus. In other words, child not prone, no
heart lesions - homicide, unless proven otherwise. These
10 are the common threads in the statements and in her
evidence as to the foundations of her evidence.

For example, there is one other area that my friend wishes
to lead evidence from the witness and that is in relation
15 to the finding of the children moribund. Now again, that
should not be permitted in the sense that this is an area
of fact. It would be elevated as a matter of medical
opinion, a matter relying on her expertise that the mere
fact of finding that two of the children moribund is
20 indicative of suffocation or homicide. So, your Honour,
the whole process is a dangerous one and, as I say, it is
one that I have had difficulty addressing because it in a
sense, despite my asking again the Crown on Friday, after
your Honour left the bench, to be a little more precise in
25 what is to be led, it basically indicated that what he had
said previously was still what he in fact intended to
lead. In that regard, your Honour, it may be necessary
really to look at the precision of what is intended, and
in a sense what I have just done, isn't give your Honour
30 an overview of my concern about the evidence. I am in a
position to take your Honour to the detail of the
statements and obviously the detail of the voir dire, but
those things may already be readily apparent and your
Honour may not need to be taken to the detail. But your
35 Honour I can address the issue at this stage on that
basis.

HIS HONOUR: The objection I can deal with the objections
really only question by question. Now the Crown has
40 pointed me to five questions and answers to which it says
you will object.

ZAHRA: Yes.

45 HIS HONOUR: All I have asked you is does that state
accurately what the problem is and obviously from what you
have said, it doesn't?

50 ZAHRA: Yes. There are other issues, for example, such as
the finding of the children moribund.

CROWN PROSECUTOR: I do not seek to lead that.

55 ZAHRA: But this is the primary objection, the rest I can
take your Honour to after this is resolved, but it is
probably more convenient for that to be dealt with.

HIS HONOUR: It is time, convenient for you now to be as

precise as you can.

5 ZAHRA: I have done that. Can I take your Honour to the transcript where your Honour indicated where my friend indicated the areas where he proposes to read?

HIS HONOUR: Transcript page 998.

10 ZAHRA: Yes. At line 55, my friend had indicated that firstly that he would be seeking to lead evidence about the higher incidence of subsequent SIDS because of the environmental factors. Now, on the face of it, your Honour, that clearly is not objectionable but the witness can in fact talk generally, as Dr Seton did, about the
15 incidence of SIDS and whether there in fact is an increased risk of SIDS or not in subsequent deaths. Your Honour, I have no objection to the evidence being led in general terms, as was the case with Dr Seton, but making it clear, your Honour, that there should be no reference
20 at all to the statistical foundations for that evidence to be led.

The second area, which appears at page 1,000 at around line 3 where your Honour asked my friend whether he
25 intended to lead all the model questions in exhibit D, which is in fact the questions and answers that my friend had indicated. In fact he replied to your Honour that he intended at that time to lead all the questions and can I take your Honour to the detail of that.

30 Your Honour, the first area includes the first six questions, this relates to whether she can give evidence in relation to floppy larynx. Again, I would accept that consistent with the evidence of other witnesses, that she
35 can give that evidence. However, again, caution should be exercised as to any use of statistics for any use of any other material that might suggest that there is a statistical foundation for it.

40 HIS HONOUR: Does that become objectionable because of the use of statistics, Mr Zahra?

ZAHRA: Yes, the precision of which, yes.

45 HIS HONOUR: Which one?

ZAHRA: They don't, on the face of it, apart from the references to none in the 500 cot deaths that she can give, but I can indicate that the evidence should not go
50 further in the sense of her relying, if it was intended by my friend to lead evidence that there was a statistical foundation for that assessment, but on the face of it, as it appears, I have no objection to those questions in that form.

55 HIS HONOUR: What do you mean by "those questions", are you talking about all the--

ZAHRA: The first six questions that relate to - the only concern I have in relation to that is that - and an underlying concern, that the witness is giving an opinion based on not reading the post-mortem reports.

5

CROWN PROSECUTOR: She has.

ZAHRA: My friend indicates that she has read the report since.

10

HIS HONOUR: This just illustrates how difficult it is for me to understand what you are asking me to decide. Just wait a moment please, Mr Zahra. Mr Crown, are you still intending to adduce evidence, as you said the other day, in accordance with the questions and answers in exhibit D on the voir dire?

15

CROWN PROSECUTOR: Yes, your Honour, and then at the end, I would be seeking to lead from her answers to questions of a similar nature to the ones that I asked Dr Berry and Dr Herdson, combining four children and asking if she can think of any single disease or illness or syndrome that might account for all the deaths and then, excluding all of the tests that have been done on the children, and then asking her whether there have, in her knowledge, been any - whether there has been a family where it has been acknowledged that there have been four sudden deaths of infants from natural causes, either in her own experience, experience of her colleagues or in the literature.

20

25

30

HIS HONOUR: Thank you. Then we have dealt with the first six of the questions and answers in exhibit D, Mr Zahra, and I understand you not to be objecting to them?

35

ZAHRA: Yes, your Honour.

HIS HONOUR: I want you to put this problem in your own way.

40

ZAHRA: Yes, your Honour.

HIS HONOUR: But I am not always understanding what it is that you are aiming at.

45

ZAHRA: Yes, your Honour, it will become clear. I accept your Honour would be in a more difficult position than I am in at the moment, because I have obviously studied the text in relation to the questions, and I have indicated already that this is an exercise that I have really found some difficulty with myself, but I thought for more abundant caution I will go through this process with this degree of precision so that that might become apparent. I hope that I will be able to assist your Honour.

50

55

Can I take your Honour to probably the last three questions on that page. Again, in a group, on page 1.

5 CROWN PROSECUTOR: Pardon me. (Counsel confer at bar table). Your Honour, it is hard for me and it is hard for my learned friend. I have gone right through these answers. There are some of them that are not within the form that your Honour has approved, but I have gone through them and I am confident that Dr Beal can give answer in his accordance with the way in which answers have been given by the other doctors thus far.

10 HIS HONOUR: I really don't know how to receive what you are saying to me now because I do not know what is being objected to. You have just interrupted Mr Zahra. He was dealing with the seventh question.

15 CROWN PROSECUTOR: The third last question on page one ends with the words "or the child was murdered". I would not seek to lead that from her.

20 HIS HONOUR: I just asked you whether you were intending to adduce this evidence. You told me you were.

CROWN PROSECUTOR: I did, your Honour.

25 HIS HONOUR: Now you are not?

CROWN PROSECUTOR: No.

30 HIS HONOUR: You are not going to adduce evidence of any answer to the third last question on the first page after the word "lesion"?

35 CROWN PROSECUTOR: Yes. As I understand it, what she will say is that in her opinion the child died from undetermined causes.

HIS HONOUR: Yes. Is there any other answer on the first page that you are not seeking to adduce in full?

40 CROWN PROSECUTOR: Page 2.

HIS HONOUR: No, on the first page.

45 CROWN PROSECUTOR: On the first page? No, your Honour, there is not.

HIS HONOUR: Mr Zahra, we now have a qualification.

ZAHRA: Yes.

50 HIS HONOUR: And the third last answer--

55 ZAHRA: It assists but not assists completely because we would have to accept that now on its face, because we can't cross-examine her about excluding the possibility of SIDS because we can understand the foundation of what she says being well, if the child was on its back, no covers on its face, no heart lesions, then it is undetermined. In a sense it is very, very difficult. We have to accept that

on its face. We could not cross-examine her about it without bringing out the fact that really, this whole answer is based on this type of reverse onus, that if the child is on its back, there are no heart lesions, then it is murder. That is what the answer is and my friend says okay, well I will cut out the last piece and we will call it undetermine. But we can't cross-examine because we know if we press her, that is the likely that she will put as explanation.

The statement, your Honour, that if the child was on its back, again your Honour has a statistical foundation alone.

HIS HONOUR: No, that is not a statistical approach at all.

ZAHRA: In a sense that this is a study, as I understand it, the foundation for this is a study of 500 cases and that she has determined, in a sense, the probability of children dying on their back. And further studies subsequent to that.

HIS HONOUR: Dr Beal knows from her experience, including the study of the particulars of a lot of cases in which children have died - well children have died unexpectedly and apparently from natural causes, that the question whether a child is supine or prone may be a significant thing.

ZAHRA: Yes, your Honour.

HIS HONOUR: There is already evidence before the jury about the back to sleep campaign.

ZAHRA: Yes, I have no objection--

HIS HONOUR: And what a great change it brought across the nation, and across the world, I gather, in cot death experience.

ZAHRA: Yes, I have no objection to that evidence, nor has there been objection to that up until now.

The witness can give evidence in that way. The difficulty is then in applying it and this is obviously what Clarke has said about the use of statistics in order to earn - determine in a given case. Essentially when we look at it we are really doing the same thing - we are based on her experience, in a sense based on the probability to determine in a particular case. It is one thing to say that this is a factor that must be taken into account, but the question then is whether one could be safe to apply it in a given case to reach a conclusion. This is what is done here. It has been used in its application to the given case and then in a sense one--

HIS HONOUR: And dealing with a question with pathological myocarditis--

5 ZAHRA: There is a difference in that there is a pathological finding of myocarditis, this factor, the child lying on its back, it is hardly elevated to that extent where we have got a pathological finding which doctors can interpret by, during histopathological slides.

10 HIS HONOUR: Dealing then with the third last question on the first page of exhibit D on the voir dire, do you take any objection to the question?

15 ZAHRA: Yes, as we have at the start. My friend's exclusion of the last reference does not significantly change the situation. If you could see that in relation to the last question on that page, how these questions are related--

HIS HONOUR: No, please. I press you on one thing and you jump to another.

20 ZAHRA: Yes.

HIS HONOUR: You must understand by now that I am not getting your drift.

25 ZAHRA: I was hoping to clarify that situation by referring your Honour to the last question but I understand.

30 HIS HONOUR: Let me calm down and you show me the last question then.

35 ZAHRA: Your Honour, I would completely accept your Honour's demeanour, that I have looked this and looked at this and I must say from time to time I have had the same reaction, your Honour. It is a very difficult exercise and I can fully understand what your Honour is saying to me. It is very difficult to understand. I accept that, your Honour.

40 Your Honour, in the last question, really it brings this out. It brings this out on the basis that this is the basis on which an assessment is made that this is likely, most likely to be a catastrophic asphyxiating event and these answers are really quite related because we can see
45 that at the end of the day, when she gives an opinion of the likelihood, that this is the foundation, the foundation is really taking this finding of fact on the back, and us using her experience and again, it has got to be looked at in the nature and quality of the experience,
50 the experience based essentially on a study of patterns. I can take your Honour to the transcript where she says that. This is a study of patterns, not of present logical findings but patterns.

55 In other words, when we see what the foundation is of her ultimate conclusion that this makes it most likely or more likely and this always replies to the other situation so hopefully when this becomes clear the other objections I

have in relation to the other questions are very much the same; that we need obviously to go back to the foundation of what the opinion is. We can understand her qualifications and we can understand that at the end of the day, she, like other doctors, can give that opinion but what we say is for someone who is preferring an opinion, even without looking at the autopsy reports, it is not much comfort that she has read them and has the same opinion. Because, really, this ultimate opinion that it is more likely and that is to say from the outset that this is more than any of the other experts have said. She is a person who is now looking in terms of giving evidence of most likely or more likely, but it is based on an assessment of the pattern of behaviour, the pattern of lying on - a child lying on its back and there being no heart lesions. That is what we say is an improper foundation because it, in a sense we are looking at patterns based on her experience, not on any pathological findings. It can't be pathological findings because she has expressed this opinion without reading the autopsy reports.

When we move back from the face of the opinion - because otherwise it becomes within the same questions that were asked of the other experts - but this is really quite a different route that has been taken to reach, not only the same conclusion but moving on from the conclusion to say things like more likely or most likely, but we need to determine the route that has been taken to reach this conclusion. We can see it here. The route is not "I have looked at the slides. I have looked at the pathological findings. I have looked at the post-mortem report, as the other experts have done. This is based on patterns and significantly based on a pattern of lying on back in the absence of heart lesions.

HIS HONOUR: But why isn't that an opinion that Dr Beal is entitled to express based upon her study, training, experience?.

ZAHRA: Only that the foundation is very much as in the Clarke case, that we are looking at it on a statistical basis, the word statistics--

HIS HONOUR: You and I have to part company there. I do not see this as statistical evidence at all. Nor do I see anything in what the Court of Appeal said in Clarke as precluding evidence of this kind.

ZAHRA: The foundation of her evidence is the probability of a child dying not supine. That is the foundation and it is based on a study of the patterns of that.

HIS HONOUR: As I said before, I do not see this as any different from a doctor expressing an opinion about the probability, be it greater or less, of a child dying with myocarditis.

ZAHRA: If your Honour is of that view I certainly can't dissuade you any further than what I have put.

HIS HONOUR: Have you said all you want to say?

5

ZAHRA: On that particular issue, yes.

HIS HONOUR: Then where have we got to?

10 ZAHRA: We can go to the next page. The next three questions again can be looked at in a group. Again we have imposed suffocation was likely to have caused this event. That is in relation to the ALTE. Again that same objection is made. The difficulty in cross-examination, where, 15 though it is not exactly articulated, but we know that the basis that she had not looked at the autopsy reports in relation to this material but we can conclude that the same conclusion is reached based on--

20 HIS HONOUR: But the answer is not responsive, is it? The doctor is asked to say whether the ALTE was consistent with a deliberate smothering.

25 ZAHRA: Yes. It is difficult, your Honour, to determine how the conclusion is reached, again, without, it appears, looking at the material.

HIS HONOUR: Officer, I should like to send a message to the jury, please. They may have their morning tea now.

30

ZAHRA: I can indicate, your Honour, at, in the voir dire at page 980, at line 49, she indicates in that area the following, on the following page, top of the following page, that she had not looked at any slides and would 35 indicate that her preference would be that a pathologist give opinions about that. Whilst she has indicated some expertise in this area, she, as your Honour can see from the top of page 980, she does not have any particular expertise in neuropathology. That would cover the 40 following three questions also, your Honour, which relate to an assessment, the three questions on page 2 of the questions on exhibit three on the voir dire.

45 Your Honour can see from what is the fourth question on page 2, that the answer includes a statement "but would say intentional suffocation was likely caused because of the original event". The only foundation for that would be what is otherwise said to be impermissible, in other words, looking at previous incident to conclude that there 50 was intentional suffocation in the second question.

HIS HONOUR: No, it is not impermissible in considering Patrick's death to take into account his history.

55 ZAHRA: But it is very difficult to see how the jump can be made looking at the ALTE that this then is suffocation in the second.

HIS HONOUR: The reference to the original event is the ALTE, isn't it?

ZAHRA: Yes.

5

HIS HONOUR: Just putting aside for the moment the word "likely" which troubles you, that is evidence identical to what Professor Berry gave on Thursday, isn't it?

10

ZAHRA: Yes, so far as it is limited to that. But the difficulty here is that one is preferring an opinion more than what Professor Berry had indicated; in other words, that it then makes it more likely that it was suffocation. The concern is whether, what the witness is doing, is in a sense taking into account history similar to the use of the mantra, in other words, what is there about the original events that permits this, if it is not using impermissible process of reasoning?

15

20

HIS HONOUR: If I may say so, Mr Zahra, you, yourself - I won't say that. What I would like you to do is state now precisely what you mean in the expression, you keep using "the use of the mantra". Will you say what that is because I want to have it recorded?

25

ZAHRA: Yes, page 4 of these questions and answers, its second question, first SIDS probably. Second, undetermined. Third, suspected intentional suffocation. Fourth, proven.

30

HIS HONOUR: Is that the whole of your answer in defining what you mean by "the mantra"?

35

ZAHRA: Yes. Insofar as it indicates that the use of a particular death has an influence, in your opinion, when you look at a subsequent death in isolation.

40

HIS HONOUR: Yes, I follow. That is what I have understood you to mean by it, but I wanted to be sure of it.

45

ZAHRA: Can I then take your Honour to the next area, which is the first - the last four questions on page 2 and the first four questions on page 3 relating to the child Sarah? Fourth last question on page 2. Again, I have already made submission that is this, in a sense, is a reverse onus based on a pattern. Not found prone, her head wasn't covered. No heart lesions.

50

HIS HONOUR: What is this reverse onus you speak about?

55

ZAHRA: I take your Honour to parts of the voir dire transcript where, in a sense, that once these two preconditions are met, that it is homicide. In fact this is also clear in the faxed statement when the witness says "in the family concerned there are at least three reasons why the fourth death would not only not be called SIDS but would alter the thinking". She indicates in the transcript at page 991 of the voir dire, line 34 that "alter the

thinking" means would lead to you consider that very strongly, that one would conclude that it was murder.

5 HIS HONOUR: But this is all based upon taking into account, when considering the circumstances of one death, the fact that there were other deaths in the same family?

ZAHRA: Yes, your Honour.

10 HIS HONOUR: That is not going to be permitted.

ZAHRA: Yes, your Honour. This is the difficulty here, and I can understand why your Honour is concerned that I may not be explaining this very clearly. It is just that when you go down to understand and analyse the answers to the questions, that she is just doing that and it has just been re-packaged in a different way, but that is what is occurring here. That is the difficulty one needs to really analyse. It is becoming increasingly difficult because we are navigating through four separate statements here and it really does take quite some time but ultimately it becomes clear that that is the process of reasoning and there is no other. Because in her faxed statement--

20 HIS HONOUR: It is not clear to me, Mr Zahra.

ZAHRA: I accept that.

HIS HONOUR: The questions and answers are not framed in those terms. They are framed in terms calculated to produce an answer which confines itself to a consideration of the circumstances surrounding the death or the ALTE of that child, to the exclusion of any knowledge of the occurrence of any other death or ALTE.

35 ZAHRA: Your Honour, I accept that there is a clinical way of doing this; that in a sense if you almost choreograph the questions and answers and say in relation to that one, just forget the last four words and this one, just forget the first three words. But the danger is that it is an impossible process of cross-examination, because we have to in a sense accept it very much on the face. Because when we go into the detail that in fact we can see that there are other areas which with it is an impermissible process of reasoning, much the same as when she looked at the video and said, really, look, there is something about the video that I think also. It becomes that dangerous. And then when one looks at her qualifications that the weight that the jury would attach to those things, if they are in answers that might be considered to be responsive to the question.

50 HIS HONOUR: How is that dangerous? Suppose your suspicions are warranted, and suppose that notwithstanding the terms of an answer, namely that the probable cause of death with a particular child was such and such, suppose you cross-examine Dr Beal and you say, "in coming to that conclusion you are taking into account more than the

circumstances surrounding that death. You are taking into account the fact, as you know it, that three other children died, and that is really the basis of your opinion, isn't it?"

5

ZAHRA: And she is most likely to give an expansive answer on the basis that that is the case and no doubt the--

10

HIS HONOUR: Why don't you ask her to answer "yes" or "no". How can your case be damaged? What is the danger you speak about? If you question the process of reasoning and you expose it.

15

ZAHRA: If she were to answer that question "yes" or "no", that may solve the problem, but a difficulty that I see is, really, is the witness is going to be limited that way.

20

HIS HONOUR: If the witness gives an unresponsive answer you can cut off the answer. If a dispute arises between you and the Crown I will referee it. But I do not understand the danger you speak about. Dr Beal, as I understand it, will give answers which purport to be based - which purport to result by the process of reasoning which I have said is appropriate. That is to say if an opinion is to be led about the probable or likely cause of the death of a child, then all that can be taken into account is the circumstances of that child; the history of the child; the findings; and all the events surrounding the death. Now, if you do not accept this, that is the basis of Dr Beal's opinion, but in order to inform her opinion she has taken into account matters which she may not, the mantra, then you can expose that in cross-examination if you wish to do so.

35

40

ZAHRA: It is a very dangerous course, your Honour, because the witness will no doubt be qualified in a very lengthy way. Any attempt by me to cut her short might in itself suggest to the jury that there is other opinion that this witness has that has not been brought out. It is fraught with those difficulties. Ultimately, your Honour, these are prejudicial, probative type assessments in a sense that if this witness gives evidence after being so well qualified, that these matters become really very, very significant, that they are elevated, these very significant matters. The mere fact of being not prone, for example, in the absence of heart lesions, again we must accept those very superficially because of - we really don't know the answers. We can glean, from going through the experience on the voir dire, that that certainly does not make one feel at ease, that the answers would be limited to "yes" and "no", that they may in fact capture a whole wide range of circumstances, as was apparent when she said that she had watched the videotape.

55

HIS HONOUR: That is part of the art of cross-examination, Mr Zahra, and you will need to ask questions which will produce an answer you want and you will have the right to

object if the answer goes too far. You are really asking me, as I understand it, to deal with this problem on an understanding that the basis of the - I will withdraw that.

5

ZAHRA: See, your Honour the impermissible process of reasoning is riddled all the way through. For example, at page 3, the third question "so you make the diagnosis on the history?".

10

HIS HONOUR: Are you pressing the second part of that answer, Mr Crown?

15

CROWN PROSECUTOR: That is the first question on page 3, your Honour?

HIS HONOUR: Yes.

20

CROWN PROSECUTOR: Only to the extent that I will get her to identify how difficult it is to distinguish SIDS from intentional suffocation. That is the only reference that there will be to that.

25

HIS HONOUR: Mr Zahra, can I take you back to the beginning - thank you, Mr Crown - I am on the first page. Which part of any answer do you object to on the first page?

30

ZAHRA: Your Honour, the three last questions, your Honour, insofar as they are interrelated and, again, based on what we say is the impermissible process of reasoning, based on the child not supine and no congenital heart lesion.

35

HIS HONOUR: Very well. Those - subject to the deletion of the last five words from the answer to the third last question, those questions and answers may be asked and given. Second page?

40

ZAHRA: The first three questions, your Honour, again it is submitted that the foundation for that is based on examination of the history of the two events and nothing more.

45

HIS HONOUR: I am sorry? So you are saying that you do not object to them?

50

ZAHRA: In their simplest form there, I have no objection to them in that form. It is the use to which that previous history might have been the foundation for the last part of the first question; imposed suffocation was likely to have caused this events. In other words the last part of the question as your Honour has identified, does not appear to be responsive. It is a statement that is made about the likelihood of imposed suffocation and the only basis--

55

HIS HONOUR: Mr Crown, how would you press an answer about likelihood?

CROWN PROSECUTOR: What I would--

5 HIS HONOUR: In response to an answer of whether there was a consistency - a response to a question of whether there was an inconsistency.

10 CROWN PROSECUTOR: An answer would not be responsive if it was answered in that way. But I would be seeking to lead from her that in her view that Patrick's ALTE was likely to have been caused by a hypoxic events, by suffocation of one means or another.

15 HIS HONOUR: Yes. Well I think you can do that. Yes, on page 2.

ZAHRA: The next three questions, as I have indicated, the statement that--

20 HIS HONOUR: This is about Patrick's death?

25 ZAHRA: Yes. The essence is, in the fourth question or the answer in the fourth question "but would say intentional suffocation was likely, likely cause, because of the original event".

CROWN PROSECUTOR: I would not seek to lead that.

30 HIS HONOUR: The bracketed part of the fourth answer is deleted.

ZAHRA: Then in relation to the last four questions in relation to Sarah, and the first four on the second page.

35 HIS HONOUR: First four on the second page?

ZAHRA: Yes - of the third page.

40 HIS HONOUR: Haven't we just dealt with that?

ZAHRA: Of the third page.

45 CROWN PROSECUTOR: In relation to Sarah, I think that she will say that, if taken in isolation, without having regard to any of the other children, that the most appropriate diagnosis is undetermined because of her age, if she had been younger it would have been SIDS. But because of her age of ten months, that it is most likely that the appropriate diagnosis would be undetermined.

50 HIS HONOUR: That is at odds with the answer recorded here.

55 CROWN PROSECUTOR: Yes, it is. I would not seek to lead evidence from the fourth last question, that the child, the most likely diagnosis was that the child had been intentionally suffocated.

HIS HONOUR: So that will be undetermined. Yes?

CROWN PROSECUTOR: Really, that flows through to some of the other questions and answers.

5 HIS HONOUR: You would not be objecting to any of the last three questions on page 2, would you, Mr Zahra?

10 ZAHRA: No, your Honour. The objection in relation to this body of questions is that we say the foundation is this impermissible process of reasoning.

HIS HONOUR: I did not understand the rider that you just put on it. My question is--

15 ZAHRA: This body of questions--

HIS HONOUR: Are you objecting to any of the--

20 ZAHRA: Not the general statements but in fact the difference between telling the two, no. So far as it comes in line with the previous. I thought I indicated that at the outset.

25 HIS HONOUR: Yes.

30 ZAHRA: But as matters of general - it is really the application that it is objected, that is objected to, not statements of general principle. Do I presume from what my friend has just said in relation to the second question on page 3, that that answer will not be led?

CROWN PROSECUTOR: That is correct.

35 HIS HONOUR: There is no need for the question either, I would have thought, in view of the answer that has been given to the fourth last question on page 2. Yes. We are now at the fifth question on page 3.

40 ZAHRA: 5-8. I think my friend indicated to me across the bar table that he is not going to lead evidence about the photographs. She indicated that that was not an area of her expertise, at line 928 line 20 of the transcript.

45 HIS HONOUR: Now that brings us to the fourth last question on page 3.

50 ZAHRA: Yes. If my friend is leading that, it is consistent with - if my friend is leading "yes, she did"?

CROWN PROSECUTOR: I think it is all a case of consistency.

ZAHRA: Yes, my friend can lead that.

55 HIS HONOUR: Consistent. Yes?

ZAHRA: In relation to the last three questions on that page relating to the child Laura, in its general form it

is consistent with the questions asked by other experts, I have no objection to that question.

HIS HONOUR: Yes, page 4.

5

ZAHRA: Similarly, the first question there in that form, so long as it does not include the references I previously objected to where she might otherwise conclude that it was suffocation based on whether the child was not prone or in the absence of lesions. In the simplest way that those questions appear, I would have no objection.

10

HIS HONOUR: I am on page 4 now.

15

ZAHRA: Yes. I do not know if my friend intends to lead any other evidence of Laura other than that?

CROWN PROSECUTOR: Yes. I anticipate that--

20

HIS HONOUR: Just a moment. I am on page 4. Are you objecting to the first question, Mr Zahra?

ZAHRA: No, not in that form.

25

HIS HONOUR: The Crown is not putting the second. What about the third?

ZAHRA: No, that is fine. That is consistent with what has been asked previously.

30

HIS HONOUR: It is only a wrap up question, isn't it?

ZAHRA: Yes.

35

HIS HONOUR: If the opinion has been expressed in relation to each death that the circumstances are consistent with a deliberate smothering.

ZAHRA: Yes, as was asked--

40

HIS HONOUR: Why do we need a question "and they all died in circumstances where there was deliberate smothering". Why do we need that question, Mr Crown?

45

CROWN PROSECUTOR: We don't Crown.

HIS HONOUR: That can go out. You don't need the next question either - that is another wrap up question. You can have the last one. You have asked that of a number of witnesses already.

50

ZAHRA: Yes, your Honour.

55

HIS HONOUR: Mr Crown, you have indicated this morning, which will answer Mr Zahra's question, certain other additional things you want to ask her.

CROWN PROSECUTOR: Along the same lines as questions asked

5 of other doctors. In relation to Laura, I anticipate that she will say that most children don't die with the level of myocarditis disclosed in Laura, and that in her view that clinically the heart stopped after the breathing stopped.

HIS HONOUR: Well--

10 ZAHRA: I would be objecting to that on the basis that she herself has indicated that she would defer to the other experts. That was the reference I had previously given your Honour, I think at 980.

15 HIS HONOUR: You can cross-examine about that, Mr Zahra.

ZAHRA: She has already indicated in evidence that this is not an area of her expertise.

20 HIS HONOUR: Well I don't know. Doctors become so specialised that unless one has - I suppose there used to be a time when the GP could give opinions about everything.

25 ZAHRA: 982 line 35 and following, this is the answer that I have indicated previously.

HIS HONOUR: Can I just understand this in context? What is being asked about at this stage?

30 ZAHRA: This is important. It is from about 980. This is in relation to myocarditis. Your Honour can see line 44?

HIS HONOUR: On which page?

35 ZAHRA: 980. In fact it starts a little earlier than that, line 23; this is myocarditis. She talks about going to lectures. Then at line 44 the question: "Do you believe that you are competent to give an expert opinion about...or Peter Berry, or somebody like that?" Answer: 40 "I'm not the expert on pathology".

CROWN PROSECUTOR: She is relying upon other doctors views also comments to how extensive it was. She is giving an opinion.

45 HIS HONOUR: If Dr Beal accepts the opinion of another expert about the extent of myocarditis and relies on it and works from there, why can't she do that and give evidence about what she has done?

50 ZAHRA: Only that she goes on further at page 981, "would you consider herself competent to be able to give an expert opinion?" I am sorry, it relates to pattern of pathology. Would your Honour bear with me a moment? Page 55 982; again this is following on from--

HIS HONOUR: Yes, I have 982.

5 ZAHRA: This is in fact where the witness in fact
qualifies her expertise at 982 line 36, in answer to a
question in which she says, "I look at what the diagnosis
is that had been made by the pathologist and I look at the
10 patterns of what has happened". Then your Honour can see
in that context, in the answer to the last question, that
she bases her opinion on propositions that the child was
lying prone. "You have determined that there is a certain
rate of the likelihood of recurrence of SIDS if a child is
15 prone or not prone?" Answer, "absolutely". And then goes
on to "since that is how you have gone about".

HIS HONOUR: We have dealt with that already.

15 ZAHRA: Your Honour can see how that--

HIS HONOUR: You say that is evidence based on statistics.
I don't think it is.

20 ZAHRA: I obviously do not wish to cavil with your
Honour's statement. Could I just say one thing in relation
to what your Honour has suggested? It is not a dangerous
exercise in cross-examination because I can--

25 HIS HONOUR: Just a moment. I do not quite know what it is,
which question we are dealing with to which you take
objection.

30 ZAHRA: The extension. This is the difficulty. My friend
has indicated that this is not a question in relation to
the law. I have asked him - I have no objection to these
questions if they are the only ones and he has now
indicated that there are two others - we are dealing with
that. This only highlights the problem that I have, is
35 that we are just getting information on the run.

HIS HONOUR: The Crown announced that first thing this
morning or first thing upon the entering into this
particular debate, and the questions - and presumably the
40 answers - seem to me to be no different from questions and
answers which have been given by other witnesses, to and
by other witnesses.

45 ZAHRA: I have already made my submissions in relation to
the expert basis of the opinion in the light of the
questions. I can't take it further than that.

HIS HONOUR: Thank you, Mr Zahra.

50 ZAHRA: Can I indicate, in relation to your Honour's
suggestion that I can cut her short in cross-examination.
I could ask your Honour the questions that your Honour
proposed, and if she said "no, it is not the only factor",
I presume my learned friend can lead in cross-examination
55 other factors. We would then open this whole area up
where he might no doubt ask her about the finding of the
child moribund and all these other factors, or the mere
fact of the history.

HIS HONOUR: This is hypothetical. How can I possibly deal with this, Mr Zahra?

5 ZAHRA: It is submitted that when we look at the material, particularly the voir dire cross-examination, that it is an inevitability.

10 HIS HONOUR: You may be right. I don't know.

ZAHRA: Your Honour--

15 HIS HONOUR: It is possible that some such open-ended answer might be cut off and that the Crown might delve into it in re-examination and bring out that the basis of the opinion is not the basis that has been put forward in chief, but a different and permissible basis.

20 ZAHRA: Well, your Honour, the question I would be asking, the one your Honour proposed is--

HIS HONOUR: I am not proposing any question.

25 ZAHRA: No, suggested.

HIS HONOUR: I am not even suggesting a question. We were having a debate.

30 ZAHRA: I accept that. I put that improperly.

HIS HONOUR: And we put hypothesis to one another's--

35 ZAHRA: As I stand here, I can think of no question that would not inevitably attract a full answer, despite my attempts to cut the witness short, even an answer "no" which appears to be the inevitable answer. Not the likely or highly likely but the inevitable answer that my friend would be permitted to re-examine why. It has just been the subject of, no doubt the subject of legal argument
40 throughout the course of this. I can indicate that my cross-examination will be brief, because of that danger, that it is an unacceptable danger because of the prejudicial effect of what is submitted to be the
45 inevitable answers that are clear from the - and then we are left with the prejudicial effect of a witness with this qualification giving these answers, not challenged in cross-examination, and the weight that would be attached to it when we know that the foundations for her opinion are not - are based, either on history or--

50 HIS HONOUR: I understand that there are difficulties for you in the conduct of the defence of this case; just as there are for the Crown in the prosecution of it, and for
55 me in doing what I have to do, and I sympathise with those difficulties; but should I stop a witness giving evidence because of those difficulties?

ZAHRA: Your Honour does have discretions to exclude the

evidence, based on a prejudicial probative effect. Prejudicial effect here is really quite immense because coming back to my first statement, that we have a witness here who is going to give an opinion more so than any other witness, that in the sense that this is a likely suffocation.

5
10 HIS HONOUR: So you are applying for me to reject all the evidence, are you?

ZAHRA: Yes, insofar as that it goes outside general statements and it applies to the application of her expertise in the given case, so far as reaching a diagnosis.

15 HIS HONOUR: And what is the test? It is not admissible unless the probative value outweighs the risk of impermissible prejudice?

20 ZAHRA: Yes. I can only go back to my starting point that really we look at this as an exercise of logic that this witness in a voir dire was preferring these same opinions without looking at the post-mortem reports and indicating, your Honour, in her own statement, the first statement of 25 8 December that these macroscopic and microscopic examination is rarely helpful, so this is where this witness has started from, and it is just as an exercise in logic. She preferred these opinions each without reading the post-mortem reports.

30 HIS HONOUR: I am of the opinion that the probative value of the evidence outweighs any risk of unfair prejudice.

ZAHRA: If your Honour pleases.

35 HIS HONOUR: And I will give reasons later on, if appropriate.

ZAHRA: Yes, your Honour.

40 CROWN PROSECUTOR: If your Honour pleases.

ZAHRA: Your Honour, in relation to the facts--

45 HIS HONOUR: Is there any other basis on which you ask me to exercise my discretion?

50 ZAHRA: Not in relation to the exhibit in D, there are other matters in relation to the other evidence. Can I take your Honour to the faxed statement, what has been referred to as the faxed of 24/4--

HIS HONOUR: I understood that we have dealt with all the evidence proposed to be adduced by Dr Beal.

55 ZAHRA: There is another component of her evidence and that is this. The overview in exhibit C about whether she is in fact aware of any case, where there have been three

or more deaths. I just want to go into that area briefly.

5 I am told that that evidence will be led in a shortened way, similar to the evidence that the other witnesses have given; but might I flag what my objection was, in the sense that any reference to other cases where there have been three deaths, but now known to be murder, is impermissible.

10 CROWN PROSECUTOR: I have explained that to Dr Beal.

HIS HONOUR: I think your point is well taken, Mr Zahra.

15 HIS HONOUR: I can take the morning tea adjournment now, can I?

ZAHRA: Yes.

20 SHORT ADJOURNMENT

RESUMPTION

5 CROWN PROSECUTOR: A minor transcription error, your Honour. According to the transcript during the course of the argument his Honour "Studdert J" slipped in and replaced your Honour. I didn't observe that.

HIS HONOUR: We will have a that looked at, thank you.

10 ZAHRA: For completeness, I understand from what may have happened, he's saying he won't be leading this material this way. But can I make it clear, my objection relates to the Scotchmer material. I can give your Honour an example of what I was talking about, the reverse onus, appearing
15 at page 106 of the transcript, her giving evidence in that case where she talks about history.

HIS HONOUR: I thought we finished all this.

20 ZAHRA: I need to make this very clear.

HIS HONOUR: Which exhibit is this on the voir dire?

25 ZAHRA: E, your Honour.

HIS HONOUR: I have exhibit E on the voir dire.

30 ZAHRA: Page 106. About .5, the answer includes this statement: "For example, there has now been shown that, as I said, generally speaking, occurs in babies on their stomachs, so if you're finding baby that hasn't been on their stomach, that immediately heightens my concern that something has been done to that baby unless the pathologist finds a medical cause for the death". It goes
35 on to talk about congenital heart disease.

One last matter your Honour--

40 HIS HONOUR: Just a moment. I need to understand what is happening now. Are you telling me it is your understanding that the Crown is going to adduce this evidence and you object to it?

45 ZAHRA: In the Scotchmer material.

HIS HONOUR: Please answer the question. Is it your understanding that the Crown is going to adduce evidence along the lines of that which you have just pointed out at page 106 of the transcript, being part of exhibit E on the
50 voir dire?

55 ZAHRA: No, your Honour. What I indicated at the outset, from reading the Scotchmer material - the Crown will not be leading this material, but I wish to note your Honour that in relation to my previous argument, when we discussed whether what the witness was doing was reversing the onus - I flag it, not as an objection but to highlight my argument.

HIS HONOUR: You are going back to the argument we had and what I have given judgment. Do you want me to give judgment again?

5

ZAHRA: No. I thought, for abundant caution, that this other material was in fact present.

10

One last matter your Honour. In relation to the evidence my friend proposes to lead from this witness, as it did from the first witness, that there is now evidence from the tracer that one can determine the sequence, in other words, that asphyxiation occurred first and then cardiac arrest.

15

As I flagged earlier today, we had no notice of that, it is a significant medical issue. It was a matter that was not even indicated by my friend to me. The statement of the first witness, it was a brief statement.

20

HIS HONOUR: Which is the first witness? Do you mean Dr Bailey?

25

ZAHRA: Dr Bailey. We received a statement and handwritten notes, but no notice whatsoever until my friend asked the question.

HIS HONOUR: Are you making an application?

30

ZAHRA: Yes. In relation to the next witness, my friend just indicated before morning tea that he will lead this evidence from the next witness. We would need to get expert opinion about that, and we cannot complete our cross-examination.

35

HIS HONOUR: You may ask for Dr Beal to be recalled later on. You have indicated you asked for Dr Bailey to be recalled. That is understood.

IN THE PRESENCE OF THE JURY

<SUSAN MICHELLE BEAL(12.37PM)
SWORN AND EXAMINED

5

HIS HONOUR (To witness): If you would like to refer to any notes you have, in order to give your answers, you may do so?

A. Thank you, your Honour.

10

CROWN PROSECUTOR: Q. Dr Beal, would you please tell the court your full name?

A. Susan Michelle Beal.

15

Q. You are a registered medical practitioner?

A. Yes.

Q. Whereabouts do you practice?

A. At the Women's and Children's Hospital in Adelaide.

20

Q. Doctor, have you been employed as a paediatrician, at the Women's and Children's Hospital in Adelaide for more than 35 years?

A. Yes.

25

Q. During that time, have you made a particular study of Sudden Infant Death Syndrome?

A. Yes.

30

Q. Have you been involved in the area of SIDS for over 30 years now?

A. Yes.

35

Q. During that time have you published very widely, on an international basis, on the issue of SIDS, both articles in professional journals and chapters of books?

A. That's correct.

40

Q. In 1986 were you awarded a Doctorate of Medicine in relation to your work on SIDS?

A. Yes, for a thesis.

45

Q. And a doctorate of medicine, is quite different from a bachelor of medicine and bachelor of surgery?

A. Absolutely. It is a post-graduate qualification.

50

Q. Doctor, are you also a member of a World Committee of Epidemiologists?

A. Yes; in regard to infant mortality, yes.

Q. Is infant mortality, in general, an area in which you have studied, worked and practised for many years?

A. That's correct.

55

Q. Are you, as well as being a paediatrician, are you also an epidemiologist?

A. Yes.

Q. Would you explain to the Court what an epidemiologist is?

5 A. An epidemiologist looks at the patterns of diseases to see if they can find out more about what causes them, how to treat them, how to prevent them occurring, work such as that.

10 Q. Is that an area that has required you to focus on any particular field of illness?

A. I did that course because I was interested in Sudden Infant Death Syndrome.

15 Q. Are you a member of the World Committee of epidemiologists?

A. Yes.

Q. What sort of the body is that?

20 A. It is called the Global Strategy Task Force. It meets after each of the SIDS International meetings, with well-known epidemiologists; but there is also education pathologists, also physiologists, and they each meet to discuss what world projects are likely to be of use, particularly now as the incidence of SIDS has fallen so
25 dramatically; to get answers in, you really need studies combined from all different places in the world. So a lot of combined studies are now happening.

30 Q. Are you also a member of an Infant Mortality Committee in South Australia?

A. Yes. The Post-Neonatal Infant Mortality Committee studies the deaths of all children between one month and one year of age that year in our state, and we have a general discussion. There are - I am - there is a
35 paediatrician, but there are pathologists; there are nurses; there are general practitioners; there are obstetricians, with the object to co-operate, geneticists people like that.

40 Q. Is that a committee sponsored by the State Government of the South Australia?

A. Yes.

Q. How many years have you been on that committee?

45 A. I have been on that committee since about 1988, I think it was. Since the inception of that committee. Until that time, I had personally been responsible for gathering the histories of all the unexpected infant deaths in the State, and providing those histories for the pathologist
50 and the State Coroner. I was going to Switzerland, so it was fairly important that some committee was set up to take over where I had left off. So I have been there since the inception of that committee.

55 Q. How many years, before the inception of that committee in 1988, were you involved in reviewing all Sudden Infant Deaths in South Australia?

A. I commenced in 1970. When I reviewed the years 1966 to

1970, and then from 1972, I visited the families of all families within a 100 kilometre radius of Adelaide on the day the baby died. In most cases in the home to discuss with them what had happened to the baby and to talk to
5 them about the death. I was usually about an hour to two hours. Following that I would give the history to the pathologist, discuss with the pathologist his findings and take the report to the family and discuss with them what the report had said. Not in every case did I go back a
10 second time but in many I did.

Q. So would it be fair to say this, Dr Beal: That for well over 30 years you have been involved in a review of every sudden infant death in the State of South Australia?
15 A. That's correct. Well over 500.

Q. Doctor have you been awarded the AM award, that is the, I think the Medal of Australia?
20 A. The Member of the Order of Australia, yes.

Q. By the Commonwealth Government in relation to your work in paediatrics and SIDS?
A. Yes.

25 Q. Have you also been included on the honours list as Australian of the Year, for your work in paediatrics and SIDS?
A. Yes.

30 Q. I think you have also received a State ward in South Australia of a similar nature?
A. Yes.

35 Q. Have you been invited on many occasions to present papers to conferences in a number of overseas countries?
A. Yes.

40 Q. Have you also worked extensively in another areas of interest concerning cerebral palsy?
A. That's correct.

45 Q. And have you been extensively involved in South Australia in teaching and training of, not only up coming paediatricians but also other doctors, ambulance officers, police, emergency services personnel and the like?
A. That's correct.

50 Q. I would like to ask you some questions about SIDS. Do you tell the court that SIDS is a diagnosis of exclusion?
A. As I said, it's defined as the death of an infant or young child who was apparently completely well at the time of death, where the death scene investigation, that is looking at what has happened to make sure they didn't suffocate accidentally or something like that, and the
55 autopsy shows nothing which can itself be responsible for the death. That is the definition of SIDS; that is generally accepted by most people.

Q. Would you explain to the Court the difference between a diagnosis of death from SIDS and death from undetermined causes?

5 A. If any of those things that I have said have something
that may be of importance, you would probably call it
undetermined rather than SIDS. Some would call it
undetermined consistent with SIDS, some would call it
10 SIDS, some would call it undetermined. And there is not
absolute agreement on those. But if you found something
like the baby had a pillow over its head or the blankets
over its head, you don't know whether it matters or not.
So you would probably put undetermined because you don't
know. For if the baby was in bed with its mother and sort
15 of found it a bit under her breast, undetermined, you
don't honestly know the answer. If you find a little bit
of pneumonia or myocarditis or a little bit of something
that's usually compatible with life rather than death, you
would probably call it undetermined. If you find in the
20 history that the baby's outside the usual age range, one
to six months, or if the baby hasn't been lying on its
stomach, or if some of those things you would probably,
many people would call it undetermined rather than SIDS.
But it's open to debate, the way you would do it.

25 Q. You mentioned about a baby lying on its stomach; were
you personally involved in the research which resulted in
the back to sleep campaign?

A. Yes.

30 Q. Could you tell the court what your involvement was?

A. In 1978 I became concerned, by that stage I had
visited about 150 families and I was very concerned about
two things; the first one was that most of these babies
were found lying flat on their stomachs with their faces
35 straight down. Others were found with bed clothes over
their heads. I was very concerned about that and I
published that in 1978, that concern, but it was
uncontrolled. I then set about getting controls and I
wasn't the only one.

40 Q. What do you mean by "controls"?

A. Finding out what the community did generally, the way
they slept babies. If you want the figures, 30 percent of
the community put their babies on their tummies and 80
45 percent of the children who died were on their tummies. It
is significant, it is different. So from that I then set
out to get other people to do the same work. And very good
work came out of the UK, in New Zealand and from here. And
ultimately it was decided that babies should not be placed
50 on their stomachs and the incidents throughout the western
world is much more than halved. We dropped in Australia
from 40 a year down to less than 10. So it has been a
dramatic change.

55 Q. The back to sleep campaign in Australia, was that
introduced in about 1990, 1991?

A. Yes, I had been asked by the SIDS foundation in
Victoria to write a paper for them on how you could reduce

the incidents of SIDS. And I included that reference in that, that was in about 1987. But it wasn't until Terry Dwyer organised a big congress in Canberra which was presented, not just to pediatricians but to statisticians and public health people, to decide if the evidence was sufficient from all over the world to make that a public recommendation.

Q. When was that?

10 A. That was in 1990 and there were three speakers. I was actually living in Switzerland. I was brought back from Switzerland for that and doctor De Jonge was brought from the Netherlands because he had done similar work, and somebody from New Zealand. And the three speakers were
15 there and it was an excellent conference.

Q. As a result of that back to sleep campaign introduced into Australia at that time?

20 A. A public health measure, yes.

Q. Did it cause the sort of reduction you talked about in the number of deaths from SIDS?

A. Dramatic, absolutely dramatic.

25 Q. Doctor, you explain to the Court how one can distinguish a SIDS death from a suffocation death?

A. SIDS and suffocation are indistinguishable in most cases. Accidental suffocation can often be diagnosed because of the way you find the child. That is, if you if
30 the child has - we had one child gone up the corner of the cot with its face pressed into the bumper. It was fairly obvious accidental suffocation, but you wouldn't find, didn't find anything in the autopsy that is different from SIDS in that. Non accidental suffocation, that is imposed
35 suffocation, sometimes there are bruises or there are marks on the face, like on the chin or the fingerprints or something like that, that will lead you to suspect that there could be something. But in the actual--

40 Q. You're talking about deliberate?

A. This is deliberately suffocation. You may seek marks on the child. You may even see old fractures but you don't necessarily find those. You wouldn't find them in just suffocation but if you found those you would be more
45 concerned about it because the actual autopsy itself doesn't tell you the difference between suffocation and post mortem examination, apart from bruising, doesn't tell you a difference between SIDS and suffocation.

50 Q. Now, doctor, as at the present time has there been accepted in the medical community, to your knowledge, that there have been any families that you are aware of, either from your own experience or the experience of your
55 colleagues or from the medical literature, in which there have been three or more children who have died from SIDS?

A. No.

Q. I would like to ask you some questions in relation to

the four Folbigg children. Firstly, you have been shown by Detective Sergeant Ryan some material in relation to each of these children?

A. Yes.

5

Q. Does that include their medical records between the times that they were alive and--

A. Yes.

10

Q. And medical records relating to the time of their deaths?

A. Yes and autopsy reports, yes.

15

Q. Includes the post mortem reports for each of the children?

A. Yes, initially I had only read the summaries of autopsy reports. I didn't read them in detail until this week.

20

Q. Going firstly to Caleb; I would like you to consider him in isolation as though you knew nothing about any of the other children?

A. Okay.

25

Q. You are aware from the records that Caleb was said to have had a floppy larynx?

A. Yes.

30

Q. And in your view did that play any role in his death?

A. Most unlikely in that the doctor who diagnosed that, which is a strange diagnosis, but the doctor who diagnosed it didn't take any precautions about immediately getting the child to hospital to consider tracheostomy or obvious watching. So I would say he was not terribly concerned. A floppy larynx, by which you Laryngomalacia, which is a narrowing or not working larynx, that normally is compatible with life but can be life threatening. It runs a line from being very, very, very mild to being very, very, very severe. And somewhere, you can get every sort of - if the doctor had thought it was a severe one, he would have done something about it. I mean that is just basic knowledge from any doctor.

35

40

45

50

55

I also read the autopsy report and the gross autopsy showed nothing wrong with the larynx. Now, I didn't note a microscopy but if the laryngomalacia was severe I would have expected that to show up just looking at it. Because an anaesthetist looking down can see it. If you look down the throat when you put a tube down, you can see laryngomalacia with any severity you would anticipate it would be seen at autopsy if there was severity. There could have been a little bit which would only show up in microscopy. But I couldn't find that microscopy examination. I would say the pathologist didn't think it severe enough in the history to bother looking in the larynx; is not something normally, I don't think that is negligent on the part of the pathologist. I think that is something you wouldn't be looking at unless you thought it

was of some significance.

Q. Doctor, have you ever heard of, or read about a child who has died from a floppy larynx?

5 A. I know of children who have, would have died without treatment from severe laryngomalacia. They have to have a tube put in below the larynx to be able to have them to breathe, they're very--

10 Q. How would they exhibit that?

A. They can't breathe in that they go -- (witness audibly demonstrated).

Q. For the record; gasping.

15 Q. It's a very noisy gasping. I have seen children with that sort of pattern, living, particularly the cerebral palsy children. I look after quite a lot of them, have that horrible noisy breathing. You cannot believe they're still alive but they go on living for many years.

20 Q. Doctor, in your opinion what was the appropriate diagnosis for Caleb's death, if look at it on its own?

A. I would have put sudden infant death syndrome with the proviso that the child was under three weeks of age.

25

Q. Three weeks or three months?

A. This is the first child?

Q. Yes?

30 A. I thought the first child was 19 days.

Q. I am querying what you meant?

A. Under three weeks. As I said the normal age range is one to six months. So this child being under three weeks puts it in a slightly different category. And this child being supine, lying on its back, those two facts I would have put down to sudden infant death syndrome in an infant under three weeks of age and lying on its back. Both of which make sudden infant death syndrome most likely, but don't exclude it.

40

Q. The finding reported in relation to Caleb, are you able to say whether or not they are consistent with Caleb having been deliberately smothered by an adult?

45

A. Yes.

Q. Are they consistent?

A. Yes, consistent with that.

50 Q. What do you say to the proposition that Caleb, when he died, suffered from an acute catastrophic asphyxiating event?

A. Yes.

55 Q. Going now to Patrick: Are you aware from the records when he was about four months old Patrick suffered from an apparent life threatening event?

A. Yes.

Q. What in your opinion was the likely cause of his life threatening event?

5 A. I believe the hospital did all the investigations they should have to rule out disease processes that could be causing that catastrophic event; such things as meningitis. Many things were excluded because a lot of children who present with an apparent life threatening event have a medical disease which has caused that event.
10 Of the remainder, with a severe one, as severe as Patrick, I would say it was again an acute asphyxial event of undetermined origin.

15 Q. In relation to Patrick's death when he was approximately eight months of age, what is your view about the likely cause of his death?

A. I can't say. My view is that it is likely--

20 Q. Sorry, looking at him on his own?

20 A. It is likely that the same process that caused the original turn, caused his death. However, it is not impossible that suffocation in a profoundly damaged child such as he was, or he seemed to be, or epileptic fit or something like that, are also possibilities for the
25 ultimate death. But when I take the two facts together in this child, that's all, you would be persuaded that that he did, they probably had the same cause and it was probably an asphyxial death, but you can't be certain.

30 Q. Asphyxial death being a death from loss of oxygen?

30 A. Yes. But that would be so even if it was an epileptic fit. It would be a lack of oxygen. The epileptic fit would be expected to cause the lack of oxygen which would then cause the death.
35

Q. In your view did his ALTE result from an epileptic fit?

40 A. Most unlikely if that, that was, from my reading of it, the neurologist looked at that to see if that was likely that that happened and they decided not. Children who have epileptic fits at that young age usually have a disease process that causes the fit, and you usually can find that either on EEG or at autopsy. Things like Canarvons; there are number of disease process that
45 present in that young age group as fits. It is not like febrile convulsions which present later, and they can happen in perfectly normal children. But in a child presenting at that young age with fits, you would usually find another disease process and I won't go into all the
50 ones you would look for.

Q. So does this summarise your view about Caleb, sorry, Patrick? That both his ALTE and his death were likely, could have been caused by some unexplained, asphyxiating event?
55

A. Yes.

Q. Is that consistent with having been caused by

deliberate suffocation of him, by an adult?

A. Most certain.

5 HIS HONOUR: Are you going to change the subject?

CROWN PROSECUTOR: Yes, I am moving to another child.

10 HIS HONOUR: That might be a convenient time to take the
lunch adjournment, ladies and gentlemen of the jury.

IN THE ABSENCE OF THE JURY.

5 CROWN PROSECUTOR: There is an important transcription correction that my learned friend, junior, picked up. It is noted on our Crown as page nine at line 32 following the last adjournment. There is the word "most" in respect of it being most likely. I heard the witness say "less" likely. And I think that is also in keeping.

10 HIS HONOUR: What was the doctor referring to by the description 'both'.

15 CROWN PROSECUTOR: To the fact that Caleb was found supined and also that the child was of a young age for sudden infant death syndrome.

HIS HONOUR: That is my recollection of the evidence.

20 ZAHRA: Yes.

HIS HONOUR: That will be corrected. I can't give the transcript page reference number. We have a temporary number apparently, but for 'most' there will be substituted "less".

25 ERRATUM NOTED

SHORT ADJOURNMENT

30

RESUMPTION

5 CROWN PROSECUTOR: Q. Doctor, moving now to the case of the third child Sarah Folbigg: Again I would like to ask you to consider her in isolation, without any reference to any of the other children. In your view, looking at her in that way, what was the likely cause of her death?

10 A. I find this very similar to the first child, that I would go along with a committee that either decided undetermined or sudden infant death syndrome, in that this child is again outside the usual age range and was found on the back. So for those reasons, I accept either diagnosis.

15 Q. In your view is there any significance in the finding that she had a displaced uvula?

20 A. I think it is important that the pathologist mentions that; I don't think it was anything to do with her death, but I think, and the displacement of the uvula, was, I don't think - I mean that could have been a most post-mortem artifact. Uvula was inflamed. The uvula had signs of what you get when you get the sore throat. So I think it showed probable throat infection in this child.

25 Q. Doctor, the findings in relation to Sarah, are they consistent with her having been deliberately smothered by an adult?

A. Yes.

30 Q. May she also have died from an acute catastrophic asphyxiating event?

A. Yes.

35 Q. Moving now to the fourth child Laura. You are aware that on post-mortem Laura was found to have some myocarditis of her heart?

A. Yes.

40 Q. In your view, was the myocarditis, to the degree to which was found by Dr Cala who conducted the post-mortem examination, what in your view is the significance of that finding?

45 A. I would bow to pathologists, but I also say you don't believe you get two pathologists who'll agree. Roger Byard, I think who has appeared here as well, I have done a lot of work with. And he has described children who have died from drowning, or from a peanut in the esophageus, or some other causes of that have been myocarditis, which he would have called myocarditis, if
50 they only died from something else. So I think the argument is out on that hand. I honestly don't know the answer to that.

55 Q. Now, doctor, evidence has been given that the mother claimed to the police, and also too in the document that she prepared for her solicitor, that she heard the child coughing, and 10 or 15 minutes later went in to find the child not breathing; it has been established that the

ambulance officers came within several minutes, found the child not breathing, attached an ECG machine to the child, and found a very slow pulse, a pulse that you would expect just before the death. Is there any significance, in your view, in the absence of breathing, but the continued presence of a pulse or heartbeat?

5
10
15
A. Yes. I know you don't like me saying "more likely", but I'm afraid it makes it more clinically, it is more likely that the breathing stopped before the heart; and that is not what you would expect from a heart attack, or a myocarditis, or something wrong with the heart. You would expect the heart to stop first, and then the patient to go on with gasping breathing for a little while. I mean they're clinically dead but they will just gasp. In this one, it is more like the picture of a dead breathing which goes on with a, like a gasp in the heart, if you like, that type of thing.

20
Q. If the breathing stopped before the heart stopped, is that more consistent with suffocation than it is with myocarditis?

A. Yes.

25
Q. To what degree is it more consistent?

A. No, I can't give you absolutes, but certainly must have more likely the breathing stopped first in this child, and that is more likely that the breathing in, for some way that the heart wasn't the cause of the breathing stopping.

30
Q. In your view are the findings in relation to Laura consistent with her having been deliberately smothered by an adult?

A. Consistent, yes.

35
Q. Are they consistent with her having a sudden acute catastrophic asphyxiating event?

A. Yes.

40
Q. After you have, in effect, said that all four of these children died from a cause which was consistent with a sudden acute asphyxiating event?

A. Yes.

45
Q. Can you think of any natural cause, that has not been excluded in these children, by the tests they had during their lifetimes and afterwards, can you think of a natural cause that would account for their deaths?

50
A. No, excluding that natural disasters, like a plane crash or something, no.

55
Q. In your experience, and in the experience of your colleagues that have been related to you and in the medical literature that you have read over the years, have you ever come across a family in any of that experience or any of that reading or research, a single family in which there have been three or more children who have died suddenly from a natural causes in the way that these

children died?

A. No.

5 Q. Are you able to give us any indication as to how long it would take for a child to die, between the cessation of breathing and irreversible death?

10 A. That's an extremely variable situation. There is a gap between not being able to get air in and stopping breathing. The child will, if it is obstructed, for example, will go on trying to breathe for up to three minutes against not being able to get air in. So you have got that initial period, and then you have a time, depending on what happens, with some drowned children it has been up to 20 minutes they have been under the water and have been resuscitated, so it is very variable, and I can only say it is very variable between three minutes and 15 20 minutes.

20 Q. How long would it take before unconsciousness occurred after the cessation of breathing?

A. After the cessation of breathing? Again, the average would--

25 Q. Can I be more specific? If a mother was smothering a child with a pillow in her hand or some other soft object?

30 A. Then it's a lot longer chain. The child stopped breathing. It is different from the time you block breathing and the child stops breathing. There are breathing movements for a significant period of time before the child actually stops breathing. Some air may be getting through a little. So it depends how much is getting through how long that timeframe is. Then there is the time from stopping breathing until the heart stops, that again is variable, but two to three minutes and, 35 minimum; and then there is a time when the breathing stopped and the heart stops, and if you get in within the next minute you might even get the heart going again. So there is quite a timeframe and it is very variable.

40 Q. Between the cessation of breathing and unconsciousness, how long would you be looking at - well, roughly or a range?

A. Oh, a minimum of two to three minutes.

45 Q. A young baby?

A. No, I'm sorry, I would have to review that. I have to think a little. This is from actually stopping breathing? The child may easily be unconscious before they stopped breathing.

50 Q. From the time if an adult is attempting to smother a child, and totally, or--?

55 A. Till the child becomes unconscious, I'd say at least two minutes; but as I say, the child may actually go unconscious from a lack of oxygen before they stop breathing, before they stop gasping. If obstruction is removed, they may actually continue to breathe, even though they're unconscious.

Q. Would a young baby struggle if an adult were deliberately trying to smother the child?

A. Oh, certainly.

5

Q. In what fashion would a baby of, say, 19 days struggle?

A. Not as much as a child of 19 months. Much less. They don't have the power. They're - it is very different in a very small baby, from the huge struggles that you would have, to hold down a 19-month older.

10

<CROSS-EXAMINATION

15

ZAHRA: Q. Doctor, you were asked a number of questions consistently in relation to each child. Firstly, whether, from what you have observed about the various symptoms, whether those symptoms were consistent with suffocation?

A. That's correct.

20

Q. And you were asked that question in relation to each child?

A. Yes.

25

Q. You also indicated in fact that there is, if there are no symptoms you cannot distinguish between a SIDS death and death by suffocation?

30

A. There is a difference between symptoms and signs. Symptoms are something that somebody complains of, or has as a symptom; signs of things you find when you look at the person. If the signs--

35

Q. I am talking about medical symptoms, in other words relying on your expertise in looking at symptoms, medical symptoms?

40

A. That's what I am trying to say. Some people muddle the symptoms, and sometimes you may find bruising, something like that. If the child is totally well and healthy and you suddenly find them dead, then you cannot tell the difference between suffocation and SIDS.

45

Q. Do I understand that your answer in relation to that particular question for each of the children, that you cannot rule out suffocation, is based on the foundation that because there are no such symptoms, that it would be consistent with suffocation?

A. That's correct.

50

Q. Similarly, with the question that was asked of you again, consistently for each of the children, whether it was consistent with the sudden acute catastrophic asphyxiating event, again that is based on the fact that one can have a sudden acute catastrophic asphyxiating event, without there being any symptoms of that?

55

A. I think the baby would have shown symptoms, if you had been looking at it.

Q. Symptoms, in the sense of?

A. Struggling or whatever. I mean, most people don't have an acute catastrophic asphyxial event without showing some signs of - if you happen to be looking--

5 Q. "Signs", in the sense of bruising?

A. No, but signs of struggling or signs of, if a baby's objecting to being, having no air way, if you watch children that have suffocated from other things, what they don't do is that they don't stay still.

10

Q. In relation to the child Caleb, I understand that your diagnosis is SIDS, but you indicate, in relation to that, that the age, and being found on his back, are two matters that you would use to qualify the diagnosis?

15

A. That's correct.

Q. Firstly in relation to age, I think you've indicated that that in itself is not determinative?

20

A. No. No, it is not determinative, no.

Q. So it doesn't exclude it?

A. No.

25

Q. Similarly, with a child being on its back, that is not determinative?

A. No.

Q. Not conclusive?

30

A. No.

Q. And again--?

A. If that were conclusive, I wouldn't have called it Sudden Infant Death Syndrome with those provisos.

35

Q. You don't exclude SIDS?

A. No, no.

40

Q. You gave an indication of what you would expect a child, with the gasping sound you made, that could be called a stridor?

A. Yes, but that also comes in degrees, from a sound that you can only hear in a very quiet room, if you have really listened to something that rocks the room.

45

Q. In relation to the child Patrick and the ALTE, you rely on other experts to exclude epilepsy, for example?

A. Yes.

50

Q. And similarly encephalitis at this stage?

A. Yes. I wasn't there at the time.

Q. In a sense, when you give your opinion in relation to Patrick's ALTE, it is on the basis that you rely on their observations?

55

A. Absolutely.

Q. Not enquiries or examinations that you have done separately?

A. Absolutely.

Q. You cannot rule out the possibility that ALTE was the first epileptic fit, in seizure disorder?

5 A. I find that extremely unlikely, because epilepsy starting at that age usually shows elements, always shows some other cause: You either show - I didn't mention them - but you find tuberosclerosis, Canovan's disease, or Leed's disease, or something else like that, that has
10 caused the epilepsy.

Q. You can't exclude that fact, however?

A. I can exclude those diseases. They were not found.

15 Q. But you couldn't exclude the initial ALTE being an epileptic seizure?

A. One hundred percent no, but pretty close.

Q. Again, you would be relying on the opinions of others in relation to--?

20 A. -- that they done all the tests to exclude those. Well I have actually seen the neuropathology report on Patrick, which showed he didn't have Canovan's disease, or Leed's disease. The ECG was normal. The spinal puncture was
25 normal. It's a good hospital. They did the right tests.

Q. You're not a neuropathologist?

A. No, but I have had a lot to do with it.

30 Q. Is the report you're talking about in relation to the death of Patrick, the report of Dr Cala, the neuropathologist?

A. Yes.

35 Q. You would defer to his experience in that regard?

A. Of course, yes.

Q. Similarly in relation to Patrick's death, if the first was epilepsy, I think you indicated that the same process was likely to have caused the death that caused the ALTE?

40 A. Yes, but I already said I think it is extremely unlikely that the first was epilepsy.

Q. The death however would be the result of seizure disorder?

45 A. Yes.

Q. When you examined the material in relation to the ALTE, did you have material from a Dr Wilkinson?

50 A. I didn't note the names. I'm not very good on names. I presume that the story about the ALTE, is it? (Witness handed exhibit 6). I had seen a lot of information on this, so I'm afraid I can't remember exactly who said what, unless I know the doctors concerned.
55

Q. Was that previously given to you?

A. Yes. I had seen this, yes.

Q. That was a report from Dr Wilkinson dated 19 September?

A. That's correct.

5 Q. 1991?

A. Yes.

10 Q. And you see the second paragraph; the letter notes the changes which were seen were of a type that could occur after seizures and encephalitis or interference with oxygen supply?

A. Yes.

15 CROWN PROSECUTOR: In fairness, if my friend is going to do this, he has to put all the material of Dr Wilkinson. He cannot be selective and choose one or two items.

20 HIS HONOUR: If Mr Zahra doesn't know, no doubt you would, in re-examination--

ZAHRA: Q. Have you been given a transcript of Dr Wilkinson's evidence in this trial?

A. I don't think so, no.

25 Q. So earlier today when you said that you were relying on the number of reports in relation to the ALTE--?

A. Can you tell me who Dr Wilkinson is? He is a neurologist, neuropathologist.

30 Q. Neurologist, yes. Paediatric neurologist?

A. Ian Wilkinson. I do know him after all, I'm sorry.

Q. Do you recall receiving this letter at all?

35 A. I recall seeing a copy of this letter, yes.

Q. Was that a document that you took into account in fact to exclude seizure or encephalitis?

40 A. No. This document I took into account, I'm saying that the only important factor is that it didn't suggest any inherited disorder. That would be looking at some of those brain diseases I mentioned. The other changes that he says that could occur after seizure, encephalitis, interference with oxygen supply. I didn't take notice of that, certainly covering an area of any of them, so it is
45 non-specific.

Q. In relation to Sarah, again you would give the diagnosis of SIDS; however again, as with Caleb, that there are two qualifications, and that is outside the
50 usual age range?

A. That's correct.

Q. And the child on her back?

55 A. That's correct.

Q. Again, with Caleb these are not non-specific?

A. Non-specific, yes.

Q. So far as the child Laura is concerned, myocarditis, did you examine the slides?

A. No.

5 Q. You're relying on the assessment made other by others to that?

A. Definitely. Absolutely. I am not pathologist. I wouldn't dream of going above the pathologist's opinion on slides.

10

Q. You referred to Professor Byard?

A. Yes.

Q. And he is a person who is well qualified in this area?

15

A. Absolutely.

Q. You would respect his opinion?

A. Absolutely. He is on the same committee as I am on in Adelaide that looks at all infant deaths.

20

Q. You would defer to his experience in relation to the examination of the slides?

A. Yes. Mind you, we have argued about several slides but, yes.

25

Q. So far as his expertise in looking at the slides?

A. He is excellent, excellent.

Q. Excellent; world respected?

30

A. Absolutely. I have written chapters for his book.

Q. You were asked some questions about the ECG tracer in relation to Laura?

A. Yes.

35

Q. Questions were put to you about an observation made by an ambulance officer that there was in fact no pulse. If that--

40

CROWN PROSECUTOR: That is not right.

ZAHRA: Sorry.

ABOVE QUESTION WITHDRAWN

45

ZAHRA: Q. I think the Crown put to you that there was a pulse?

A. No. Sorry, my understanding is that there was no pulse. By the pulse, you mean what you feel at the wrist or in the neck?

50

Q. Yes. The Crown put to you that there was a pulse, as you understand it?

A. There was a heartbeat.

55

Q. Agonal rhythm?

A. There was a bradycardic heartbeat, a slow heartbeat, which is most consistent with low oxygen.

Q. The Crown was putting to you there was in fact a pulse; this was not a pulse, but an agonal rhythm?

A. That's correct.

5

Q. Those agonal rhythm can occur for many minutes?

A. Absolutely.

Q. And that fact alone makes it very difficult to conclude one way or the other what the sequence was?

A. No, I don't believe that. Personally I believe that if you have something wrong with your heart then it is your heart that will stop first.

Q. That again is not conclusive; in other words, you have indicated it is more likely than, but not?

A. Nothing is a hundred percent, no. Someone else said that this morning; in medicine nothing is a hundred percent.

20

Q. You can't describe the sequence, firstly, being the cardiac arrest?

A. That's what I think it was. I certainly wouldn't exclude it. You can exclude that the heart was still beating, albeit very slowly, and the breathing had stopped. That is what I have understood from the history, from the ambulance people, the history in Ms. Folbigg and the history from, the looking at the ECG, that the baby in fact was not breathing at the time that tracing showed the bradycardia. I think that is fairly definite.

30

Q. The sequence could have been an abnormal heartbeat, arrhythmia leading to the stopping of breathing, leading then to cardiac arrest?

A. Yes. You couldn't prove that didn't happen, that is one of those unlikely things that could have happened.

35

Q. It could happen?

A. Oh, yes.

40

Q. So far as the questions you were asked, about how long it would take, for example, for a child to stop breathing and lapse into unconsciousness, I think you have indicated that these times are really quite variable?

A. Very variable.

45

Q. There is not a strong body of evidence. Obviously this is very hard to - sorry, there is not a strong body of research into that area, because obviously it is very hard to replicate?

A. Absolutely. You don't go around smothering babies and bringing them back.

50

Q. In a sense, much of the information got from a very few handful of cases where there has been some video surveillance?

A. Yes; but also from an anesthetist who makes children unconscious and stops their breathing and then puts a tube

55

down and pump them - and there is obviously a timeframe when they can, when the baby is not breathing - but they're still alive, but there is a definite gap.

5 Q. That can be quite, again variable, as you indicated in evidence?

A. Absolutely. And from my own experience I can remember a woman with a thyroid operation where she bled into the thyroid gland. When I got there she was certainly not
10 breathing, and hadn't been breathing for a while. That is why they paged me. It wasn't until I put the tube down her neck that, and then started doing some initial
15 respiration, she then started to breathe again. So she had been not breathing for quite a while. She was perfectly quite all right in the longterm.

CROWN PROSECUTOR: I have no re-examination, your Honour.

HIS HONOUR: Dr Beal, you may step down. You are excused
20 from the further attendance.

A. Thank you.

<WITNESS RETIRED AND EXCUSED

25 CROWN PROSECUTOR: Your Honour, there are two short witnesses the defence requested we call. The first one of them is Mr Allen Reid, an ambulance officer.

<ALLAN ALBERT REID(2.35PM)
30 SWORN AND EXAMINED

CROWN PROSECUTOR: Q. Mr Reid, would you please tell the court your full name?

A. Allan Albert Reid.
35

Q. Mr Reid, in 1989 were you employed by the Ambulance Service of New South Wales?

A. I have been, sir.

40 <CROSS-EXAMINATION

COOK: Q. Officer Reid, you have been called to give evidence about your attendance at the premises of 36 Rawson Street, Mayfield on 20 February; do you understand that, 1989?
45

A. Yes, sir, I do.

Q. Were you called to that address just before three am on that date?

A. That's correct sir.
50

Q. Did you get there at about a little after three, at 3.03 am?

A. True.
55

Q. Did you observe when you went into the premises that officer Baines, and officer Hopkins were already there?

A. That's correct sir.

Q. In the premises?

A. Yes.

5 Q. And they were attending or treating a child who wasn't breathing?

A. That's correct.

Q. Now, did you record the skin temperature of the child?

10 A. The child was cold to touch, sir, which I recorded on my report sheet.

Q. Would you just look at this two page document, please. (Handed.) Is that a copy of the ambulance report that you filled out relative to your attendance on that morning?

15 A. That's correct, sir.

Q. And you have ticked the little box indicating the child's skin temperature was cold?

20 A. Yes.

Q. That is out of choices, I think?

A. Cold or hot.

25 Q. Pardon?

A. It's either cold or hot and we found cold.

Q. Or normal?

A. Yes or normal.

30

HIS HONOUR: This has not been previously marked?

ZAHRA: No, it's a different one. The other one was by a different officer.

35

EXHIBIT #9 ABOVE MENTIONED DOCUMENT TENDERED, ADMITTED WITHOUT OBJECTION

HIS HONOUR: Ladies and gentlemen this is an ambulance report is exhibit nine.

40

(Exhibit nine read to the jury by his Honour.)

<RE-EXAMINATION

45

CROWN PROSECUTOR: Q. Mr Reid, do you have any actual memory of this particular job?

A. Not a good deal, sir, it's quite a number of years have gone by. Only what is on my case sheet I can refer to.

50

<WITNESS RETIRED AND EXCUSED

<VIRGINIA FRIEDMAN(2.40PM)

55

SWORN AND EXAMINED

CROWN PROSECUTOR: Q. Miss Friedman, would you please tell the court your full name?

A. Virginia Friedman.

5 Q. Ms Friedman do you work at the Division of Analytical Laboratories of the New South Wales Department of Health at Lidcombe?

A. Yes, I do.

10 Q. Do you specialise in the analysis of blood and other body tissue?

A. Yes, I do.

15 Q. Does that include screening exhibits for possible presence of blood?

A. Yes, it does.

15 Q. And doing DNA analysis?

A. That's correct.

20 Q. In this case, in 1999 did you receive a pillow from the New South Wales police?

A. Yes, may I refer to my notes please?

HIS HONOUR: Yes, please do, Ms Friedman?

25 A. Yes, the pillow was received on 12 October 1999.

CROWN PROSECUTOR: Q. Would you have a look at exhibit AF please; a certificate which is under your hand (Handed.) Is that a certificate that you produced in relation to the pillow that you were sent by the police?

30 A. That's correct.

35 Q. Now, in that certificate which has gone into evidence, you have said that you did a preliminary or screening test for blood?

A. That's correct.

Q. And that was a positive?

A. Yes.

40 Q. And preliminary or screening test is a very broad brush sort of test?

A. Yes, it is. It would give a positive result where blood is present but it can also give you a positive result in some instance where blood is not present.

45 Q. So it can give a positive reading for a whole lot of other things?

A. Yes.

50 Q. At the request of the New South Wales police did you conduct some further testing on an area of the pillow that had a mark on it in the last fortnight or so?

A. Yes, I did.

55 Q. In particular did you try and ascertain whether there was any human DNA on the pillow?

A. Yes, I did.

Q. In particular from an area that appeared to be stained on the pillow?

A. Yes, we tested an area that appeared to be what looked like a blood stain on the pillow case.

5

Q. Is this the case, that you were able to extract some human DNA from the what period to be a stain?

A. Yes.

10 Q. Is this the case: That you compared that DNA with the DNA of Laura Folbigg?

A. That's correct.

15 Q. And you came to the conclusion that it was not the DNA of Laura Folbigg?

A. That's correct.

Q. And in fact did it appear that it was the DNA of a male?

20 A. Yes.

Q. And did you subsequently do some more testing over the last few days?

A. Yes, we did.

25

Q. From that testing did it confirm that the DNA was from a male?

A. It appeared to be, yes.

30 Q. And did you also determine that the person who left that DNA was unlikely to be a male relative of the Laura Folbigg?

A. We could only say that it was unlikely to have been from the biological father of Laura Folbigg.

35

Q. So the DNA you extracted from the pillow was unlikely to be from the biological father of Laura?

A. That's correct.

40 <CROSS-EXAMINATION

ZAHRA: Q. Have you taken some photographs of the pillow?

A. Yes, I have.

45 Q. Firstly, can I ask you; it was in fact only recent times that you have been asked to analyse the pillow for DNA?

A. That's correct.

50 Q. In fact only in the last week or so?

A. I think so. I'm not sure of the exact date we were asked but it was recently.

Q. You have a copy of that photograph in your file?

55 A. Yes, I do.

Q. The photograph you took of the pillow. Can I have access to that? (Handed.) Can you just have a look at

that? (Returned to witness.) On that sheet of paper there are in fact two photographs?

A. That's correct.

5 Q. One in fact at the top is of the whole pillow?

A. Yeah, showing one side of the pillow.

Q. And there are two markings on that pillow?

10 A. Yes.

Q. And are they markings that you placed on the pillow?

A. Yes, they are.

15 Q. Are they two areas in fact that you examined for the presence of human DNA?

A. Yes, they are.

Q. The photograph on the bottom, is that a close up of one of those particular areas?

20 A. It's a close up of what I marked as area one.

Q. That photograph is sufficiently marked to show area one on the top photograph and area one on the bottom?

25 A. Yes, I believe one can work out which of the two it is.

Q. You tested a number of points in those areas for presence of DNA?

30 A. In area one we conducted I think three separate DNA tests in area one.

Q. What about the other?

A. One DNA test.

35 Q. Were your results consistent?

A. I'm not sure what you mean.

Q. They were a consistent in the sense that they showed that in fact this blood was male?

40 A. The first result that we got from area one recovered a partial DNA profile that was definitely originated from a male. A second DNA test that we conducted from area two, tended to confirm, well, also indicated that it came from a male. The DNA test, that further DNA test we conducted
45 in area one could not be established that it was male or female DNA that was recovered.

Q. In relation to the amount of substance you need in order to commence a DNA test, you need very little of the substance?

50 A. That's correct.

Q. In fact you probably need about only two hundred picograms of substance?

55 A. We are getting down to very small quantities of DNA required, yes.

Q. We are talking in terms of one millionth of a gram?

A. Yes.

Q. Invisible?

A. Yes.

5

Q. From two; they have told that you were able to clearly show that one of the loci that is called amelogenin, that was it was clearly male?

10 A. The first result we got from area one, yes, the DNA came conclusively from a male.

15 HIS HONOUR: Ladies and gentlemen, this photograph, I think you can see from this distance shows that the pillow, of which you have already seen a photograph, and the lower photograph on the same sheet is a close up of the same pillow; it is exhibit ten. When you have a look at it, I invite you also to look at exhibit AE, particularly photographs 40 and 41.

20 EXHIBIT #10 PHOTOGRAPH TENDERED, ADMITTED WITHOUT OBJECTION

<RE-EXAMINATION

25 CROWN PROSECUTOR: Q. Ms Friedman, are you able to say how long DNA can survive on an object like a pillow slip like that and still be extractable?

A. It's very hard to determine an accurate timeframe. The DNA could have been there for quite some time.

30

Q. Could it be for years?

A. It's possible. It's less likely it would have survived the washing. In other words, if the pillow case had been washed in that time, the DNA most likely would have been deposited on to the pillow case after it had last been washed.

35

Q. And can you explain to the Court whether, what the effects of possible contamination are of DNA?

40 A. It is possible to get or retrieve DNA from the pillow case from anybody who may have touched that pillow case.

Q. Would that include a police officer who examined the scene?

45 A. Yes, if he had touched that particular area where I conducted my testing, it may have been possible to pick up his DNA from cells that he may have sluffed off his fingers.

50 <WITNESS RETIRED AND EXCUSED

CROWN PROSECUTOR: One further area, a very short area I might add that will require a ruling from your Honour.

55 HIS HONOUR: Ladies and gentlemen, I will deal with this matter now. Would you mind returning to the jury room please?

IN THE ABSENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour, I wish to make a
submission to the jury about the fact that the accused
appeared to breakdown during the playing of latter part of
the record of interview. To make a submission to them
about the significance of exactly which parts of the
10 interview was being played at the time that the incident
occurred. The Court of Criminal Appeal has said on a
number of occasions that if one of the counsel wishes to
rely upon something that has happened in court, in the
presence of jury, there ought to be evidence led to
15 describe that incident so it is available for posterity if
need be. So I wish to call Detective Sergeant Ryan who was
present during the playing of the interview. He is just
outside, I understand, about what point it was and just to
describe, in broad detail, what happened. It won't come as
any surprise to anyone. It is in our view a formality that
we have to undergo.

20 HIS HONOUR: Mr Zahra, you're not required to respond but
if you wish to, do so.

25 ZAHRA: If I hear the officer's evidence.

CROWN PROSECUTOR: On the voir dire, your Honour?

30 HIS HONOUR: Yes. I assume you want to take the evidence
first in the absence of the jury?

CROWN PROSECUTOR: No, I thought my friend was objecting;
that's why I asked the jury to be sent out.

35 ZAHRA: I thought my friend would lead evidence on the voir
dire so we could have some understanding of the evidence,
your Honour.

40 HIS HONOUR: The answer is that you were apparently
mistaken. Do you take any objection to the evidence?

45 ZAHRA: Yes, we do. As I understand the evidence as
proposed, I understand the evidence to be called will be
limited to just identifying the point in the record of
interview where the accused left the dock. I understand
the evidence to be led will be to identify question 902 at
page 241. Your Honour my objection is that in a sense from
the way that that evidence is proposed to be led is in
fact unfair in the sense, the culmination of the accused
50 leaving of the dock should not be suggested to be the
manifestation of emotion at that point in time.

55 In other words from what I can understand and observed
myself, that there was distress in the accused which goes
back, in fact to as early as question 808. I understand
that there are two additional witnesses who could give
evidence of that. Major Joyce Harmer and one of the
reporters who was in fact to your Honour's right and in

view of the front of the accused. So your Honour as part of the reason that maybe this evidence should be run on the voir dire. Because I understand the officer may not be giving the full evidence of that particular sequence, rather than just identifying one point and there is a real concern whether proper inference can be drawn from that.

HIS HONOUR: I think Mr Zahra is entitled to know precisely what evidence it is you propose to adduce. I think it is appropriate that it be taken at least initially in the absence of the jury.

CROWN PROSECUTOR: As your Honour pleases.

<BERNARD MICHAEL RYAN(2.58PM)
RESWORN, FURTHER EXAMINATION ON THE VOIR DIRE

CROWN PROSECUTOR: Q. Sergeant would you please tell the court your full name, rank and present station?

A. Yes, Bernard Michael Ryan, I am Detective Sergeant from Goulburn local area command.

Q. You have previously given evidence in this trial?

A. Yes, I have.

Q. Sergeant, were you present in court on Wednesday last week, which I think was 30 April, during the playing of the accused's record of interview?

A. Yes, I was.

Q. Were you present in court during a time when she became visibly upset and distressed and then later appeared to be sobbing, broke down and left the dock?

A. Yes, I was.

Q. Referring to the transcript of her record of interview, if you wish, would you please tell the court what you observed and at which point it was in the record of interview?

A. Approximately around the point where in the interview I was asking the accused whether she was responsible for the deaths of her children. I think I commenced with the question, "are you responsible for death of Caleb".

Q. That is question 886?

A. Yes, it is from that point I was sitting behind the instructing solicitor. I observed that the accused's head went down. She appeared to be crying. And then when I asked her did she kill her children, that appeared, well that behaviour from the accused appeared to continue. And then my colleague Detective Endale commenced asking questions. I think the question was 902. Around that point the accused appeared, her arms were shaking. She appeared to gesture somehow or gain the attention of Mr Kresenthal and I don't know whether she communicated anything to him or not but he appeared to look at her turn from his seat and look at her and after getting some sort of, how do I put it.

Q. Cue from him?

A. Yes, she then appeared to stand up and walk from the dock. That is what I observed.

5

Q. In relation to question 902, the question is: "What technique do you have to stop your babies crying"? Was it during that question or immediately after that question or during the answer that she appeared that she was shaking?

10

A. I would have to say that her behaviour went from one point around question 886 to question 902, it was a slow progression where it got to the stage at 902 where she stood and attempted to walk from the dock or did walk from the dock.

15

HIS HONOUR: Q. May I just understand what it is that is happening now? Is it proposed to call this evidence in order to tell the jury what Detective Senior Constable Ryan saw?

20

CROWN PROSECUTOR: In a formal sense that is the requirement of it, your Honour. But I would anticipate that most of the jury, if not all of them, would have seen it. But it is important for it to be placed on the record before the jury, so that if there were any who did not see it, it is available to them in the form of testimony and it is also available as testimony in any other place.

25

HIS HONOUR: I understand what you say about the other place and the need for there to be a record, but I am wondering about the appropriateness. I don't say I have a view about it. I am unaware of this case that you have in mind. Why do we have to tell the jury in evidence what went on in their presence?

30

35

CROWN PROSECUTOR: Well your Honour there might have been some of them, for instance, who were focused entirely on the video being played who didn't see her crying from the earlier questions.

40

HIS HONOUR: Well, I suppose there might have been witnesses who nodded off and jurors, sorry, who didn't hear a particular pieces of evidence. There is ultimately no end to this. If witnesses are called to tell the jury what has gone on in their presence. Can you show me this case you have in mind?

45

CROWN PROSECUTOR: I don't have a specific recollection of which case it was. I just remember having read some decisions in which it has been said it should be put on the record if it is something that maybe not all the jurors have seen.

50

HIS HONOUR: First of all, Mr Zahra, do you want to ask any questions?

55

ZAHRA: Q. Did you have her under your constant view at the time?

5 A. No, not constant. I do recall making a point of, when I got to a question or when the video was played at question 886, I was watching the accused.

Q. To could be the case Mr Kresenthal had his back to the accused and it was--

10 A. It may have been the case, sir, I didn't see that part, no.

Q. Did you see Mr Kresenthal walk around to her and speak to her?

15 A. Yes. He only turned around.

Q. When I say "cue", you're talking about him going to speak to her?

20 A. Yes, I would like to add I wasn't saying there was anything improper that was done. I must admit that it appeared as though Mr Kresenthal was going there to give some sort of aid because there was obviously distress.

<WITNESS RETIRED

25 HIS HONOUR: Mr Zahra, you mentioned you might want to call evidence. Do you wish to do so?

30 ZAHRA: I don't think it is necessary at this stage. Your Honour, can I just flag what our objection is. As I understand what my friend is hoping to ultimately do with this piece of evidence is tell the jury they can draw an inference that she walked out of the dock at question 902 and that they can reach an adverse finding about that. In other words, that they could take that as an admission or
35 they could draw an inference that that is capable of an admission.

40 HIS HONOUR: Let's not hypothesise about it. Let the Crown now tell us precisely what it is he proposes to tell the jury they can make of the evidence of what Detective Senior Constable Ryan will tell them went on.

45 CROWN PROSECUTOR: Your Honour, the submission I seek to make would be this: That this is a woman who is sat through a very lengthy interview in this courtroom with a lot of details about the lives and deaths of her children, without seemingly becoming visibly distressed. And then she becomes visibly distressed at a point in time when the accusation is made that she is responsible for the deaths
50 of her children and it comes to a crescendo when she is asked.

55 HIS HONOUR: I thought the whole thing was a crescendo, according to you, because the crescendo began to grow, that is to say, at 886 and grew to the crescendo at question 902. That was the peak.

CROWN PROSECUTOR: What technique she had to stop her

babies crying. She appeared, what I want to submit to the jury, she appeared to be uncontrollably distressed at that point. So she sat through all the details of her babies deaths without being visibly affected and becomes
5 uncontrollable at this stage, stressed and asked about the technique of stopping her baby's crying. Of course our case is that the reason why she smothered these babies is that she had flashes of anger, resentment and
10 uncontrollable stress that caused her to smother these babies. It wouldn't amount to anything. But we would submit that we are entitled to draw it to the jury's attention to what happened; one factor they can take into account, together with a whole lot of other material in
15 concluding that is precisely what happened. It is a simple as that, your Honour.

HIS HONOUR: What process of reasoning would the jury adopt in taking it into account?

20 CROWN PROSECUTOR: I suppose the process of reasoning would be your Honour that she is aware that it was her reaction to the baby's crying that caused her to smother them.

25 HIS HONOUR: What do you say, Mr Zahra?

ZAHRA: Your Honour, I understand what my friend is saying. I started to indicate a moment ago, in a sense what my friend is saying, more than just taking into account but
30 it can amount to admission in the sense of some consciousness of guilt at that point in time when she left the dock. It is so imprecise, however, it was firstly, it doesn't appear right at that moment that the condition manifested itself instantaneously. But there was a build
35 up and when one looks at the questions that were asked immediately before that; that they ranged from references; can you close your eyes and see the faces of all four children? And then essentially, "how do you feel for those children?" That is where it has been identified, the
40 crying has in fact started. It is in fact so precise I also take issue with my friend saying there was no reaction during the course of the record of interview. I made observation that she appeared to be distressed, certainly not to that degree but that highlights the whole
45 area of this opening up. We probably need to call upon the members of the media to try and identify areas within this lengthy record of interview where she did show distress. That fact alone under s135 is all rather time
50 wasting and certainly time consuming and certainly we would be in a position in the short-term to meet it. It would be so imprecise even on taking what my friend says at its highest, when we look at the question beforehand, we can see it was a process that was in fact evolving at that point in time and certainly not permit my friend to
55 elevate it to the way he wants to put it to the jury, as if there was some type of admission or consciousness of guilt at the actual time she left the dock.

CROWN PROSECUTOR: Your Honour, I suppose it is a little bit like evidence of flight.

HIS HONOUR: It is a lot like evidence of flight.

5
CROWN PROSECUTOR: It is never conclusive in itself, it can be viewed in a whole lot of different ways; flight can be for a whole lot of different reasons. But evidence of flight is generally admitted as being capable of being
10 viewed by a jury, together with other evidence, as showing a consciousness of guilt.

HIS HONOUR: The difficulty about it is, it seems to me Mr Crown, that you're relying upon question 902 as
15 precipitating what I will call the flight for the moment. But the evidence is, and my clear recollection is that there had been an increasing manifestation of disturbance and distress for quite a number of minutes before that subject was ever broached.

20
CROWN PROSECUTOR: I concede that, your Honour.

HIS HONOUR: If you are to rely upon what the accused - as
25 consciousness of guilt, I will have to give an Edwards direction, I think, won't I?

CROWN PROSECUTOR: Edwards is a direction on lies, isn't it, your Honour?

30
HIS HONOUR: Yes, it's about lies but it covers in principal, flight, destroying evidence, any particular thing done as evidence of a precipitation of a consciousness of guilt. Wouldn't I have to give that
35 direction?

CROWN PROSECUTOR: I am not sure, I would have to have a look at that.

40
HIS HONOUR: As I see it, I probably would, and I would have to tell the jury, among other things, that there might have been plenty of reasons why Ms Folbigg might have rushed in her distress out of the witness box. And if I may say so, there are plenty that we all know about. That direction that I would give would emasculate the
45 evidence which is another way of saying, I think, in view of what happened before we ever arrived at answer 902, there is plenty of explanation to what happened, independent of question 902.

50
I think in all the circumstances I would be bound to come to the view that the probative value of the evidence would not be high and the risk of impermissible prejudice would be high. My thinking is that the evidence is inadmissible and it would follow that you would not be permitted to
55 make a final submission to the jury along those lines.

CROWN PROSECUTOR: As your Honour pleases. Your Honour that completes the evidence in the Crown case. However,

there are two documents which we would want to have included in our case which are not prepared yet. The first is an updated version of the summary of the medical evidence which has not been completed yet, but I would like to flag when it is complete in due course we wish for it to be tendered as part of the Crown case. We are also working on a chronology in relation to each death, showing the times of various movements in relation to each child's death in the hour or two before the death, up to admission to the hospital. We would also wish that to be before the jury, again as a document that would assist them to understand and remember the evidence that has already been given it should be admitted as a documentary exhibit in the Crown case. But it is not ready yet so we would like to flag it is in the course of preparation and in due course we will tender it, or hand it up to your Honour.

HIS HONOUR: Do you have in mind that you will tender it at some stage during the defence case?

CROWN PROSECUTOR: Probably, yes. It will be well prior to the addresses.

HIS HONOUR: Do you have any difficulty with that, Mr Zahra?

ZAHRA: There are some issues we want to take about the form of the document and put submissions to you whether the type of document envisaged by the legislation.

HIS HONOUR: What about the principle of the timing?

ZAHRA: The timing doesn't hurt us, no, if it comes within the section we would consent to it.

HIS HONOUR: When your document is ready let Mr Zahra have a look at it. If there is any difficulty about it, I will deal with it.

CROWN PROSECUTOR: There is also MFI 27, the post mortem autopsy report for Lara Folbigg, not in evidence. The defence want more time to consider it. I will formally tender it.

ZAHRA: There are submissions we want to make in relation to that; that the doctor relates in the first few pages. If my friend reads again he would not be pursuing the tender. We have no objection to the body of the report, in other words the examination, the find.

CROWN PROSECUTOR: I can't see if there is anything in here that has not already gone into evidence many times over.

ZAHRA: My friend is right; much of this is already in evidence. There are quite a number of parts, including statements putting the multiple homicides at family, not being excluded. If homicidal acts have been committed,

most likely acts performed in the smothering.

HIS HONOUR: Is there another copy of this document
anywhere?

5

CROWN PROSECUTOR: I have no objection to the sentences
being deleted. We can black them out. My friend asked
until tomorrow morning to review it. I have no objection
to that. What I might do is formally close the Crown case
subject to that and I don't know if my friend wishes to
start.

10

HIS HONOUR: Are you going to start this afternoon?

15

ZAHRA: We have three civilian witnesses who live in
Newcastle. We might ask them to come tomorrow morning. The
other is Professor Byard who arrived today from South
Australia and two witnesses on Wednesday.

20

HIS HONOUR: Are you going to start this afternoon?

ZAHRA: No, your Honour. But there is a brief submission I
wish to make which refers to previous proceedings. I
don't expect that to take more than a few moments. We can
probably do that this afternoon.

25

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: Your Honour I can indicate, subject to
one document that has been marked for identification and
still has to be tendered, and my friend wants to have
until tomorrow morning, subject to that, that completes
the evidence in the Crown case. So first thing tomorrow
morning I would be closing the Crown case.

10 HIS HONOUR: Thank you Mr Crown. Well ladies and
gentlemen, that ends the evidence this afternoon. Counsel
and I have still one matter to consider this afternoon and
we shall go on and do that, but I will let you go now and
we will resume at ten o'clock tomorrow.

15

IN THE ABSENCE OF THE JURY

HIS HONOUR: Yes, Mr Zahra?

5 ZAHRA: Thank you. Your Honour would be aware of the number
of applications that were made prior to the trial,
regarding the separation of the counts, and there was in
fact a special leave application in the High Court on that
particular matter.

10

HIS HONOUR: Yes.

ZAHRA: The foundation of the argument that was preferred
was that--

15

HIS HONOUR: Before you go any further, tell me what you
are now doing.

20

ZAHRA: Your Honour, in a sense, submitting, as we have
before, that the Crown has not identified a case to answer
in the sense that there are no - that he is unable to
prove the separate counts, and--

25

HIS HONOUR: It does not tell me what you are doing. It is
a statement. Are you applying for me to do something.

ZAHRA: This is a "no case" submission, consistent with--

30

HIS HONOUR: You are asking me to direct the jury to find
your client not guilty on all counts?

ZAHRA: Yes.

35

HIS HONOUR: What is the basis of it?

40

ZAHRA: For the sake of consistency, it is on the same
basis as the argument that was preferred in relation to
the application for separate trials, and that is that the
Crown cannot, in the individual case, prove that the child
was murdered, and was essentially relying on the
circumstances of all of the deaths to prove its case; but
when separately considered, that it could not prove its
case on the separate counts. It was submitted that it is
only the prejudice of the counts together which is likely
to result in the conviction in the matters.

45

50

During the course of argument, and in relation to the
separate trial application, and as is evident from the
judgments, the Crown was asked to identify the process
upon which the matter will ultimately be placed before the
jury, your Honour, including the proceedings in the Court
of Criminal Appeal; when Mr Sexton of counsel was asked
that, he could not indicate to the court the process upon
which this matter was eventually to be placed before the
jury.

55

CROWN PROSECUTOR: That is an inaccurate statement.

HIS HONOUR: Well, I have read - does it matter whether Mr Sexton could or could not indicate this or that thing? I have read the judgment of the court.

5 ZAHRA: We say that that failure to be able to identify the way in which this case will be put to the jury is indicative of the fact that there is no case to answer. That is the submission that we made in relation to the application for separate trials and, consistently with
10 that, that we say the situation has not changed since our application for separate trials.

HIS HONOUR: If the situation has not changed, you have to get the same result, don't you?
15

ZAHRA: The situation has not changed, in the sense that there is no medical evidence which has elevated what we had foreshadowed, in other words that there is no medical evidence on its own to prove these cases, other than being
20 consistent with.

HIS HONOUR: I do not know whether the Crown ever claimed that, taken alone, the circumstances surrounding any death or the ALTE would be sufficient to prove murder or the elements of the second count. Did the Crown ever make that submission?
25

ZAHRA: Well, your Honour, our case was that the Crown was relying on all of the circumstances.
30

HIS HONOUR: No. Did you hear the question I just asked you? Did the Crown ever submit to the Chief Judge or to the Court of Criminal Appeal, that the circumstances surrounding any of the five events, and only those
35 circumstances--

ZAHRA: No, your Honour.

HIS HONOUR: -- were capable of proving its case beyond reasonable doubt?
40

ZAHRA: No, your Honour.

HIS HONOUR: I am not surprised to hear you say that, and I would be surprised if the Crown made that submission to this jury.
45

ZAHRA: No, they did not.

HIS HONOUR: So nothing has changed.
50

ZAHRA: No, it hasn't, but consistent with what we have argued previously, based on authority, in a sense that this, the cases heard together, are really fuelled by the
55 prejudice of the sheer number.

HIS HONOUR: This is just a formality, isn't it, raising formally in this trial the point that was raised before?

ZAHRA: Only in the sense that our failure to do so might otherwise draw an inference that we no longer are of that view.

5

HIS HONOUR: What, from the High Court?

ZAHRA: Yes.

10

HIS HONOUR: I doubt anybody would be drawing inferences against you.

15

ZAHRA: Having read so many decisions in the Court of Criminal Appeal one starts to become a little hardened to ensure that there is nothing left implicitly by one counsel's actions, so one does not leave it implicitly to one's demeanor.

20

HIS HONOUR: You are being very careful, Mr Zahra. I have heard your "no case" submission, and it is rejected.

ZAHRA: If your Honour pleases.

25

HIS HONOUR: Now, Mr Zahra, you will be ready at some time reasonably early tomorrow morning to begin your case?

ZAHRA: First--

30

HIS HONOUR: I have made some inquiries about the jury and court 3. Court 3 will be available to us on Wednesday. It will not be necessary to uproot the jury, in the sense that they will need to change their accommodation. They can continue to use their present premises. They will simply have to walk a little further through the court house to get to court 3 at the appropriate time.

35

40

What I thought we would do would be to assemble in court 3, either at 2 o'clock, or if either of you saw the need for it, we could spend the whole day there. I do not know what setting up or testing needs to be done; this is Wednesday I am talking about. But let us leave it on this basis, that we will sit here on Wednesday morning, and in court 3 for the whole of Wednesday afternoon. I won't bother to change during the course of the afternoon.

45

ZAHRA: I would prefer that course, so if there is some testing to be done it could be done before 2 o'clock.

50

HIS HONOUR: Yes, all right.

55

CROWN PROSECUTOR: From what Mr Zahra was saying earlier, it looks as though the defence case will conclude on Wednesday. I do not anticipate at this stage having a case in reply. Assuming that still be the case, we would ask your Honour to adjourn after Wednesday until Monday, to allow two days for us to prepare our closing address. The court would not be sitting Friday anyway, so it is really only a day that we are losing.

HIS HONOUR: Yes. I would certainly allow that. You can
rely on that.

5 HIS HONOUR: Ten o'clock tomorrow morning then.

ADJOURNED PART-HEARD TO TUESDAY 6 MAY 2003 AT 10AM

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MDC:BOW:RT:8

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TWENTIETH DAY: TUESDAY 6 MAY 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

IN THE ABSENCE OF THE JURY

15 HIS HONOUR: I'm sorry to say one of the jurors is ill and will not be here today. The sheriff has furnished a medical certificate. I won't hand it down to the bar table because, among other things, it names the juror. I will direct that it be marked 35 for identification.

20 MFI #35 MEDICAL CERTIFICATE

HIS HONOUR: That will be kept with the file: The certificate will be sealed in an envelope and marked "Confidential. Not to be opened or inspected without the approval of a judge". I can tell counsel that the sheriff has informed me that she has spoken to the juror, and the juror intends to be here tomorrow; very much wants to be here. It may possibly be the juror who reported illness yesterday, which I didn't pass on, but who said that the juror wanted to continue on yesterday. So I am fairly confident in saying that we should be able to sit tomorrow and the Thursday of this week.

35 Perhaps I will; I don't know whether I need to discuss the implications with counsel before I invite the remainder of jury in order to dismiss them for the day, but I won't do that unless counsel want me to do that.

40 CROWN PROSECUTOR: I am not troubled one way or the other, your Honour.

HIS HONOUR: Mr Zahra, while we are waiting may I ask whether this has any implications for the video-link evidence?

45 ZAHRA: No, I have discussed the matter. We expect there to be a little bit of a delay tomorrow because we had Dr Jones and the gap. What we now propose is to have Dr Byard in the morning and Dr Bristol in the afternoon. We should finish both tomorrow. That would mean the civilians we intended to call first up here today will be called first up on Thursday. Probably an hour. There won't be in fact a great deal of delay.

55 HIS HONOUR: Thank you, Mr Zahra.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, as you are well aware,
one of your number is it not here. She has sent a message
to the sheriff and has provided a medical certificate. She
is not well and cannot be here today, and we are not going
to be able to sit today. However the juror has told the
10 Sheriffs that she wants to come tomorrow, and intends to
be well enough to come tomorrow, and I fully expect that
we shall be able to sit tomorrow. That means for the rest
of this week we shall be sitting on Wednesday and
Thursday; as you already know we have arranged not to sit
on Friday anyway. That is all that I need to say, and all
15 I really can say to you this morning, ladies and
gentlemen. And I will let you go now and wish you a
pleasant day, and we will see you all at ten o'clock
tomorrow.

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: As far as counsel are concerned, will it still be convenient for us to sit in this court tomorrow morning and then move to court three at two o'clock? Is that convenient?

ZAHRA: Yes, your Honour.

10 THE FOLLOWING ERRATA WERE NOTED

1. Page 1102 line 30 the word "mile" to read "mild".
2. Page 1102 line 57 the words "aid of" to be deleted and in lieu thereof, the words "eight or" be substituted.
- 15 3. Page 1148 line 18 the word "know" to be deleted.
4. Page 980 line 53 the word "air" to be deleted.
5. Page 991 line 39 it is transcribed "mcAD" to read "MCAD".

20

HIS HONOUR: Any matters we can usefully deal with now?

CROWN PROSECUTOR: I would like to raise a concern I have in relation to Professor Byard.

25

Your Honour, whilst I understand that your Honour has limited the area of examination in chief of Crown expert witnesses to certain topics, namely, to considering the children individually by and large, that creates considerable difficulty for me in cross-examining Professor Byard, in that I am aware, from his report, that he would express the view that if he now were to consider all of the children together, that it would cause him to have considerable suspicions about the case and that it may well have, if he was the pathologist, change his diagnosis from one of a definitive diagnosis to one of undetermined.

30

35

The only way I can elicit that is by asking in this cross-examination now, in retrospect, to consider consideration of all children together in the light of the fact that it is at least exceedingly rare, if not unknown, to have had a family like this where all of the deaths - there have been four deaths from in the one family - sudden deaths of infants in the one family.

40

Our submission would be that we ought to be allowed to cross-examine him on an overview of all the cases, rather than being restricted, as we were in chief with our expert witnesses, to getting our experts to give evidence in relation to each child individually.

45

We would submit that in fairness we ought to be allowed to cross-examine him in that way and it may well present his evidence in chief in a different light. It is a light which we ought to be able to elicit being based as it is, not just on an amateur sleuth but on a proper appreciation as a medical practitioner, as a professional pathologist

50

55

and in his practice of pathology, that is precisely the way that he would look at the cases and indeed has looked at the cases in his report.

5 HIS HONOUR: Why is Professor Byard any different from any of the other experts who, rightly or wrongly, I have restricted in their opinions?

10 CROWN PROSECUTOR: Well I suppose it is this, your Honour: That there are, your Honour has imposed restrictions on the Crown in its own case which we are bound to accept, but we would submit that that doesn't necessarily mean that we are bound in the same way in cross-examination.

15 HIS HONOUR: Well no, it doesn't. But you must consider the principle by which the restrictions were made. I delivered a judgment in which I expressed the view that effectively the opinions of the doctors fell into two categories. One; expert opinions that fell within the
20 purview of s79 which they were entitled to by their evidence and effectively, lay opinions. Now, doctors have lay opinions as well. Styles, it is difficult to separate the lay part of a professional opinion. And the whole opinion may be given but it did seem to me that there was
25 a remarkable dichotomy here and one could easily distinguish between an opinion about a probable cause of death in the case of one child when considering that child in isolation and augmented or additional opinion based upon the mere fact of the deaths of other children. I took
30 the view that that was not an opinion of the kind of which was recognised by s79.

Now, whether it is in, whether the rule is to be applied in chief or in cross-examination doesn't seem to me to
35 matter. It is not admissible, that is the basis of the restriction.

40 CROWN PROSECUTOR: The difficulty we have your Honour is that the jury will only have heard evidence of medical opinions in relation to each child individually. The jury will conclude from that that there is no view about a medical diagnosis when all of the children are looked at together.

45 HIS HONOUR: Why would they do that?

CROWN PROSECUTOR: Because they have not heard any such view.

50 HIS HONOUR: I don't see that that follows. What if they do conclude that there is no view? That is the proper conclusion to come to, if they're not to know any such evidence about such view, isn't it?

55 CROWN PROSECUTOR: The jury themselves are obviously entitled to look at all of the cases together and consider--

HIS HONOUR: I propose to tell them they will not be restricted in the way expert witnesses were restricted.

5 CROWN PROSECUTOR: I suppose what we are asking your Honour is to reconsider your Honour's ruling in relation to cross-examination of the defence expert on this basis: That I can really best explain it by means of analogy. If a doctor gets of case of some illness and is unable to
10 diagnose it because there are just not enough symptoms of illness, but then finds there are hundreds of people with the same illness in the community, then the fact that there are so many people with the same illness might assist the doctor in coming to a diagnosis in each individual case.

15 HIS HONOUR: You have used an analogy of that kind before.

CROWN PROSECUTOR: Similar, yes.

20 HIS HONOUR: I am aware of that argument but I considered it and rejected it Mr Crown.

CROWN PROSECUTOR: Yes, your Honour has.

25 HIS HONOUR: I don't see the position with Professor Byard to be any different and I don't see the position in cross-examination to be any different. You introduced this topic a few days ago and some discussion arose about your cross-examination of Professor Hilton based upon the
30 American document. I thought that you were putting to me, though we didn't take the debate on, that the evidence of Professor Hilton had been significantly different from the evidence of the other experts in that Professor Hilton had expressed or agreed with a proposition that in coming to a
35 diagnosis of SIDS or no SIDS or undetermined, with respect to a particular child, one could have in mind the prior deaths of other siblings in the same carer. I looked at the evidence and I don't think that was the effect of his evidence and I do not regard the evidence of Dr Hilton as
40 significantly different in that respect from the evidence of any other expert. I think all the evidence means is that Professor Hilton was agreeing with a proposition that when a pathologist has to reach a conclusion about the probable cause of a death of a child, his knowledge of the
45 fact of prior deaths of siblings is something that would cause him to deal with the case with particular care and no more than that.

I raise this now because this was the topic that you
50 lighted upon that caused you to raise with me before in a preliminary way, this desire you had to cross-examine Professor Byard. So I don't want there to be any misunderstanding about that.

55 CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: Mr Crown, I think the answer to all this is that Professor Byard in chief and cross-examination will

be limited as the other experts have been to expressing opinions about probabilities based only upon the circumstances directly relevant to the child concerned. Are there any other matters we can deal with today?

5

ZAHRA: No, your Honour.

HIS HONOUR: All right. Ten o'clock tomorrow then.

10

FURTHER HEARING ADJOURNED TO WEDNESDAY 7 MAY 2003 AT 10AM

BOW:MDC:RT:8

D21

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TWENTY FIRST DAY: WEDNESDAY 7 MAY 2003

10 70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

15 IN THE ABSENCE OF JURY

HIS HONOUR: Are we ready for the jury?

20 CROWN PROSECUTOR: Your Honour, if I could perhaps outline
what I anticipate will happen this morning.

HIS HONOUR: Yes, Mr Crown.

25 CROWN PROSECUTOR: Your Honour, I understand that Dr Hilton
in the last 48 hours has found some photographs of the
displaced uvula of Sarah, so I intend to recall him to
tender those photographs.

30 I have MFI 33, which is referred to in the accused's
record of interview which I would like to tender. I have
MFI 27.

HIS HONOUR: Is that the document which was going to be
edited?

35 CROWN PROSECUTOR: No. No, it is not, your Honour. The one
that was going to be edited was MFI 27 which is Laura's
post-mortem which I have an edited copy of that which we
will be tendering with a deletion on page 4.

40 We have a plan of 36 Rawson Street back in 1999 which is
in Mr Folbigg's statement which I don't propose to--

45 ZAHRA: Can I indicate while the accused is looking at that
diagram that we won't be calling professor ~~Bristor~~ this
afternoon; we have notified the court Registry, so we
won't be needing to have the video-link.

50 HIS HONOUR: Mr Zahra, is the tender of any of these
documents likely to lead to controversy?

ZAHRA: No, your Honour. We are just conferring.

55 HIS HONOUR: Is it likely to lead to the need for you to
ask questions of Mr Folbigg?

ZAHRA: No.

HIS HONOUR: May we have the jury, please?

ZAHRA: Your Honour, I understand through Professor Hilton,
that certain photographs will be shown to him. I do not
know if my friend intends to tender them or mark them in
5 the application. I don't think the jury can make--

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Good morning ladies and gentlemen, it is good to see that you are all fit and well this morning. Yes, Mr Crown?

10 CROWN PROSECUTOR: Your Honour, I tender a photocopy of MFI 27, which is the post-mortem report in relation to Laura. I must admit I had forgotten that we had delayed the tender of it so that the defence could have an opportunity to look at it and we had just forgotten about it. I now tender it. There has been one sentence that has been edited out of it, so I am tendering a photocopy, and I have a copy for each of the jurors.

15 HIS HONOUR: Have you seen that, Mr Zahra?

20 ZAHRA: Yes, we had it previously and we have had an opportunity to look at it and obviously it was more a matter of abundant caution.

HIS HONOUR: The edited copy of the autopsy report for Laura Folbigg marked 27 for identification is exhibit AL.

25 EXHIBIT #AL ABOVE IDENTIFIED DOCUMENT TENDERED, ADMITTED WITHOUT OBJECTION

30 CROWN PROSECUTOR: I tender MFI 33 which is a letter from the accused to her husband, Craig; it is undated. It is a six page letter, although only three of the pages are numbered. It is referred to in her record of interview at questions 566-574. Might I suggest, your Honour, that I perhaps read it to the jury because it is a little unclear in parts.

35 HIS HONOUR: That letter will be exhibit AM.

40 EXHIBIT #AM ABOVE IDENTIFIED DOCUMENT TENDERED, ADMITTED would you tell OBJECTION

HIS HONOUR: The original can be handed back to the Crown.

45 (Exhibit AM handed to Crown Prosecutor and read to jury by.)

CROWN PROSECUTOR: Finally, I tender a hand drawn plan of the house at 36 Rawson Street, Mayfield, drawn by Craig Folbigg back in May of 1999, showing the location of Caleb's cot when he died, and the location of Patrick's cot

ZAHRA: I have got no objection.

55 HIS HONOUR: The plan will be exhibit AN.

EXHIBIT #AN ABOVE IDENTIFIED DOCUMENT TENDERED, ADMITTED would you tell OBJECTION

CROWN PROSECUTOR: There is a copy for each juror, a copy for the court and a copy for your Honour.

(Relevant copies provided.)

5

HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Your Honour, I recall Professor Hilton.

10

<JOHN MILLER NAPIER HILTON(10.24AM)
FURTHER EXAMINATION-IN-CHIEF, RESWORN

CROWN PROSECUTOR: Q. Professor, will you please tell the court your full name?

15

A. John Millard Napier Hilton.

Q. And you have given evidence previously in this trial?

A. Yes, I have.

20

Q. Professor, just in the last 48 hours, have you found some photographs relating to Sarah Folbigg?

A. Yes.

Q. Would you tell the court where you found them?

25

A. In my papers.

Q. In your papers where?

A. At one of the three locations that I am currently in operating out of.

30

Q. Could you tell the court how you came to find these photographs?

A. Well, I am in the process of moving out of one office, out of one residence into another residence, and I was going through my papers and I found the photographs which you have got.

35

Q. Would you just have a look at these, would you take them out? (shown). Those are the photographs that you have referred to?

40

A. Yes, these are them.

Q. Is there one photograph showing the petechiae of Sarah's lungs?

45

A. Yes.

Q. The fourth photograph showing the displaced uvula which you dissected?

A. Yes and which I outlined to the court.

50

Q. Have you marked on the back of each photograph what that photograph shows?

A. Yes.

55

CROWN PROSECUTOR: Might that bundle of photographs be marked for identification?

MFI #36 ABOVE IDENTIFIED PHOTOGRAPHS

CROWN PROSECUTOR: Q. Professor, having seen those photographs, do you wish to change any of the evidence that you have given so far in this trial?

5 A. No. I think the photographs merely confirm the description which I have already given to the court of the--

10 Q. Do they in any way change the evidence that you have given, that in your view, the displaced uvula was an incidental finding that probably did not contribute to Sarah's death?

15 A. As I have said, I feel that the most likely explanation for the displacement of the uvula, that's as I saw it, was that section artefact. I can't exclude absolutely that it wasn't.

20 Q. A dissection artefact being something that has been caused by the process of dissection?

A. Yes.

Q. By you?

A. By me.

25 Q. Do you know who took the photograph?

A. No. I know I didn't take the photograph because, again, always I wanted to explain, I do not take photographs when I am actually operating.

30 Q. Do you assume that the photographs were taken by somebody who was working with you at the morgue at Glebe?

A. I believe it would have been one of my technicians, possibly the x-ray technician.

35 Q. Is that something which you asked technicians to do from time to time?

A. Yes.

40 Q. To take photographs of findings during autopsies?

A. Yes, especially for teaching purposes.

Q. Do you presume that it was done with photographic equipment that belonged to the morgue?

45 A. That, I can't tell you.

Q. It wasn't done by a police officer?

A. It certainly was not done by a police officer.

<FURTHER CROSS-EXAMINATION

50 ZAHRA: Q. Professor, you still have a copy of your post-mortem report in relation to Sarah?

A. I think so.

55 ZAHRA: Might the witness have access to exhibit Z?

HIS HONOUR: Yes.

(Exhibit Z shown to witness.)

Q. Possibly, professor, if you could have a look at page 3 of exhibit Z?

5 A. Yes.

Q. Do you see about .3 on that page that you refer to your findings concerning the uvula?

10 A. Yes.

Q. You said in your report the uvula, although of normal proportions, appeared somewhat congested/haemorrhagic in it's anterior surface?

15 A. Yes.

Q. Anterior meaning the front surface?

A. Yes.

Q. Having had an opportunity to look at the photographs, are the photographs consistent with that observation that you made?

20 A. Yes. The photographs don't show the anterior surface of the uvula but in all other respects the photographs support my description and my description supports the photographs.
25

Q. Was it significant that the uvula appeared somewhat congested and haemorrhagic?

30 A. Well, yes. I mean in any carefully conducted autopsy if one sees something which is departing from normal it is significant, and yes, it did. The majority of babies who die suddenly or unexpectedly, the vast majority of babies who die suddenly and unexpected do not have a congested haemorrhagic uvula.
35

Q. You also said in your report when viewed at post-mortem it was placed anterior to the epiglottis producing an obstructive element in the airway?

40 A. Yes.

Q. You indicated in relation to my friend that after looking at the photographs that there is nothing that you wish to change about your evidence?

45 A. True.

Q. And my friend asked you whether it was still your view that your findings about the uvula were an incidental finding?

50 A. I favour the view that this was, as I said a, dissection artefact.

Q. You then went on to say, however, but were cut off but my friend's next question - that you can't exclude it wasn't?

55 A. No.

Q. So you can't exclude that it wasn't a significant finding?

A. I cannot exclude that it wasn't a significant finding.

Q. Significant in the sense that the congested uvula may have obstructed the epiglottis?

5 A. Well next to that, if I may correct the fact, that the uvula was congested and haemorrhagic is just a fact, just that it was the fact. I can't absolutely exclude that in life. The uvula did not have, had not adopted a position at least similar to that which I saw at autopsy.

10

Q. Which could have caused an obstructive element?

A. Yes. It would have, because the - and again, if one looks at one's own uvula it hangs down off the soft pallet at the back of the mouth, and just dangles almost free in the air, it doesn't do very much anything at all, but if it is displaced downwards for any reason at all and particularly if, and remembering that the anatomy of a small baby's lining is quite different from adults, it is much, much crowded, if it becomes displaced to the point where it is lying in front of this little trap door that protects the airway, then it is going to produce some degree of obstruction to the passage of air. If that happens, if it happens.

15

20

25 Q. The fact that it appeared congested and haemorrhagic, that was not a post-mortem artefact?

A. No.

Q. Post likely to be the result of infection?

30 A. Well there was some microscopic evidence of inflammation, not of any serious nature, but there was some evidence of inflammatory response.

35

<FURTHER RE-EXAMINATION

CROWN PROSECUTOR: Q. You said that there was some evidence of an infection because of the congestion of the uvula?

A. Yes.

40

Q. Is that consistent with a very mild cold?

A. Yes.

Q. Is it more than consistent, is it in fact likely to be a sign of a very mild cold?

45

A. Yes.

Q. Were you asked questions by Mr Zahra about not being able to exclude the displaced uvula as a cause of death. You of course listed the cause of death in your post-mortem report as SIDS?

50

A. Yes.

Q. If you had thought at the time that the uvula may have contributed to her death, what would you have put down in your report as the cause of death?

55

A. I would have put down respiratory obstruction due to displaced uvula. I might add, if it may help the court, that the diagnosis of SIDS was reached after at the end of

all these investigations, and at the end of all these considerations. I mean there is a provisional diagnosis of SIDS but the final diagnosis was only made several weeks after the actual commencement of the examination.

5

Q. So is this the case; that the court can assume, from the fact that you did not write down airways obstruction due to displaced uvula, always the cause of death meant that you were satisfied that it was probably not the cause of death?

10

A. It was my considered opinion and in view of everything else and in view of all the other investigations, that it was not the most likely cause of death.

15

CROWN PROSECUTOR: Yes, thank you.

HIS HONOUR: Once again, thank you professor, you may step down and you are excused from further attendance.

20

<WITNESS RETIRED AND EXCUSED

(Exhibit Z returned to court.)

25

HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Your Honour, that completes the evidence in the Crown case and I now formally close the Crown case.

CLOSE OF CROWN CASE

30

HIS HONOUR: Thank you, Mr Crown. Yes, Mr Zahra?

CASE FOR THE ACCUSED

35

ZAHRA: The first witness will be Jan Bull. Mr Cook will be leading that witness.

<JAN BULL(10.37AM)
SWORN AND EXAMINED

40

HIS HONOUR: Will you please stay as close as you comfortably can to the microphone so that it will amplify your voice, and try to speak a little more slowly than you normally would.

45

COOK: Q. What's your full name?

A. Jan Bull.

Q. What area do you live in?

50

A. Singleton.

Q. And what is your occupation?

A. Fitness leader.

55

Q. Is that another way of saying a gym instructor?

A. Yes.

Q. Do you currently run your own business as a gym instructor?

A. I do.

5 Q. And back in the years 1998 and 1999 were you also working as a gym instructor?

A. I was.

Q. Whereabouts were you working?

10 A. Body Flex gymnasium, Singleton.

Q. And did you take all sorts of different styles of classes at the gymnasium?

A. Yes, I did.

15

Q. And, in particular, did you take morning classes, regularly?

A. Yes, I did.

20

Q. Starting at 9 o'clock?

A. Yes, varying times, 9 to 9.30, 10, 10.15.

Q. And in the contexts of your conducting classes at that gymnasium, did you meet Ms Kathleen Folbigg?

25

A. Yes, I did.

Q. And when you first met her, was that at the gymnasium or was it somewhere else?

A. No, we met through the gymnasium.

30

Q. Was she there as a client or a customer of the gymnasium?

A. Yes, she was.

35

Q. And when you first met her, was she on her own or did she have a child with her?

A. No, she had a little daughter.

Q. That is Laura?

40

A. Yes.

Q. Are you able to tell us about how old Laura appeared to be when you first saw her?

A. Just toddling.

45

Q. Walking or just?

A. Yes, just.

Q. Just starting to walk; just starting to walk?

50

A. Yes, that's right.

Q. And from when you first met Mrs Folbigg did you see her regularly at the gymnasium?

55

A. Yes, particularly in the morning classes; that was the class that we had baby-sitting available. The evening classes didn't have baby-sitting.

Q. Would it be fair to say that most of the people who

attended the morning classes or your morning class were women?

A. Yes, that's right.

5 Q. And a lot of them had young children or babies?

A. That's right.

Q. And there was a creche at the gymnasium for that very purpose?

10 A. Yes.

Q. Now, over the time that you observed Mrs Folbigg, did you make some observations about her interaction with her daughter Laura?

15 A. Yes I did.

Q. What can you tell us about those interactions?

A. I thought she was a good mother. I thought she was a caring mother. The little girl was always dressed well. They seemed to have a really good bond. The little girl was outgoing, which usually comes from a child that is secure and happy. She just was will a little delight, really.

25 Q. And did you have any discussions sometimes with Mrs Folbigg about her future plans in relation to her daughter?

A. Actually, yes we did. Because Laura was a happy little out-there-type girl. We would have a conversation. I remember vividly one day saying about how one day we thought she would be in front of a camera, be it as a little model or a little actress. She was really a little vivacious thing. And then she laughed and said; "yeah, that's where I think we will be going." She had all the normal plans for her child that people do.

Q. Now, were you instructing or working at the gym on 1 March 1999 when Laura Folbigg died?

40 A. Yes, I was.

Q. And did Kathleen Folbigg attend for a class?

A. She did, and I did comment to Kath that day that Laura just didn't seem herself. She just didn't seem as bright and bubbly as normal.

45 Q. And did she seem a little unwell?
A. Yes, she just didn't seem herself.

Q. Did you notice anything about the way that the child and Mrs Folbigg were relating to each other that morning?

A. No. Kath was - actually she didn't stay for the morning tea as normal, because she said that Laura didn't seem, just didn't seem well, so she was going to take her home and put her down for a nap, but.

55 Q. What sort of tone of voice did she say that in?
A. Just a caring, normal - "I will take her home", because we did morning tea every morning.

Q. Now, later that day did you hear that the child Laura had died?

A. Yes, I did.

5

Q. And was that something you heard in the afternoon?

A. Yes. We were on our way to Newcastle, myself and another - and two or three other instructors to have a look at a new program that was coming out, and they let me know that Laura had passed away.

10

Q. And what did you do after you found out that Laura had passed away?

A. Nothing that day because, as I said we were on our way, we had to go to Newcastle. The next day myself and another instructor called up to see Kath.

15

Q. You went to Kathleen's house?

A. Yes.

20

Q. And did you make some observations about Kathleen's behaviour when you went to the house?

A. That she was upset as any mother would be.

25

Q. Did you speak to her?

A. We did. And I commented that now probably wasn't the time but; 'don't be a stranger to the gym. Come back, even if you just want to have a cup of tea and the company. Come back as soon as you feel.'

30

Q. Did you see her in the days following that first visit, the day after Laura died? Did you go to the house again?

A. I don't remember, I don't remember. I think there was one other visit but then I don't think the next time I saw her was until the day of the funeral.

35

Q. And did you go to the funeral?

A. Yes.

40

Q. Did you make some observations about the way Mrs Folbigg appeared at the funeral?

A. Every now and then I would look at her and Craig. I noticed at one stage, I think she put her hand on Craig's back or sort of made, like a comforting move towards Craig and then another time, a couple of times I noticed the shoulders slumping down.

45

Q. And you are moving your shoulders up and down?

A. Yes, sort of like a slumping move, shrugging move.

50

Q. Where were you sitting relevant to her?

A. About five rows back behind.

55

Q. Did it appear to you that she might have been sobbing or crying?

A. Yes, yes, or that's how I interpreted it.

Q. Did you speak to her at the funeral?

A. Yes, I did.

Q. How was her demeanour when you spoke to her?

5 A. Obviously upset. She just looked like someone that was trying to keep it together, to try and get through the difficulty as best she could.

Q. Now subsequent to the funeral did you attend what has been described as a wake at the Folbigg household?

10

A. Yes, I did.

Q. And were there a lot of people there?

A. There were.

15

Q. And were there food and drinks served?

A. Yes, there were.

Q. And did you notice anything about the behaviour of Kathleen Folbigg at that time?

20

A. No, nothing that would be unusual to the situation that she was going through, no.

Q. Was she speaking to people?

25

A. Yes, she was. Once again it was just trying to get, to me it was just the attitude of someone trying to get through the day as best she could.

Q. Now, after that did you have further contact with Kathleen Folbigg?

30

A. I had one other conversation with her at her house and then the next time I saw her she was back at the gym.

Q. Did you, together with some other people of mutual acquaintance, other friends, try to get her to do something in relation to the gymnasium?

35

A. To come back to the gym.

Q. When did you start trying to do that?

40

A. Well as I said it was virtually like from day one when I went after the bubby died, like, I said it probably wasn't the time to be talking about it, but 'don't be a stranger', you know, 'come and see us'. So I have virtually from day one was saying it.

45

Q. Did you say it on - did you say the same sort of thing on different days?

A. Yes, it was basically the same thing. Just, 'come and see us. You don't have to do a class, just have a cup of tea and if it's too much, go home'.

50

Q. And did other people in the circle do the same thing?

A. Yes.

55

<CROSS-EXAMINATION

CROWN PROSECUTOR: Q. Mrs Paul, you only saw Laura and Kathleen together when they came to the gym; is that

right?

A. Yes, that's right.

5 Q. You never went to Kathleen's home and saw them both together there, did you?

A. No.

10 Q. You never met them outside of the gym environment, did you?

A. No.

15 Q. So your knowledge of how Kathleen and Laura interacted was entirely restricted to the public areas of a gymnasium with lots of other women around. Is that right?

20 A. Not completely true. Because following that we would often go somewhere and have morning tea or spend a little bit of time together and five days a week after the class she would spend time with them, like, being a small country town once the class is finished, like, you have a sort of social thing like that and you would spend time there and no, that's the limit of the time I would spend with them.

25 Q. And the vast majority of the time that you were together with Kathleen, Laura was being looked after at the creche?

30 A. After, no, like I said with the morning tea things, it was a social thing and the children were no longer in the creche, and the mothers were responsible for their children.

Q. At the gym?

A. No, at the coffee lounge or whatever.

35 Q. At the gym she was mainly, Laura was mainly in the creche?

A. In the gym, yes, in the gym area.

40 Q. And when you went to have morning tea afterwards, was that generally in a coffee lounge or cafe or something like that?

A. Yes.

45 Q. Is that right?

A. Yes.

50 Q. And so your contact with Kathleen and Laura was restricted to the gym and the coffee lounges; is that right?

A. Yes.

Q. Did you ever see them at home together?

A. No.

55 Q. Did you ever see them alone together?

A. No.

Q. Did you ever see any signs of Kathy getting feelings

of jealousy or anger towards her child?

A. No.

5 Q. Did you ever see any signs of her being engaged in a battle of wills with Laura?

A. No.

10 Q. Did you ever see any signs of her being insistent on Laura eating or sleeping?

A. No.

Q. Did she ever tell you that stress had made her do terrible things?

15 A. No. No, actually - I don't understand that question. I mean, as a mother with four children, stress is part of having children.

Q. Would you answer my question: Did she ever tell you that stress had made her do terrible things?

20 A. No.

Q. Did she ever tell you that she wanted to get things right and not be defeated by totally inadequate feelings about herself?

25 A. No. No.

Q. Did she ever tell you that she wanted to prove that there was nothing wrong with her?

30 A. No.

Q. Did she ever tell you that she was scared most when she was alone with the baby?

A. No.

35 Q. Did she ever tell you that she had feelings of getting overwhelmed?

A. No.

Q. Did she ever tell you that she had dark moods?

40 A. No.

Q. Did she ever tell you that she was scared that Laura might leave her like Sarah had?

45 ZAHRA: I object to that.

WITNESS: No, I can answer that. She said--

50 ZAHRA: With respect, I object to this process of what is going on now, of reading particular extracts of the diary to the witness and asking the witness, in effect, to say whether or not such things had ever been said to her.

55 HIS HONOUR: This is something that I shall have to hear argument about, ladies and gentlemen. Would you mind going to the juryroom, please?

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mrs Bull, we hope not to keep you long but it will be necessary for me to ask you to wait outside while I deal with this matter?

5

A. Okay.

Q. Just outside the courtroom door, please. While you are outside please don't talk to anybody about your evidence?

10

A. Okay.

WITNESS LEAVES COURTROOM

15 ~~ZAHRA~~: The simple point of the objection is this; the only possible relevance this cross-examination can have is to demonstrate that Mrs Folbigg did not confide in this witness her most intimate thoughts.

20 Now, that is assuming that the diary reflects, in a literal sense, her intimate thoughts.

Now this is a process which in my submission, whatever utility, it has has been exhausted, that is the level of acquaintance between the witness and the accused, clearly does not include the accused confiding deep thoughts, it would appear to be tolerably clear.

25

Now, beyond that, with respect, we are simply having the Crown have an opportunity to read extract after extract to the witness with the likelihood of getting a negative response each time. So, in my submission whatever utility this process has had, and whatever relevance it has had, has now passed and should go no further. That is the submission, your Honour.

30

35

HIS HONOUR: I don't understand that something ceases to be relevant or able to be proved simply because in the opinion of counsel proof has been achieved.

40

~~ZAHRA~~: I will put it another way it is a discretionary argument in that case. If it is relevant and remains so then I suggest that its utility is so minor that it should be disallowed in the exercise of your Honour's discretion because there is an unfair aspect to it, which is that the Crown is allowed by this process to recite various selected extracts from the diary.

45

HIS HONOUR: What is unfair about that? The jury already have that material.

50

COOK: Because the Crown will have a chance at the address at the end of the trial, in my submission, if this, the emphasis is the unfair aspect, with no utility, you see. That is the point.

55

HIS HONOUR: Mr Crown, how many diary entries to you propose to ask Mrs Bull about?

5 CROWN PROSECUTOR: Not many more, one or two more. The
defence have called this witness to give evidence that the
accused was a good mother, a caring mother, and that she
had a good bond with her daughter.

HIS HONOUR: Yes, I think it is relevant. May we have the
jury please?

10 COOK: May it please the court.

15 HIS HONOUR: I will give only short reasons because I wish
this trial not to be delayed. I have considered the
balance of probative value and the capacity for unfair
prejudice, mandated by the Evidence Act, particularly
section 137. I am satisfied that the probative value of
the evidence outweighs any risk of unfair prejudice.

IN THE PRESENCE OF THE JURY AND WITNESS

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Your Honour, I think that the previous question was unanswered.

HIS HONOUR: Would you mind repeating it?

10 CROWN PROSECUTOR: Q. Did she ever tell you that she was scared that Laura might leave her like Sarah had?

A. No.

15 Q. Did she ever tell you that Laura and Sarah were like chalk and cheese?

A. No.

20 Q. Did she ever tell you that Laura had saved her life by being different to Sarah?

A. No.

25 Q. Did she ever tell you that she had seriously contemplated leaving her daughter with Craig and going away?

A. No.

30 Q. Did she ever tell you about an incident that had occurred on the day before Laura's death?

A. You would have to say what incident. I don't know what you're talking about.

35 Q. Well, did she ever tell you this, that the day before Laura's death, that she had lost patience with Laura and that she had, in effect, lost it with her?

A. No.

40 Q. The day before Laura's death?

A. No.

45 Q. Did she ever tell that you Laura had been following her around, whingeing and moaning and that she had spun around, knocked Laura over, screamed at her and then Laura was lying on the ground in an emotional wreck?

A. No, sir. And that would be alien to anything that I had ever seen.

50 Q. Did she ever tell you that the next morning Laura had been very clingy, subdued and whingey - this is the day of Laura's death?

A. No but as I said at the gym I did notice that she was not herself.

55 Q. That Laura was not herself?

A. Unwell. Not herself.

Q. Did she ever tell that you that morning before leaving for the gym at breakfast time that she had had both of Laura's hands pinned down on the deck of the high chair

trying to force feed Laura?

A. No, sir. And with respect, that doesn't sound like anything I've seen Kathy ever do.

5 Q. That was not a side that you had seen, was it?
A. No.

10 Q. Did she ever tell you that she had then growled at Laura?
A. No.

15 Q. Did she ever tell that you she used to regularly, on average every-day, growl at Laura?
A. No.

Q. Did you ever see her growling at Laura at the gym?
A. No.

20 Q. Did you ever see her growling at Laura in the cafes?
A. No.

25 Q. Would it be completely contrary to what you had seen, to know that she used to growl at Laura in anger?
A. I would have to see it to believe it, yes.

Q. Would that be a side that was never disclosed to you if it did happen?
A. If it did happen. I don't know that it did.

30 Q. Do you recall being asked questions by Mr Cook about Laura's wake?
A. Yes.

35 Q. That was held at Kathleen and Craig's home?
A. Yes.

40 Q. Do you recall that at the wake Kathleen was laughing and talking with the girls from the gym?
A. No.

45 Q. I suggest to you that she was laughing and talking with the girls from the gym?
A. But you asked me did see it and I didn't. I wasn't one of those girls.

Q. All right. Were there other girls that she was with?
A. Yes.

50 Q. Who were they?
A. Whoever was there.

Q. Were they also girls who had been patrons of the gym?
A. Yes.

55 Q. Were you separate from that group?
A. Obviously on that occasion I was.

Q. Did you hear them - did you hear this group laughing

and talking during the wake?

A. I don't necessity. Perhaps they were remembering some little thing that Laura did that was funny. I don't know. I wasn't there. I can't say.

5

Q. In fact, do you recall anything about these women laughing about a white suit that Craig used to wear.

COOK: I object to the form of that question.

10

ABOVE QUESTION WITHDRAWN

CROWN PROSECUTOR: Q. Did you hear any discussion in which Kathleen was a party about Craig having worn a strange white suit?

15

A. No, sir.

CROWN PROSECUTOR: Yes, thank you. Nothing further.

20

<RE-EXAMINATION

COOK: Q. From what you have said, there would be quite often times when Kathleen Folbigg and you and perhaps others would go to a coffee shop after the gymnasium?

25

A. Yes, sir.

Q. And on most of those occasions would Kathleen have Laura with her?

A. Yes.

30

Q. And would Laura eat on some of those occasions, eat food?

A. Yes. Yes.

35

Q. Did you ever notice anything unusual in the relationship or what was going on between Laura and Kathleen when Laura was eating?

A. No. As I said I always found her to be a very caring kind mum. I never saw anything that would make me think anything else - other.

40

COOK: Yes. Thank you, could the witness be excused?

CROWN PROSECUTOR: No objection.

45

HIS HONOUR: Mrs Bull, you may step down and you are excused from further attendance?

A. Thank you, your Honour.

50

<WITNESS RETIRED AND EXCUSED

HIS HONOUR: Yes, Mr Zahra?

ZAHRA: I call professor Byard.

55

<ROGER BYARD(11.05AM)
SWORN AND EXAMINED

5 HIS HONOUR: If you would like to refer to any notes of
yours, professor, in order to answer any question, you may
do so?

A. Thank you, your Honour.

10 ZAHRA: Q. Your name is professor Roger Byard?

A. That's correct.

Q. Is that spelt B-Y-A-R-D?

A. That's correct.

15 Q. Professor, are you currently employed by the Forensic
Science Centre in Adelaide?

A. Yes, I am.

20 Q. And are you engaged there as a specialist forensic
pathologist?

A. That's correct.

Q. And have you been in that position since May 1999?

25 A. That's correct.

Q. Before that, were you a senior consultant
histopathologist at the Women's and Children's Hospital?

A. In Adelaide, yes, that's correct.

30 Q. And did you there hold a position of visiting
consultant pathologist at the Forensic Science Centre?

A. Yes, I did.

35 Q. Do you hold clinical professorships with the
Departments of Pathology and Paediatrics at the University
of Adelaide?

A. Yes, I do.

40 Q. And are you also a Consultant Paediatric Forensic
Pathologist to the Child Protection Unit at the Women's
and Children's Hospital, Adelaide?

A. That's correct.

45 Q. Did you qualify in medicine at the University of
Tasmania in 1978?

A. Yes, I did.

Q. And do you hold qualifications in Canada in 1982?

50 A. Yes, I do.

Q. What qualifications are those?

A. I have the LMCC which is a Canadian medical degree,
and I have a Fellowship in General Practice in Canada.

55 Q. Do you hold fellowships in anatomical pathology in
three countries?

A. That's correct.

- Q. In Canada?
A. Yes.
- 5 Q. The United Kingdom?
A. Yes.
- Q. And the United States?
A. Yes, I do.
- 10 Q. And do you also hold fellowships in family medicine with the Canadian College of Family Physicians?
A. Yes, I do.
- 15 Q. And do you have a special interest in sudden infant and childhood deaths?
A. Yes, I do.
- Q. And have you published significantly in that area?
A. Yes, I have.
- 20 Q. Have you held a number of university positions?
A. That's correct.
- Q. In 1981-82 did you hold a position at Master
25 University, Hamilton, Canada?
A. That's correct.
- Q. In 1984-1988 at the University of Ottawa?
A. That's correct.
- 30 Q. In the Department of Anatomical Pathology?
A. That's correct.
- Q. In 1988-89 the University of Toronto?
35 A. That's correct.
- Q. In the Department of Paediatric Pathology?
A. Yes.
- 40 Q. In 1991-1995 with the University of Adelaide?
A. Yes.
- Q. In the Department of Pathology?
A. That's correct.
- 45 Q. As a clinical senior lecturer?
A. Yes.
- Q. And from 93-1995 in the University of Adelaide, also
50 as a clinical senior lecturer?
A. That's correct.
- Q. And from 1996 have you held the position of clinical
55 professor at the University of Adelaide, Department of Paediatrics and Pathology?
A. I think it was actually later than that, but, yes, that's the position I have.

Q. Have you received a number of awards in relation to your research in relation to SIDS?

A. Yes, I have.

5 Q. And that includes the Alice Davey award for SIDS research at University of Adelaide?

A. That's correct.

10 Q. And also an award in 2001 from the National Institute of Forensic Science, the annual award for best chapter in a book for 2000-2001?

A. That's correct.

15 Q. And that related to a publication and chapter headed differential diagnosis of sudden infant death?

A. That's correct.

20 Q. In particular, the chapter 12 on sudden infant death syndrome problems, progress and possibilities?

A. That's the book that, it was published in, yes.

Q. So far as your postgraduate certificates are concerned, do you hold postgraduate certificates on the Medical Council of Canada?

25 A. It is the college of physicians and surgeons of Canada, yes.

Q. And also you hold a Diploma with the American Board of Pathology?

30 A. That's correct.

Q. And also with the Royal College of Physicians and Surgeons in Canada?

35 A. Yes. I think the first one must have been the British fellowship.

Q. And in 1994 were you awarded the Degree of Doctor of Medicine?

40 A. That's correct.

Q. And was the title of your thesis sudden natural death in infancy and early childhood?

A. That's correct.

45 Q. And did that thesis involve an analysis of audiological mechanisms and pathological features?

A. That's correct, looking at the causes of deaths in babies.

50 Q. Now in your position with the Adelaide Children's Hospital, were you Senior Consultant Histopathologist?

A. That's correct.

Q. What did that involve?

55 A. Essentially that meant that I worked in the Pathology Department, looking at specimens that came in from the operating theatres, making diagnoses based on tissues and also performing autopsies on babies, babies and children.

who had died in the hospital and babies and children who had died outside and were the subject of coronial investigation.

5 Q. Now, have you also been the visiting consultant pathologist at the Forensic Science Centre from 1995-1999?
A. That's correct.

10 Q. And have you undertaken there a number of coronial autopsies?
A. That's correct.

15 Q. How many autopsies would you have carried out?
A. I think probably 1800-2000 now in adults and about 600 in children and babies.

20 Q. Were you engaged by the Commonwealth Government in operation aligns (Alliance)??? At Kuta Beach Denpasar in relation to the Bali bombings?
A. That's correct; last November.

Q. Have you held a number of teaching positions?
A. Yes, I have.

25 Q. And those teaching positions have been in various countries?
A. That's correct.

30 Q. And amongst other lecturing positions, have you lectured in child abuse at the police investigator's course?
A. That's correct, yes.

35 Q. Have you been a lecturer in paediatrics and pathology?
A. Yes, I have.

40 Q. And have you been a lecturer in paediatrics and pathology at Flinders University?
A. Yes, I have.

Q. And a lecturer in Chemistry and Analytical Science at Flinders University?
A. Yes.

45 Q. Are you currently involved in major projects involving children's safety?
A. Yes, I am.

50 Q. Does that include the keeping your baby and child safe program?
A. That's correct.

55 Q. And is that a program that you initiated?
A. That's correct.

Q. What does that program involve?
A. What it means is that I examine all of the accidental deaths of babies in South Australia, looking to see what

has happened, what the cause of death was, why this child has died and whether there is something we can do to prevent further deaths happening.

5 Q. In 1999 did you establish a State wide paediatric forensic autopsy protocol for South Australia?

A. That's correct.

Q. What did that involve?

10 A. Essentially that involved setting down a proper approach to unexpected baby deaths, putting down a protocol so that there were certain steps that were followed, describing in detail what needs to be done in terms of testing for infections or testing for injuries.

15 Q. Have you also had published a number of articles in forensic journals?

A. Yes.

20 Q. And paediatric journals also?

A. That's correct.

Q. And those publications total 279?

25 A. Yes, I think so.

Q. In addition to those articles, have you authored text?

A. Yes, I have.

30 Q. Are you the author of Byard and Cohle, C-o-h-l-e, Sudden Death in Infancy Childhood and Adolescence?

A. That was the first edition, yes.

Q. And also on your own, Sudden Death in Infancy Childhood and Adolescence, the second edition?

35 A. That's correct.

Q. And have you, in fact, written chapters in a number of texts?

40 A. Yes, I have.

Q. In fact 40 in all?

A. Probably, yes.

45 Q. And they primarily relate to researches involving children?

A. Most of them do, yes.

Q. And a number of them involved in researches in sudden death in children?

50 A. That's correct.

Q. Have you organised a number of international paediatric forensic conferences?

55 A. Yes, I have.

Q. And they have included Canada, Germany, Indonesia, United States, South Africa, New Zealand, Japan and France?

A. That's correct.

Q. And currently organising a conference in Norway?

A. That's occurring in three weeks time, yes.

5

Q. And these predominantly are in relation to sudden infant death syndrome?

A. Sudden infant death syndrome and other causes of sudden infant death.

10

Q. And have you in fact presented papers at a number of conferences?

A. Yes, I have.

15

Q. And do they total in fact 210 papers that you have presented at various conferences?

A. I believe so, yes.

20

Q. And, again, did they involve, in a large majority, papers in relation to sudden infant death in children?

A. Many of them do, yes.

25

Q. And have you been invited in a number of chairs also?

A. That's correct.

25

Q. Do they total 113?

A. I think that that includes invited lectures as well as chairing.

30

Q. Now, professor, were you provided with a number of documents and slides in relation to the matter before the court?

A. Yes, I received two boxes of case files.

35

Q. And did they include autopsy reports in relation to each of the four children?

A. That's correct.

40

Q. And neuropathology reports in relation to the child Patrick?

A. That's correct, yes.

45

Q. From a Dr Kan?

A. That's correct, yes.

45

Q. And also a number of folders in relation to medical records of each of the four children?

A. That's correct.

50

Q. And you have been provided with a number of reports and statements?

A. Yes, I have.

55

Q. And have you read transcript of the proceedings in this court?

A. Yes, I have.

Q. And amongst the transcript that has been read, have

you read the evidence of Dr Wilkinson and Dr Dezord?
A. Yes, I have.

5 Q. In those transcripts have you read a number of
references to the definition of sudden infant death?
A. Yes, I have.

10 Q. And you have also read the transcripts of Professor
Herdson?
A. Yes, I have.

Q. And Professor Berry?
A. Yes.

15 Q. And of Dr Beal?
A. Yes.

HIS HONOUR: Q. That is of the evidence that they have
20 given at this trial?
A. That's correct your Honour, yes.

ZAHRA: Yes.

25 Q. And Dr Cala?
A. Yes.

Q. And I think also Dr Hilton?
A. Yes, that's correct.

30 Q. Now, can you tell the court what your definition of
sudden infant death would be?
A. If you mean the definition of sudden infant death
syndrome that I use.

35 Q. Yes?
A. I use the definition that the Americans came up with
in 1991 and it is the sudden death of an infant under one
year of age. It is unexpected and no cause of death is
40 found after a thorough case investigation and the case
investigation includes, not only a complete autopsy but
examining the deaths scene and reviewing the clinical
history.

45 Q. If, for example, a crime scene examination has not
been carried out, would you give a diagnosis of SIDS?
A. No, I wouldn't, because the definition requires that
you examine exactly how the baby was found and what
happened at the time.

50 Q. And if that one fact alone had not taken place, you
would not diagnose SIDS?
A. Not now. I think in the past we would have, but not
now.

55 Q. What would you diagnose, if in fact there were no
other findings on pathology?
A. I would call the death, if I find absolutely nothing
in this baby I would say the death was undetermined and I

would make a comment that this may have been SIDS, but because I don't have the death scene information I can't exclude certain things like accidental asphyxia, for example.

5

Q. Can I take you to the child, Caleb? Can you tell us what relevant features of Caleb's history that you considered?

10 A. With Caleb, basically we don't really have all that much to go on.

Q. You read the post-mortem report of Dr Cummings?

15 A. That's correct. There are certain problems in that the death scene wasn't examined and the autopsy did not include an examination of the brain under the microscope.

Q. Looking at the medical material that you have been provided with, what diagnosis would you place on Caleb's death?

20 A. With Caleb, I would say the cause of death was undetermined and the reasons for that, there are several, one is that I don't have the death scene examination. The second is that the brain wasn't examined, so I don't really know whether there was any pathology in the brain. 25 And thirdly, there is an issue of his voice box, he was said to have a floppy voice box.

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

30 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 35 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 can get cartilage in the larynx that is not formed properly, so the larynx sort of 40 collapses or you may find no structural findings at all. It may just be that you have got a weak larynx.

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

45 A. That's correct.

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

50 A. That's correct, yes.

Q. And that was two days before his death?

A. That's correct.

55 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"?

5 A. Yes.

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

10 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 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." 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"?

15
20

25 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 wheezing 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.

30
35
40
45

Q. Can you tell us a little more about the research material that you have considered in relation to this issue of the floppy larynx?

50

A. There is a paper, it is a very interesting paper, it was written in 1991 by Sivan, S-I-V-A-N, and it is an Israeli group and they look at six babies who presented with respiratory arrest. They just stopped breathing. They did an examination with a camera in these babies who were alive so they actually looked down to see what was going on in the larynx and they diagnosed cause her as floppy

55

larynx.

CROWN PROSECUTOR: Sorry I missed that?

5 A. The diagnosed, the cause was a floppy larynx,
laryngomalacia. They point out in this circumstance there
is no structural abnormality, so you wouldn't expect to
see anything at post-mortem, so I think that to me says
that it is important if you have got babies who have
10 symptoms that you consider that as a possible factor. Most
laryngomalacia is quite benign, and kids grow out of it.
But there is some cases where they may not necessarily
grow out of it, or it may cause a respiratory arrest and,
if not resuscitated, it could cause death.

15 Q. Are you aware in any of the literature or your own
experience or your discussion with colleagues as to
whether any child has died as a result a floppy larynx?

A. I have not been able to find any cases. I have found
20 two cases reported by Dr Beal where babies died and they
had floppy bronchi, which is the windpipe lower; but my
position on this, and I thought about it a lot, is that if
there is any condition that narrows a baby's airway and
can cause respiratory arrest, then that must be able to
cause death. So I think it has to be regarded as a
25 potential, but a very rare cause of unexpected death.

Q. So far as the upper airway of a child of this age is
concerned, are there particular features that we need to
take into account?

30 A. I'm surprised that more babies don't block off their
airways. Their airways are very narrow, and that's why I
think that anything that actually narrows that airway
further is something to, you know, it is of concern.

35 Q. The fact that there may not have been any reported
deaths of floppy larynx, does that affect your opinion as
to whether a floppy larynx played any part in the cause of
the death of Caleb?

A. Well, I think it means it is very rare. But I have an
40 example of another little baby who died who had
respiratory problems, and what happened with him was that
had he a very small jaw, so the tongue moved back in the
throat, but at autopsy we found that the epiglottis, which
is the bit of cartilage over the voice box, was quite
45 deformed, and I think with that, that played a role in his
death. Now I have never seen a description of this before,
I have never seen photographs of a similar case. So it is
a unique case, but it still happened. So you can have
50 problems in airways that are very rare but still can cause
problems.

Q. Does the position of the child have any relevance to
considering the affect that a floppy larynx might have?

55 A. Well, again it is often quite a positional thing. . It
may vary, depending on the way that the baby is lying or
the way the head is. There are some parts of the airway
that, when a baby is lying on their back, it is narrowed
more, so it gets worsened when they are lying on their

back. So that is why it is sometimes hard to diagnose, because it is not always there.

5 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?

10 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
15 - 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
20 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
25 airway.

Q. Do you know if there was any histology of the brain?

A. No. No, I don't believe there was.

30 Q. In this particular case, what would be your ultimate diagnosis in relation to Caleb?

A. An undetermined cause of death.

Q. Why would you give the diagnosis of undetermined?

35 A. Because we don't have sufficient information. We have the death scene undescribed. We don't have histology of the brain, and we have got this history of him having problems with his breathing, with a diagnosis of a floppy larynx.
40

Q. Is there any medical condition or symptom that you observed that would amount to any proof of suffocation?

45 A. Suffocation is very difficult in babies, and I think this is one of the real problems. If somebody suffocates me, or attempts to, I will fight back and, you know, I will usually have injuries; and if they have actually got me by the neck, for example, I will have little haemorrhages in the face, and bleeding in the whites of the eyes, and my face would be congested. The problem with
50 babies is that you can suffocate them, either accidentally or deliberately. For example, if a baby slips down between a mattress and a cot side, and they don't struggle, their airway is blocked, and basically they die; and the autopsy findings are the same as SIDS. However,
55 the case that I had, that I think illustrates this very well, was a baby who was found in a cardiac arrest under her mother in a public toilet in Adelaide; she was a heroin addict, and she collapsed on top of the baby, so

5 this baby was absolutely squashed, and I thought if there was going to be a case - if there was going to be one case that I used to see that suffocation can cause some signs different from SIDS, this would be it, and there were no positive findings in that case at all.

10 Q. Does the fact that there was no histology of the upper airway or histology of the brain and no crime scene examination exclude a diagnosis of SIDS, in your opinion?

A. I think the lack of death scene and the lack of examination of the brain exclude that.

15 Q. In this particular case, however, there are no positive symptoms, medically, of suffocation?

A. No, no, there aren't.

ZAHRA: Is that a convenient time? There is another aspect I will take the witness to.

20 HIS HONOUR: Yes. We will take the morning tea adjournment.

(To witness): Professor, please step down. We will be resuming at about midday.

25

IN THE ABSENCE OF THE JURY

5 CULVER: Could I raise a transcript correction, which
may prove to be critical it is page 1672 of the
transcript and it extends all the way through to page
1084. It lists at the bottom of each of those pages
that Herdson is the witness, when in fact it should
be Berry.

10 (Correction noted.)

SHORT ADJOURNMENT

15

RESUMPTION

IN THE PRESENCE OF THE JURY

5 ZAHRA: Q. Professor, you are aware of Professor Berry's evidence in relation to finding of haemosiderin?

A. That's correct, yes.

10 Q. What do you say about the relevance of the finding of haemosiderin in the present case?

A. I think haemosiderin is, which is iron present in the lung, is it is a difficult topic. The way the whole concept came about was Dr Beecroft in New Zealand had some cases of suffocation where he found iron in the lungs and he said in the observation, this is a very good test we can use to see if there has been suffocation; if there is iron there has to be suffocation. I actually provided him with some the cases for that study.

20 The problem with the pathology though, in all these cases, is ~~that~~ it is not specific; we are not dealing with a bullet hole or stab wound. We are dealing with findings that are not absolute. And I have done a study where I found haemosiderin in something like 20 percent of SIDS babies lungs; that was in the framework of lungs, and also in the air spaces of the lungs. I have also had a case where I was convinced was a SIDS case where there was a lot of iron in the lungs. To me, all iron means is that something has happened with bleeding in the past. It may be suffocation. It may be something we just don't know about. I think it is a finding that should increase your awareness, that there may have been either apparent life-threatening event, suffocation or nose bleed, and it means the case should be investigated carefully, but it is not an absolute finding.

35 Q. What about child birth?

A. I don't think anybody really knows how much iron you would get into the lungs from child birth. It has not really, to my knowledge, been looked at carefully, but I think that any, any inhalation of blood into lungs may cause iron.

40 Q. Can you detail the study that you have referred to a moment ago in relation to the finding of haemosiderin in a number of cases?

A. I looked a series of SIDS babies to see how much, if any, iron was present in the lungs; and I found that some children who had an apparent life-threatening event described, had iron. I found some the children who had injuries, such as fractured ribs, had iron in the lungs and, as I said, I did have one SIDS case that had absolutely nothing other than a typical SIDS case that had a lot of iron as well.

55 Q. You have given an opinion that you would give the cause of death of the Caleb as undetermined?

A. That's correct.

Q. And that is in fact because you do not have, amongst other things, the full crime scene investigation?

A. That's correct.

5

Q. When you give the diagnosis of undetermined, does that exclude the fact that Caleb may have in fact have died from SIDS?

A. No it doesn't. What we have with babies who die, where we have a typical SIDS case, the baby will be two to four months of age; more often a boy than a girl; it is the winter months; the baby is sleeping face down. We don't find anything at autopsy. There is nothing at the death scene. Most of those cases we will attribute to SIDS. The other case, where we have an obvious cause of death - it might be pneumonia, meningitis. In this court, the grey area, we have cases where we really don't know. We have a baby, for example, who might have a little bit of inflammation of the lungs, not enough to kill the baby, but more typical SIDS, I call that undetermined. That means there is natural disease there that we really don't know how significant it is. The same with laryngomalacia. I have that history, which I am not sure what it means, so therefore undetermined.

25

Q. Looking at the findings of all of the pathologists in isolation, in relation to Caleb, did you find any new findings of symptoms which would amount to proof of suffocation?

30

A. No, there is not.

Q. Can I take you to the ALTE of Patrick?

A. Yes.

35

Q. Can you tell us what are the relevant findings in relation to that ALTE that assist you in coming to your opinion?

A. It's very difficult in these cases, because we are going back so far. What we know is that Patrick had an epilepsy where he wasn't breathing, was deprived of oxygen for sometime, was brought into hospital and then had a progressively back course with a lot of fitting, and then died several months later. Looking at the pathology, we are looking at something that is right down the end of line, so it is very hard on the pathology to actually say what may have happened. I can say that there may have been an epilepsy where he just had a problem with his breathing. That happens in some babies. Three percent of babies in the community will stop breathing at some time for reasons we don't understand. We know he had epilepsy. Is it possible he had an epileptic ~~epilepsy~~? I think based on the pathology, certainly I couldn't exclude that. People have talked about encephalitis and inflammation on the brain, on the pathology, that is a possibility.

45

50

55

Clinical doctors looked at that, and certainly excluded herpes simplex encephalitis; but I suppose what I am saying is there are a range of possibilities that could cause this. Could he have been suffocated accidentally or

deliberately to produce a similar finding, that that is possible too, the findings in pathology, though, are unspecific.

5 Q. Is there any way of determining which of those particular factors has caused the ALTE?

A. Not on the pathology, no, there is not.

10 Q. Can I take you to the first of those? The fact that the child may in fact have stopped breathing, that caused the ALTE. What are the mechanisms involved?

A. We don't really know. What we think is that there are some babies who say die of SIDS who have trouble controlling their breathing. We used to think that these children might have epilepsy where they stopped breathing but were found before they died and so could be resuscitated. That is called an ALTE. Then medical opinion changed and people said, "Oh, no, ALTE, it means something different. It means they have been suffocated, and it really doesn't mean that you have a SIDS event". Now, I think the truth is in the middle somewhere, in that some babies have trouble controlling their breathing; some baby will die from it; and some babies will be found before they die, and they can be resuscitated.

25 Q. If that were the situation in relation to Patrick ALTE, could that have resulted in an hypoxic event?

A. What happens - the answer is "yes". What happens is they stopped breathing and don't get enough oxygen to their brain unless they are resuscitated they will die.

30 Q. What would be the process of - or we know in this particular case that there was intervention - but if that were the cause, what would have been the process leading up to the time where there was a resuscitation?

A. I don't think we know. I think what we hypothesise is that the part of the brain that controls breathing isn't working properly, and so the baby often in sleep just stops breathing, and they don't get enough oxygen and the brain has damage, the heart has damage, and the heart stops beating, and it goes on to death. At any time along that path they maybe resuscitated. Sometimes resuscitation won't work; other times it may work.

45 Q. If that were the process in this particular case, is it possible to get to the extent of brain damage that was observed by the clinicians?

A. The brain damage at the autopsy or the brain damage clinically?

50 Q. Clinically?

A. Clinically; I believe so, yes.

55 Q. Are you aware that the child was able to be resuscitated?

A. Yes.

Q. And you have read the evidence of Dr Dezordi?

A. Yes, I have.

Q. Do you recall Dr Dezordi had referred to the child responding to treatment at first?

5 A. Yes.

Q. It appeared that he revived sufficiently so that he had appropriate oxygen levels?

10 A. That's correct.

Q. And subsequent to that there were a number of seizures?

A. That's correct.

15 Q. Are you aware of the findings on pathology in relation to Patrick's brain?

A. Yes, I am.

Q. You have read the evidence of Dr Kahn?

20 A. Yes.

Q. And you have had the opportunity of reading his report?

25 A. Yes, I have.

Q. Is there anything in the neuropathology that would exclude this process if there were the process leading to ALTE?

30 A. No, there is not. All the pathology shows is a brain that has been very badly damaged, damaged by not enough oxygen over sometime. So there is scarring of brain, some inflammation of brain. Dr Kahn mentioned there may have been encephalitis. Really, the findings at pathology don't really help us in sorting out what happened three months before.

Q. Are you aware that there were a significance number of seizureures at around the time of the first seizure in the hospital?

40 A. That's correct.

Q. Do you recall how many there were?

45 A. I think after he came into hospital that night on the 19th he had eight seizures, and then I think the next day, I think he had two to four every couple of hours. Very significant epilepsy.

Q. Have you examined the clinical notes recently?

50 A. Yes, I have.

Q. Have you made an observation about the question of whether the child had a temperature at the time of coming into hospital?

55 A. Yes, I have that's correct.

Q. What have you found?

A. Well, the statements were made that he didn't have a fever, but I looked back at the record and his

temperature, I think, was a bit low when he came in; and then I think the following day he certainly had a temperature of 37.5 - normal temperature being 37. It went up to 37.8. He also had an elevated white cell count in his blood. So I don't understand the significance of that. And I can understand why they would think may be encephalitis was a cause, because this suggested there was infection, but I don't think that has been adequately explained. Certainly hypoxia to the brain doesn't cause these findings.

Q. Do you understand also that one of the ambulance officers at the time of the ALTE had observed that the child Patrick was warm to touch?

A. Yes, that's correct, and I wondered whether he may have had a fever when he came into hospital. ^just read rest of answer a note when the temperature measured was low. When babies are left on hospital trolleys an I resuscitation are undertake, they are often very, very cold because they have all their clothes off; it maybe the temperature was lowered because he had been in drafty or cold place.

Q. Could those seizures, that manifested themselves within a short time of Patrick coming into hospital, could they have been the result of brain damage caused by the first of these possibilities, in other words that Patrick had stopped breathing?

A. Yes, I think so.

Q. The next matter that you referred to in relation to understanding the ALTE was the possibility of epilepsy?

A. That's correct.

Q. Could the ALTE have been the first manifestation of epilepsy or seizure disorder?

A. I think that is possible. Certainly based on the pathology I couldn't exclude that. A lot of children have epilepsy and don't run into problems. So it would be very unusual to have this degree of damage from the first ^episode of epilepsy, but it is possible that he had one fit the night he came in ~~^word objection~~ the next day and had a series of fits the next night, and that is what caused the damage. Based on the pathology, yes, I can't exclude that possibility.

Q. If there was the first manifestation of epilepsy which caused the ALTE, is there anything in the examination of neuropathology which would be inconsistent with that?

A. No. Epilepsy is a very hard thing to diagnosis, and there often aren't and the findings at autopsy. It is possible it is a defect in Patrick's brain which may not have been picked at the time of autopsy. It may be that it was changed because of all the damage to the brain. A number of epileptic patients don't have anything on histology. I have had, I think, four epileptic patients over the last year. I have checked them, and they all have a normal neuropathology, and they have died from;

epilepsy but what it means that the electric circuit of the brain is a problem, not the structure or, if the structure is a problem, it is a subject change we can't pick up.

5

Q. If it were such a structural abnormality, is that likely to have been observed by Dr Kahn?

10 A. As I said, the odds are that you mightn't find anything, in a person who hasn't got this degree of brain damage, but when you have the added brain damage it is possible that he wouldn't be able to see it.

Q. You also have considered the possibility that there was encephalitis?

15 A. That's correct.

Q. You have had an opportunity of looking at the evidence of Dr Wilkinson and Dr Dezordi?

20 A. Yes, I have.

Q. And the various tests undertaken?

A. That's correct.

Q. Excluding CAT scans - EEG's?

25 A. That's correct.

Q. And examination of spinal fluid?

A. That's correct.

30 Q. Would you defer to the their experience, as clinicians?

A. Yes I would. They're paediatric neurologists, they look after living babies, so certainly I would.

35 Q. Is there anything that you can say about their particular findings, in relation to whether there is in fact a possibility of encephalitis causing the ALTE?

40 A. I would accept their judgment. One of the things I find a little bit confusing though is that they mix up, when they're giving statements, encephalitis with herpes simplex. With encephalitis, they often say there is no encephalitis, and I think Dr Wilkinson had seven points that there no encephalitis; but five of those, from dealing with herpes simplex is, it may be he may have excluded other viruses. But I can't find anything in the hospital records. For example, looking at cytomegalo virus, or enterovirus, those are two viruses that can rarely cause encephalitis. I would like a statement from somebody who has done this to say "Yes, we have looked at all of these things". That would help. The fever and the white cell count, I don't know how that fits in. The initial tap of fluid around the brain didn't show any inflammatory holes that can occur with encephalitis. There are certain points I find a bit puzzling, and I am - I think it would have been helpful to have that clarified by

55 them.

Q. In relation to the epilepsy, Dr Herdson referred to

some of the observations that might be made at the time of such a seizure, such as: Vomiting, swollen airways, posture?

A. Yes.

5

Q. What do you say about those factors as relevant to whether epilepsy was, firstly, the cause of the ALTE?

A. Most epileptic patients don't vomit and inhale for for some reason. You can die from epilepsy a number of ways. 10 You can die from an accident, such as during a fit, or you can suffocate because you are not protecting your airway, or you can have an arrhythmic disturbance of the heart. In the findings on autopsy - again I would like to emphasise how non specific sometimes pathology is. The findings on 15 the autopsy are often minimal. Swollen airways is not a sign of epilepsy. So I would ignore that point. Somebody else - I mentioned that the swallowing of the tongue wasn't observed at autopsy. We don't see swelling of the tongue. It is not swallowed. It moves back. You won't 20 from an autopsy with the biting of the tongue. That is certainly a sign of somebody who had a fitted in those four cases. I told before over the last year only one of the small bites on the inside of the cheek, none them had bitten tongues; there was four. People can die from any 25 sort of epilepsy, they don't have to have the classic convulsion, and even if they have had the convulsion, after they die, they relax. People move the bodies around. You don't find the person who had died in the crouched posture. They're often lying in bed ~~as~~ sleep. The 30 finding of epilepsy at pathology are very non specific. The neuropathology is often just normal. You can't see anything there neither.

HIS HONOUR: Q. Professor, would you mind, and since your 35 answers are rather long, as you have observed, the Court Reporters are having a little difficulty keeping up with you. Could I ask you please to reduce your pace of speech a little?

A. Yes, your Honour.

40

ZAHRA: Q. Is the death of Patrick consistent with background of the ALTE resulting from stopping breathing, the first scenario that you put?

A. Yes, I think it is.

45

Q. Against a background of a subsequent seizure disorder that had resulted from the initial asphyxiating event?

A. Yes.

50

Q. Similarly can the death of Patrick be understood, in terms of a seizure?

A. Yes.

55

Q. Again, a seizure in a background of a seizure disorder?

A. That's correct.

Q. Could such a seizure have caused a catastrophic

asphyxiating event?

A. I think it could have; it would be very unusual, but it's possible.

5 Q. I think, as you have indicated, you may not necessarily find the symptoms that Professor Herdson had spoken off?

A. That's correct.

10 Q. Similarly, is the death of Patrick consistent with a catastrophic asphyxiating event in a background of possible encephalitis?

A. As I said, I would defer to the clinicians on that. Looking at the pathology, I don't think ~~we~~ we can exclude encephalitis.

15

Q. The neuropathology does not exclude any of these three scenarios?

A. That's correct.

20

Q. Looking at the ALTE, is there any findings, looked at in isolation or symptoms which could amount to proof that the ALTE was caused by suffocation?

A. No, there is not.

25

Q. In looking at the findings of the pathology in isolation in relation to Patrick's death, is there any finding or symptom which could amount to proof of suffocation?

A. No, there is not.

30

Q. Can I take take you to the child, Sarah?

A. Yes.

35

Q. What were the relevant findings upon which you formed an opinion about the death of Sarah?

A. The autopsy findings were essentially normal. There was nothing specific there. The only question I think is the issue of whether she had and abnormal upper airway with narrowing. There is some history there was problems with her breathing, and Professor Hilton described an abnormal uvula at the autopsy.

40

45 Q. Have you today had the opportunity of looking at some photographs?

A. Yes, I have.

Q. That were taken of the uvula?

A. Yes, I have.

50

Q. What can you say about the examination of those photographs?

A. Four of the photographs don't really show anything specific. The fifth photograph is quite interesting, I think. It shows an uvula that has moved down towards the epiglottis. Now, I'm not sure what that means. It actually makes me want to study the uvula in babies. It may be abnormal. It may be that this was caused by the

55

5 post-mortem dissection. One of the reasons that I think it may be significant is that Professor Hilton has done a lot of autopsies on babies, and he thought this was an unusual finding at the time in the photograph. So I can't exclude that that was an abnormal structure, and it may have played a role in death.

10 Q. Are you aware of his present opinion that he in fact said it played no part in the death of Sarah?

A. I didn't know he came out and said it played no part. I remain unconvinced; I think it is possible.

15 Q. Could it have been a post-mortem artifact?

A. I think it could, yes.

20 Q. There was a reference to punctate abrasions?

A. Yes. I remember reading that.

25 Q. What do you say?

A. It is very, very difficult, because we don't have photographs. I think that Professor Hilton has obviously regarded them as not important at the time. I know that Sarah had some attempts at resuscitation, and I have not infrequently see small injuries around the mouth and the nose in babies who have had attempts at resuscitation - people are panicking; they may scratch the nose and the mouth - so I think, given there was resuscitation, it may well have been due to that. If it wasn't resuscitation, it doesn't appear to have been major trauma, because there was no bleeding or bruising inside the mouth or abnormalities of anywhere else.

30 Q. Would you have taken a photograph of those punctate abrasions?

35 A. I certainly would now, and I think that is what we have learned over the years. When we do these baby cases, we photograph absolutely everything, even if we don't think it is important, so we can go back at look at the photographs if we have to.

40 Q. What about in 1993?

A. That is a short watershed ^{year}~~type~~. I would like to say "yes", but I really am not certain. We took a lot less photographs back then than we do now.

45 Q. What about the finding of a scratch on the arm of the child?

A. I'm not certain what that means. If there was unexplained bruising, that would be more significant to me; but a scratch? My memory is it wasn't a very long scratch, and it is again possible that it happened during resuscitation.

50 Q. Is the age of Sarah relevant to your consideration of the cause of death?

55 A. Not particularly, no.

Q. What is your diagnosis as to the cause of death of

Sarah?

5 A. I'm putting the cause of death down as undetermined for several reasons. One of them is that I have this odd upper airway. I'm not sure what that means. Secondly, I don't think - I haven't seen a description of the death scene.

10 Q. Does your diagnosis of undetermined exclude the possibility that Sarah died of SIDS?

15 A. No, it doesn't. People have said she's quite old for SIDS. The definition of SIDS is up to 12 months of age. 90 percent of SIDS deaths occur under six months, which means one in 10. We have seen six months and twelve months. I diagnosis SIDS readily in children of that age.

20 Q. Is it to be understood that the fact that is preventing you coming to such a conclusion from such a diagnosis is the fact, firstly, that there is not a crime scene?

A. That is one of the reasons, yes.

Q. And the issue concerning the uvula?

A. That's correct.

25 Q. Putting those to one side; otherwise would your findings be consistent with SIDS or the findings be consistent with SIDS?

30 A. I think you can't exclude those mechanisms of course, yes.

Q. You referred to the age ranges that is considered in relation to SIDS. What about the child Caleb being 19 days old at the time of the death; what do you say about that age?

35 A. There is actually no official lower limit for SIDS. Some people say you can't diagnosis under eight months, but that is not in the definition. I would diagnosis down to a week of age. I may have actually diagnosed it under that.

40 Q. Looking at all the findings of the pathology of Sarah in isolation, is there any finding or symptom which could amount to proof of suffocation?

45 A. No, there is not. There's just my concerns about the upper airway and whether that was involved in obstruction.

Q. Can I take you to the child, Laura?

A. Yes.

50 Q. What were the findings at post-mortem that you consider relevant to any diagnoses of death?

55 A. Laura had and established inflamation of the heart, myocarditis. It was of moderate myocarditis. It was the sort of inflamation that I have seen in a number of cases of sudden death in children.

Q. Did did you examine a number of slides of samples of the heart of Laura?

A. Yes, I did.

Q. Do you recall how many there were?

5 A. There were seven slides with eight samples of the heart.

Q. What did you observe about those samples in relation to myocarditis?

10 A. Each one of the sections of the heart had areas where there was inflammatory cells, so there was information there was some areas where the heart muscles had died and there was also swelling in the tissues. So this is an established myocarditis.

15 Q. Can you tell us about the condition of myocarditis?

A. It's an interesting condition. It's caused usually by a virus and people have quite a range of presentations. You can have people who have full blown heart failure, they're having trouble breathing, they're coughing, you 20 have flu, they have a fever, they are really unwell. You can have other people who appear absolutely normal. I think the reason for this is that because the heart relies on contraction, if you have areas of inflammation that cause palpitation and if it is in a critical condition, you 25 can get a palpitation that can kill you with relatively modest inflammation. I have had cases where people have had minimal symptoms and most of their hearts have been involved, so it has a tremendous range of presentations.

30 Q. Is it important to consider what part of the heart the myocarditis was in fact present?

A. Well people will say if you have got inflammation in the electrical circuitry that is more likely to cause death. I think death in myocarditis can occur from 35 inflammation from just about anywhere. What happens, the heart gets irritated and has this rhythm disturbance and people die.

Q. Did you observe necrosis?

40 A. Yes, I did.

Q. Can you tell us about necrosis?

A. To make a diagnosis of myocarditis you need to have inflammatory cells and you need to have evidence that the 45 heart cells are dying, so you have dead heart cells.

Q. Firstly, in relation to the observation that there was myocarditis in the eight samples on seven slides, does that tell you anything about the extent of myocarditis?

50 A. Well it's not just one focus. I mean it is every one that was sampled. So it means it's not just a minor myocarditis. It is quite well established and well spread.

Q. You have talked about the possibility of myocarditis in the electrical system within the heart: Is that the conductivity?

55 A. That's correct.

Q. Section of the heart. If there was myocarditis in the conductivity system, could that have been fatal?

A. Yes it can.

5 Q. What would be the processes involved?

A. Again what happens is you have a virus which is infecting the cells and you have all the inflammatory cells that come in, because of that the cells become very ill, they breakdown, they die, they set off discharges when they shouldn't be. So you get this problem the conduction in the heart, the heart could stop or the heart could have an abnormal rhythm.

15 Q. Is there any observation you made when examining the slides as to whether this myocarditis was or was not conductivity system?

A. To examine the conduction system it is a very specialised study, it requires taking a lot of slides. It is not routine. It wasn't done in this case. I wouldn't have expected it to have been done in this case. So I can't comment whether it was involved or not.

25 Q. If there was necrosis in the conductivity system, what would you expect in that situation?

A. Well exactly the same. If we have myocarditis, we have got part of the heart that is affected. If it is the electrical wiring or electrical circuitry, then you're probably more likely to have arrhythmia.

30 Q. Are you aware that Dr Cala examined a video of the child who died previous?

A. That's correct.

35 Q. What assistance can be gained from looking at a video of a child that died before, as to the question whether this child did or did not die of myocarditis?

A. I'm not sure. I did a lot of clinical medicine and if it was so easy to get a diagnoses by looking at a video for four minutes, then life would have been a lot easier I think. What the video shows is that apparent normal little girl, but it doesn't tell me whether she has a fever or tell me whether she is off colour, or doesn't tell me anything much. Even if she was normal that doesn't prevent her dying from myocarditis. There is a report in the literature of a young girl who, I think she played basketball for an hour, swam 40 metres in a pool and dropped dead from myocarditis. So, you know, she was obviously absolutely normal, still had this problem.

50 Q. Is that a typical scenario; in other words playing of sport or some exertion?

A. It varies. I think you're more likely to drop dead when you're exerting yourself with it.

55 Q. The fact that Laura died whilst she was a sleep, does that exclude myocarditis?

A. No, it really makes no difference.

Q. Have you studied the relationship between children dying of myocarditis and the question of whether they may or may not have been well immediately prior to that?

A. Yes, I have.

5

Q. To your knowledge have there also been other studies in relation to this issue?

A. Yes there are.

10 Q. Can you tell us a bit about, not only your own researches but researches of others?

A. The study I did went back about 35 years in Adelaide. I wanted to look at all of the children and babies who had a diagnosis of myocarditis and I found about 32 cases. In 15 half of those cases death had been caused by the myocarditis. So that is 16 cases. Five of those children died suddenly, unexpectedly. And three of those had had no symptoms. So basically 60 percent of those died 20 suddenly unexpectedly, had no symptoms or signs. There is another study of Dr Derek ^ Dissar, a well-known and respected paediatric pathologist in Canada. I can't find the actual figures here, but I think he found something like 70 to 80 percent of the children he looked at, either 25 had no symptoms who died suddenly or only had symptoms for about a day. So it is a well recognised phenomenon that apparently normal people can have myocarditis and it can be quite severe.

30 Q. Is it possible that the myocarditis that was examined on these particular slides was in fact incidental to the death?

A. That is part of the difficulty. Because we all in pathology have cases where somebody has died of something else and we find myocarditis at autopsy. I have had, I 35 think three children now, who have died; one from drowning, one from suffocation and one who inhaled a peanut. They were obviously the cause of death, yet at autopsy we had quite well established myocarditis. This is part of the difficulty in this case; it is not 40 something you can say, yes, it definitely caused death. But in the absence of any other findings, then that is the diagnosis that I would make.

45 Q. What is your diagnosis in the present case?

A. I've put the cause of death as undetermined because I can't exclude myocarditis as the cause of death.

Q. What is your processes of reasoning, coming to the conclusion of that being undetermined?

50 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.

55

Q. Are you aware that there was an EEG tracer?

A. An ECG, yes.

Q. Completed by the ambulance officer?

A. Yes.

5 Q. Are you aware that that ECG tracer found agonal arrhythmia?

A. Yes.

10 Q. Are you aware that Dr Beal and Dr Bailey yesterday have given certain opinions about the presence of that arrhythmia in relation to whether Laura's breathing had stopped first, or whether that was a cardiac heart stopped?

A. Yes.

15 Q. What do you say about using this ECG tracer for that purpose?

20 A. I don't think it's possible to. One of the reasons I say that is, I used to look after a paediatric or neonatal intensive care unit years ago, and sometimes when babies were very little their respirators were found to have stopped, and then up to half an hour afterwards you would get an agonal rhythm on the cardio graph. I don't think it helps me to say anything about how they died. I think it is just a non-specific finding, really.

25 Q. How long is it possible to get this condition subsequent to, for example, a cardiac arrest?

A. I'm not certain. As I said I've seen it up to half an hour, but it may be longer.

30 Q. What about Dr Bailey's opinion that five to ten percent of people who have a cold, have myocarditis?

35 A. I found that really interesting because to make the diagnosis of myocarditis you have to do a heart biopsy. So I have never seen people with cold, gone in for a cold, who have gone in for a heart biopsy. I think he is confusing just inflammatory cells in the heart with a myocarditis. But I don't know how you would actually know there are inflammatory cells there.

40 Q. What about Dr Bailey's opinion that myocarditis is a common finding at autopsy?

45 A. Well it's not actually. I was trying to think back, because I do autopsies every day; people who die from a whole variety of the illnesses, heart disease or accident, car accidents. And probably, I think I have only seen one or two myocarditis's that were not related to the cause of death in the last year. That is sort of 300 autopsies. So it happens, but it is not common.

50 Q. Looking at the finding on pathology of Laura in isolation, what would you have as to the cause of death?

A. In isolation, looking at slides, I have no doubt the cause of death was myocarditis.

55 Q. Looking at all the findings of pathology of Laura in isolation, is there any finding or symptom which could amount to proof of suffocation?

A. No, no, there is not.

ZAHRA: I have nothing further, your Honour.

5 <CROSS-EXAMINATION

CROWN PROSECUTOR: Q. Professor, you would agree with me, would you not, that it is often impossible to distinguish between SIDS and suffocation?

10 A. Absolutely, yes.

Q. And you would also agree with me, wouldn't you, that suffocation, including deliberate suffocation by an adult of a child, often leaves no trace behind?

15 A. Particularly with a baby or a young child.

Q. Is this the case: That in these four cases of the four Folbigg children, you cannot exclude deliberate suffocation by an adult as a cause of death for any of them?

20 A. In these cases and in a number of my other baby cases, because there is no pathology, no definite pathology so, no, it can't be excluded.

25 Q. In this case; each of these children died or had an ALTE suddenly?

A. Yes.

30 Q. In this case each child died or had an ALTE unexpectedly?

A. Yes, I think to say the Patrick's death wouldn't be unexpected given the history but the ALTE was unexpected.

35 Q. Next, you have been made aware each child died or had ALTE, apparently during a sleep period?

A. Yes.

40 Q. And in this case you have been made aware that each child died or had an ALTE at home?

A. Yes, I believe so.

45 Q. Have you yourself ever had a case in your practice in which there have been three or more children in the one family who have all died or had an ALTE suddenly, unexpectedly during a sleep period at home?

A. No, I haven't.

50 Q. Have you from your discussions with your colleagues, either here in Australia or overseas, ever heard of a case of three or more children in the one family who have all died or suffered an ALTE suddenly, unexpectedly during a sleep period at home?

55 A. That's less easy to answer because there are cases that have been recorded in the literature of up to five deaths or more in a family that has been attributed to SIDS. These are cases from a number years ago.

Q. Could I interrupt you there: Is it now considered by

the medical profession that they were not SIDS?

A. I believe so, yes.

5 Q. So perhaps if I can refine my questions a little bit. Have you become aware from discussions with your colleagues of any case of three or more children present in one family who have all died of natural causes suddenly, unexpectedly during a sleep period at home?

10 A. I can't think of any cases.

Q. You can't think of any?

A. That's right.

15 Q. Are you aware of any such cases from a review of the medical literature?

A. No, I'm not. Although I think that some of the very rare metabolic conditions could cause it and some of the cardiac conditions might cause it, but I can't come up with a paper that details this.

20 Q. Are those cardiac and metabolic conditions, conditions that you have been told have been excluded in these cases?

A. That's correct.

25 Q. That we are concerned about in this trial?

A. That's correct.

30 Q. I want to put a hypothetical scenario to you: A baby is smothered by its mother, leaving no traces or signs which I think you would agree is commonly the case?

A. In infants who are suffocated, yes.

35 Q. A pathologist who is conducting a post-mortem examination finds some abnormality or disease of the deceased's child, something like pneumonia for instance. Would you agree that most pathologists in that situation would say that the abnormality or the disease was the likely cause of the death?

40 A. If it's a well established condition, yes.

Q. Now, that is in a case where in reality the child has been smothered by its mother?

A. Yes.

45 Q. That is there is an incidental finding that the pathology determines the cause of death?

A. Yes.

50 Q. Do you agree that even where a definitive cause of death is found by a pathologist on a post-mortem examination, it is common for the pathologist to find incidental disease or illnesses or abnormalities that could have caused death, were it not for some other definitive cause?

55 A. Not usually in babies or young children. I think the older we get, the more likely that is.

Q. Can you provide us with some examples in, say, an

adult where you might have a definitive cause of death but you have incidental findings that could have caused death in the absence of this definitive cause?

5 A. You may have, say, an elderly person who has pneumonia because expired that they have very severe coronary artery disease with an enlarged heart. Sometimes it is difficult to know which is the cause of death or whether it is a combination.

10 Q. Can I perhaps give you a factual scenario and suggest these may also be some examples; a person has a car accident. On autopsy that person, that adult is also found to have multiple blocked heart arteries, is that a similar situation?

15 A. Yes, it is. In that circumstance I might put the cause of death as head injury, but I can't exclude the fact that this person had a heart attack and then crashed the car.

20 Q. So in order to decide whether the car accident caused the death or whether the heart attack caused the car accident which caused the death, you would need to know details about the circumstances of the accident. wouldn't you?

25 A. I would probably have to be sitting beside the person to ascertain that.

30 Q. For instance if you were told that this person was driving along, perfectly normal, a truck suddenly smashed into them from the side, then you would conclude that the accident caused the death, not the bad arteries, wouldn't you?

A. Yes.

35 Q. Whereas if you discovered that that person had for no apparent reason, driven off the road and it was a straight road, then you might be suspicious that they had had a heart attack which caused the car accident?

A. That's correct.

40 Q. Would it be correct to say in that situation you could only determine the cause of death if you knew the circumstances of the accident?

A. I think that's true, yes.

45 Q. Can I give you another example. A person has a heart attack and also suffers from severe pneumonia?

A. Yes.

50 Q. In order to decide which had caused the death, would you need to know the immediate medical history of the deceased?

A. I think in that circumstance you probably wouldn't be able to determine which it was.

55 Q. But if you knew that the person had suddenly dropped and had apparently been well before that, then you would decide it was probably the heart attack, not the pneumonia that killed them?

5 A. If I think there was a severe pneumonia, they are not going to be well, if for example they were sitting and wheezing from pneumonia and complaining of chest pain and tingling of the finger, and then died, I would say the heart condition, but maybe worsened by the pneumonia.

10 Q. Is this also an example of how you would need to know the immediate history surrounding that person's last day or two, in order to decide whether it was the heart attack that killed them or pneumonia?

A. When you're choosing between pathological finding at autopsy, you often do need that sort of information.

15 Q. Would you agree with this: It often happens that there are incidental findings where the pathology doing the post-mortem can't say whether or not they were related to the death without knowing the deceased's history?

20 A. I wouldn't say often. I mean it does happen. As I said with myocarditis I would turn up one or two per year. As an incidental finding so it is not all that common.

25 Q. Is this the case: That in this case you can't say what the cause of death was other than as to it was undetermined for each of these children?

A. That's correct.

30 Q. And when you say that the cause of death was undetermined, that includes death from natural, death from natural causes and death from unnatural causes?

A. That's correct.

Q. And unnatural causes includes deliberate suffocation?

A. That's correct.

35 Q. In your view is one of the possibilities in this case that all of the deaths and the ALTE were caused by deliberate suffocation?

40 A. I think that is a possibility. The difficulty is of course that the pathology doesn't really help us.

CROWN PROSECUTOR: Perhaps that might be a suitable time, your Honour.

45 HIS HONOUR: We will take the luncheon adjournment, ladies and gentlemen.

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Professor, you may step down and would you mind coming back at two o'clock.

CROWN PROSECUTOR: Your Honour, I have a brief application; I think your Honour knows what it is.

10 HIS HONOUR: Let me just go back to it. This was with Laura, wasn't it?

CROWN PROSECUTOR: Yes. Page 1218 at line 49.

15 HIS HONOUR: I am not picking up the part I thought you were speaking about.

20 CROWN PROSECUTOR: Our page numbers are different to yours, but it is a question of asked by Mr Zahra; "what is your process of reasoning coming to the conclusion of that being undetermined".

HIS HONOUR: Related to Laura?

25 CROWN PROSECUTOR: Yes.

30 HIS HONOUR: I have my own summary of the answer written down; "would you have diagnosed cause of death as myocarditis but in view of other deaths in the family, would diagnosis cause undetermined." Is that the substance?

35 CROWN PROSECUTOR: Yes, the actual answer was; "if I looked at the cases" I think it should be, "if I looked at her case 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 I can say myocarditis. So I said undetermined because of the circumstances."

40 Your Honour, what I would wish to do is to put the American article to the doctor; I think he has in fact referred to the American standards on an earlier version of it.

45 HIS HONOUR: Tell me what you're application is.

50 CROWN PROSECUTOR: 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.

55 HIS HONOUR: Why should you have leave to do that, Mr Crown?

CROWN PROSECUTOR: Because it has been firmly raised in examination in chief in. I ought to be able to ask the

5 doctor why it is that he views the diagnosis differently in the context of the previous deaths: Whether that accords with appropriate professional standards that are accepted around the world, and whether a competent pathologist in the position of Dr Cala would inevitably do that.

HIS HONOUR: Yes. Mr Zahra?

10 ZAHRA: Your Honour, the way that this witness referred to the other children was somewhat unresponsive if one looks at the context of the questions he was asked, specifically in relation to this matter. Your Honour I submit it doesn't change the situation. This was not a situation
15 where some advantage was sought to be gained. In fact it is not of any advantage to the accused's case. Because of of this sequence, the over all consideration of the prejudicial effect of this process of reasoning, still does not outweigh its probative effect. There is no
20 additional probative effect by the fact that the witness has raised this. So it doesn't change the situation in our submission.

25 CROWN PROSECUTOR: Perhaps it should be specific what I ask, your Honour.

HIS HONOUR: Yes, Mr Crown.

30 CROWN PROSECUTOR: 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
35 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; that is all.

HIS HONOUR: Thank you.

40 ZAHRA: My friend again refers to the criteria for finding of SIDS; our argument is still the case that this is not the criteria for finding of SIDS, but criteria for doing a post-mortem or investigation condition of SIDS.

45 HIS HONOUR: You're playing with the edges of it, Mr Zahra. Really, what the Crown wants to put is that it is appropriate in coming to any diagnosis concerning the death of a child to take into account, if it be the fact,
50 that there are other sibling deaths in the same family, in the same carer.

ZAHRA: As I submitted previously your Honour's ruling in the past has been on the basis the prejudicial effect outweighs the probative value.

55 HIS HONOUR: No, it's not. I have excluded this evidence because it is irrelevant. It is irrelevant because it is excluded by the opinion rule. It is excluded by the

opinion rule, because it engrafts on to a proper medical opinion, evidence of which may be given, an additional opinion in order to produce the final opinion. The additional opinion is a lay opinion. And the opinion is, you don't toss heads 20 times in a row. I don't consider the doctor any better qualified to have that opinion than anybody else, myself included. That is why I excluded it.

ZAHRA: Our submission is in a sense this doesn't change that ruling.

HIS HONOUR: We now have evidence adduced by yourself in contravention of my ruling.

ZAHRA: It wasn't unresponsive if one looks at the context that was referring to the specific case. In fact the questions in the context were referred to individually. There was no intention to reveal this. Your Honour, the witness has been told about your Honour's rulings in this case and in fact the witness reminded me in conference that my friend even raised this with him, so your Honour it appears really quite unresponsive to the questions that were being asked of him, which were specifically designed at looking at this case in isolation.

HIS HONOUR: I looked back at your questions for a few questions previously, before this one. I didn't see any particular request to give evidence of consideration in isolation but previously to that, you did.

ZAHRA: Your Honour needs to look at it in the way the questions were asked. It is true it was interspersed there are questions of, asking a little bit more about myocarditis, because that needs clarification in those points in time. But the whole tenor of those questions were specifically directed at the finding of pathology in isolation in relation to Laura. This was not an area that we in fact opened up. In if in fact they don't appear in sequence it is not because we were taking him to another area because it is, we sought clarification. Obviously there were terms he needs to explain and not only explain but explain what his opinion is, even though these matters have been addressed by other witnesses. So it is important obviously in the context in which he gives the evidence to ask him about what his opinion is. Even though the other witness said very much the same thing, but his opinion has got to be based on what foundational rules or opinion that he has. So if one takes that into account the whole tenor, the cross-examination at that time to limit it to the examination of the finding of pathology of law in isolation.

HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Well, your Honour 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.

HIS HONOUR: This is a strong submission. Well, I will let you know the answer at two o'clock:

5

LUNCHEON ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 FOR JUDGEMENT SEE SEPARATE TRANSCRIPT

10 HIS HONOUR: Now, Mr Crown and Mr Zahra, that may not be
the end of it. Are you intending to refer to this in your
final submission to the jury, Mr Crown, because that is
something that needs to be broached, the evidence is
there. It is quite exceptional to any other evidence that
has been given. As things stand, as a matter of law,
unless I do something about it, or unless you make some
indication to the contrary, I think you can pick it up and
15 use it in your final address.

I might say, that since it is out of kilter with all the
other evidence, it is going to be quite confusing for the
jury. I think that you are both to consider what ought to
20 be done about this evidence.

CROWN PROSECUTOR: Yes. Your Honour, if I might have some
time to consider it.

25 HIS HONOUR: There is no need to answer that question now
but it is something that needs to be broached.

ZAHRA: Thank you, your Honour.

30 HIS HONOUR: May we have the jury, please? Mr Zahra, do
you wish to have your instructing solicitor speak now to
Professor Byard? I know that Professor Byard, he is
sitting in the court and has heard my judgment. I think
that your instructing solicitor should say something to
35 him, notwithstanding that he has been cross-examined.

CROWN PROSECUTOR: Perhaps my instructing solicitor will,
because he is under cross-examination..

40 HIS HONOUR: All those persons present in court, I
understand that this judgment has been given in the
absence of the jury, and is not to be reported, either by
word of mouth, inside or outside this court.

45 Professor Byard, would you mind coming back into the
witness box, please.

(Witness returned to witness box.)

50

IN THE PRESENCE OF THE JURY

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Q. Professor, you have read the evidence given by Dr Barry Springthorpe, a paediatrician from Newcastle?

A. Yes, I have.

10 Q. And you are aware, are you, of his qualifications?

A. Yes, I am.

15 Q. That he helped to establish the child development unit at Newcastle, a paediatrician in 1976 and he has had an emphasis in that unit on the development of children, SIDS and child abuse, and that he has been a consultant paediatrician at the Newcastle hospital for some years, an honorary associate position at the Children's Hospital at Westmead also?

20 A. Yes.

Q. So, you would agree, would you not, that he is amply qualified to be able to detect and analyse the severity of something as simple as a floppy larynx?

25 A. I think the question is difficult because you say something is simple as a floppy larynx, whereas a floppy larynx is not simple. I would agree he is a very experienced paediatrician.

30 Q. Would you agree, that a person of his eminence and qualifications would be one of the most appropriate people one could think of for diagnosing something like floppy larynx, in a live child?

35 A. I think he would be an experienced individual who could do that, yes.

Q. One of the best, one of the most experienced, would you agree, in Australia?

40 A. I couldn't say that. I couldn't answer that.

Q. From his qualifications, would he appear to be eminently qualified to diagnose the severity of a floppy larynx?

45 A. I am not certain what his experience in the ear, nose and throat is in children. I would think he is obviously a very experienced paediatrician.

Q. Wouldn't most paediatricians have a lot to do with ears, noses and throats in children?

50 A. Absolutely, but probably not floppy larynx and predicting its outcome.

55 Q. Now, would you agree that by virtue of the fact that he actually examined this child and that he got an on-the-spot history of the floppy larynx from the mother, that he was in an ideal situation to diagnose the severity of the floppy larynx?

A. I think the difficulty with clinicians.

Q. Sorry, doctor, please, answer my question; do you agree or not?

5 A. Could you restate the question?

Q. Yes. Do you agree that a person with his qualifications, seeing the live child in front of him, having an opportunity to examine the child and to get the history directly from the mother, was in an ideal position to diagnose the severity of the floppy larynx?

10 A. I can't really say yes to that. I think he would be very experienced and very good at it but he hasn't done the full examination like the endoscopy, so I am not really sure--

Q. He would certainly be in a better position than you, wouldn't he?

20 A. I think he obviously could see how the child was functioning, where always I obviously can't.

Q. You didn't see the live child?

A. That's correct.

25 Q. You haven't seen the deceased child?

A. That's correct.

Q. You haven't seen the larynx?

30 A. That's correct, yes.

Q. You are relying entirely upon second and third hand accounts?

A. Yes. Yes, that's correct.

35 Q. So wouldn't you agree that he was in a much better position than you to diagnose the severity of the floppy larynx?

A. The severity but not necessarily the outcome.

40 Q. Now, he diagnosed it, correct me if I am wrong, he diagnosed the floppy larynx as being very, very mild?

A. Yes, which surprised me a little bit.

Q. Just answer my question, please?

45 A. Yes.

Q. That's what he diagnosed?

A. That's correct.

50 Q. And he noted that there was no gagging associated with the stridor?

A. I believe so.

55 Q. The history that he was given was that the stridor was only when the child was feeding?

A. I think that is in his statement, yes.

Q. He ascertained that the child had no difficulty in

feeding and was progressing well?

A. I believe so, yes.

5 Q. And that there was no stridor when the baby was asleep or no obstructive element when the baby was asleep. That's the history that he was given, wasn't it?

A. Probably, yes. I can't say.

10 Q. Would you agree with his diagnosis, that bearing all of that in mind and taking into account that he examined this live child, that in all probability this was indeed a very, very mild stridor when the baby died?

A. Can I elaborate a little?

15 Q. Do you agree with that or not?

A. It is hard to actually put it into a "yes" or "no" because there are elements in his report that you haven't mentioned that concern me.

20 Q. Yes. So you would partially agree and partially disagree, is that right?

A. Well, there is parts of it that I would be concerned about.

25 Q. Now, you have seen the post-mortem report of Dr Cummings?

A. That's correct.

30 Q. And the post-mortem report of Dr Cummings noted that he examined the respiratory system?

A. Yes.

35 Q. And he noted that the larynx, trachea and bronchi were unremarkable?

A. Yes.

40 Q. "Unremarkable" means that there was nothing of any significance, does it not?

A. No, it doesn't. It means he didn't see anything in examining the floppy larynx, as I pointed out; he didn't actually take histologic slides.

45 Q. What it means, does it not, is that he looked at the larynx, trachea and bronchi?

A. Yes.

50 Q. And when he looked at them there was nothing abnormal that he saw?

A. Nothing that he saw that was abnormal.

55 Q. Yes, that's right; that's what I asked you. There was nothing that he saw about this larynx that was abnormal. That's what it means, doesn't it?

A. But he hasn't done a full examination.

HIS HONOUR: Would you answer the question, please? Is that what it means or not?

A. Yes.

~~HIS HONOUR: Yes.~~

- 5 CROWN PROSECUTOR: Q. Now, doctor, based upon the diagnosis of Dr Springthorpe who saw the live child, and the finding during the post-mortem examination by Dr Cummings, would you agree that it is highly unlikely that the floppy larynx had any significance at all in the death of this child?
- 10 A. No. I couldn't, I couldn't exclude the floppy larynx.
- Q. That is not what I asked you?
- A. Sorry.
- 15 Q. Do you agree that it is highly unlikely that the floppy larynx had anything to do with the death of the child at all?
- A. Yes.
- 20 Q. Have you, yourself, ever had an autopsy in which you have found the floppy larynx to be the cause of death?
- A. No. No, I haven't.
- Q. Have any of your colleagues in South Australia, to your knowledge, had a case of floppy larynx being a cause of death?
- 25 A. Not to my knowledge, no.
- Q. And have you ever, yourself, read in any of the medical literature of a death being caused by a floppy larynx?
- 30 A. No. No, I haven't.
- Q. So would it be fair to say this; that if this child had died from a floppy larynx, so far as you are aware, it would be the first time - it would be a world first, insofar as being reported?
- 35 A. I believe so, yes.
- 40 Q. The haemosiderin which you have been asked questions about by Mr Zahra, you have told the court that that is evidence of some previous bleeding?
- A. That's correct.
- 45 Q. By "previous" does it mean more than 24 hours or more than 48 hours before the death or what?
- A. Usually more than 24 to 48 hours, yes.
- Q. And does it mean bleeding that has either occurred in the lungs or bleeding that has been inspired by the child into its lungs?
- 50 A. It can be either of those.
- Q. And normally if a child is bleeding, say, in the nose or the mouth or in the throat, would a child normally inhale its own blood?
- 55 A. It can happen, more often it comes out through the nose or the mouth.

Q. It would be unusual, even for a very young baby, to inhale blood, wouldn't it?

A. On its own, yes, I would think so.

5

Q. So, is it more likely that haemosiderin signifies the presence of bleeding from within the lungs?

A. Yes, I think that's probably correct.

10

Q. And is one of the most common causes of bleeding within the lungs an asphyxiating event of some sort, causing the petechiae to bleed?

A. That's probably correct, yes.

15

Q. So would I be correct in saying that the presence of haemosiderin in this child tends to indicate that there was a previous episode of asphyxiation or attempted asphyxiation?

A. I think it would - that would be one possibility.

20

Q. Is that the thing that is the most likely cause of the haemosiderin, over and above other possible causes?

A. I am just trying to consider the study that I did. Probably, in the absence of documented trauma.

25

Q. Now, moving to Patrick's ALTE. You are aware of Dr Dezordi's qualifications?

A. Yes, I am.

30

Q. You are aware that he is a specialist paediatrician in the area of neonatology, the care of newborn babies?

A. I believe so, yes.

35

Q. And I take it that you are also aware of Dr Wilkinson's qualifications, he being a paediatric neurologist?

A. That's correct.

40

Q. For something like 22 years?

A. That's correct.

45

Q. And he being an executive member of the Board of the International Child Neurology Association. You are aware of that?

A. I don't specifically remember that but I'll take your word for it.

50

Q. You are aware that for many years he has been employed as a director of medicine, practising in paediatric neurology at the John Hunter Children's Hospital at Newcastle?

A. Yes.

55

Q. And you are aware, are you not, that Dr Wilkinson has given evidence that there are something like, I think it is eight different reasons, why, in his view, Patrick's ALTE was not caused by encephalitis of any kind?

A. That is what I was a little confused, because I

couldn't work out when he was talking about encephalitis or herpes simplex encephalitis.

5 Q. See, I want to suggest to you, you have read his evidence?

A. Yes, yes, I have.

10 Q. I want to suggest to you that he has specifically excluded not just herpes simplex encephalitis but encephalitis generally as a cause of the ALTE; do you agree with that, having read his evidence have?

A. If that is the case then I would accept that he has done it, yes.

15 Q. Did you read in Dr Dezordi's evidence the statistics about herpes encephalitis and other forms of encephalitis?

A. Yes, I did.

20 Q. Do you agree that the incidence of herpes simplex encephalitis in the United States is about two cases per million people per annum?

A. I would accept his statement on that.

25 Q. And that that is "the most common form of encephalitis by far", to use his words?

A. Yes.

30 Q. You accept that. So that there might be six patients per year in Australia that have herpes simplex encephalitis?

A. I am not aware of the figure. I would accept his assessment of it.

35 Q. And that any other cause of encephalitis would be so horrendously rare that Dr Dezordi doesn't know, if we really need to entertain it, really, it would have to be extraordinarily rare. Would you agree with that?

A. I think that the other causes are rare, yes.

40 Q. Not just rare but extraordinarily rare, would you agree?

A. I don't have the figures, so.

45 Q. So you wouldn't disagree with these?

A. No.

Q. You would accept them. Is that right?

A. That's right, yes.

50 Q. Now, Dr Wilkinson's eight reasons were the three EEGs that were done, the lumbar punctures, the post-mortem report on the brain, the nature of the seizures, the loss of visual function, the calcium changes noted on a CT scan, the absence of fever on presentation and an IGM test, as all being reasons why he would exclude
55 encephalitis as a possible cause of Patrick's admission on 18 October 1990, that is after his ALTE. You have told us that you defer to that view; is that correct?

A. That's correct in the clinical areas. I think in the pathology I would defer to Dr Kan.

Q. Yes, but I am referring to the ALTE now?

5 A. Yes.

Q. So you defer to that view, do you?

A. Yes.

10 Q. Dr Wilkinson was essentially of the view that there was no cause that could be found in retrospect for the ALTE, so that its cause was undetermined. Do you agree with that?

15 A. I would wonder how he excluded epilepsy as a possible cause.

Q. Have you read the evidence of Professor Herdson?

A. Yes, I have.

20 Q. Professor Herdson was asked "would one normally expect a first episode of epilepsy to cause the kind of brain damage that Patrick suffered", and he answered "not in my experience". In your view does the absence of any of those signs - signs being signs of epilepsy make it highly
25 unlikely that Patrick suffered from an especially sick fit when he died?" Answer; "I think that is a fair conclusion". Now, firstly, do you agree that normally you would not expect a first episode of epilepsy to cause the kind of brain damage that Patrick suffered?

30 A. Yes, I would agree with that.

Q. So if Patrick's ALTE was a first epileptic seizure, it was highly unusual?

A. Yes.

35 Q. I think you in fact in your evidence-in-chief called it "very unusual"?

A. I would agree with that, yes.

40 Q. And would you agree that an epileptic fit, without leaving any obvious physical signs, would also be very unusual?

A. I'm not quite sure about that. Physical signs such as?

45 Q. Well any physical signs of an epileptic fit?

A. Causing death you mean or just a fit?

Q. No I am talking about his ALTE?

50 A. Right. People can have fits without having any signs.

Q. Yes, but do you agree that if that first especially - if that first ALTE had have been an epileptic fit, it was very unusual in that it didn't result in any signs afterwards?

55 A. No. I wouldn't agree.

Q. Is your conclusion this: That the ALTE was caused by an asphyxiating event of unknown cause?

A. I think that's the most likely, yes.

5 Q. Moving now to Patrick's death. Again, he was seen at the hospital when he was brought in, by Dr Wilkinson. Dr Wilkinson, of course, was in a position to see his body when it came into the hospital; something which again you have not had the benefit of viewing?

A. That's correct.

10 Q. And you have read Dr Wilkinson's evidence that there were no signs that he saw indicative of an epileptic fit?

A. Yes.

15 Q. You have seen, have you not, from Dr Wilkinson's evidence, that now in retrospect, he diagnosed Patrick's death as having been caused by an asphyxiating event of unknown origin?

A. Yes.

20 Q. Would you agree with that?

A. I couldn't exclude epilepsy as a cause.

Q. Do you agree that the most likely diagnosis or cause is an asphyxiating event of unknown origin?

25 A. It is a little difficult here. Am I talking about the death just in isolation?

Q. Yes?

30 A. In isolation, I would have attributed death to epilepsy.

Q. Now having had the benefit of seeing the reasoning of Dr Wilkinson in evidence?

35 A. Yes.

Q. Having seen his finding, do you agree with his diagnosis that the death was caused by an asphyxiating event of unknown origin?

40 A. No. No, I don't.

Q. But you do agree that he was in a better position than you to diagnose the cause of death?

A. No, because he didn't do the autopsy.

45 Q. Had he seen the live child?

A. Yes.

Q. Had he seen the deceased child?

50 A. Yes.

Q. He had the benefit of reading the autopsy and all of the reports that went with it?

A. Yes.

55 Q. You of course have had the opportunity to read all the written material?

A. That's correct.

Q. But you didn't have the benefit of having treated the child over many months?

A. That's true.

5 Q. Or having seen the deceased child?

A. That's true.

10 Q. So do you agree that he was in a better position than you to be able to make an accurate diagnosis of the cause of death?

A. No, I don't, I don't think so, based on the pathology.

15 Q. See, I suggest to you that Dr Wilkinson was in a better position than you, for a number of reasons: Firstly, he was a specialist in neurology of course which you are not?

A. That's true.

20 Q. Secondly, he saw the live child and you didn't?

A. True.

Q. Thirdly, he saw the deceased child's body which you didn't?

25 A. True.

Q. I want to suggest to you that for all of those reasons he was in a much better position than you to make an accurate diagnosis of the cause of death?

30 A. Well, again, I can't agree because he is not a paediatric pathologist.

Q. He is a paediatric neurologist?

A. Yes, that's correct.

35 Q. And we are considering with Patrick, issues of neurology, are we not?

A. I think we are talking about the cause of death.

40 Q. Was there any finding in the post post-mortem report that said that he had died of an epileptic seizure?

A. No, I don't believe so.

Q. So the post-mortem report didn't assist you?

45 A. I wouldn't expect it to, as I said before.

Q. So if the post-mortem report didn't assist you, and you didn't see the live child, and you didn't see the deceased child, don't you agree that you are hardly in a position to do anything than agree with Dr Wilkinson?

50 A. If I could perhaps clarify my thinking. If I have a child that has epilepsy, there are no definite autopsy findings of epilepsy, as in the bitten tongue, swollen airways, et cetera, and we have brain damage that could cause the epilepsy; so based on the pathology, I think
55 that we have an epileptic event, because I don't have any pathology to show asphyxiation.

Q. But you have just told us that there is nothing in the

pathology report, on the post-mortem, indicative of epilepsy?

A. Well, perhaps I should correct that. There is--

5 Q. Well, do you agree with that?

A. It was the neuropathology, there should have been damage.

10 Q. There is nothing in the neuropathology to indicate in any way whether or not Patrick died from epilepsy?

A. What the neuropathology shows is a brain--

Q. Sorry, just answer my question?

15 A. Sorry.

Q. Do you agree that there is nothing in the neuropathology report to indicate whether or not Patrick died from epilepsy?

20 A. No, that's true.

Q. See, given I want to suggest to you that you really are in a position where you are obliged to defer to the diagnosis of Dr Wilkinson?

25 A. I find that I can't ignore the fact that there has been a history of epilepsy and we have neuropathology findings to support a damaged brain. I can't exclude epilepsy as a cause of death.

30 Q. I understand that you can't exclude epilepsy as a cause of death. But do you agree that the most accurate diagnosis of his cause of death is an asphyxiating event of unknown origin?

35 A. If there was an asphyxiating event - sorry, could you put the question again? I don't mean to--

Q. No, that's all right. Do you agree that you can't exclude - I understand that you can't exclude epilepsy as a cause of death. But do you agree that the most accurate diagnosis and the most comprehensive diagnosis of his cause of death is asphyxiating event of unknown origin?

40 A. Sorry, I still feel epilepsy is the cause.

45 O. I would like to move now to Sarah. You noted Dr ~~Lip~~ ~~Wilkinson's~~ report about a displaced uvula?

A. That's correct.

Q. You noted his evidence that in his view it was not the cause of death but was probably incidental?

50 A. Yes. I was be certain - yes. Yes.

Q. And is that also your view that it was probably incidental and not the cause of death?

A. I'm not sure of its significance.

55 Q. So you can't - is your position that you cannot say whether or not it had anything to do with her death?

A. That's correct.

Q. Have you, yourself, ever done an autopsy where a displaced uvula was the cause of death?

A. No, I haven't.

5 Q. Incidentally, how many autopsies have you done?

A. 600 paediatric and about, I think 1500 to 1600 adults.

Q. Sorry, in all of those 2000 plus autopsies, you have never had a displaced uvula causing death?

10 A. No.

Q. Have any of your colleagues in South Australia told you about autopsies in which a displaced uvula has caused death?

15 A. No. No, they haven't.

Q. And is this the case; that in the medical literature that you are aware of there is only one case that has ever been reported, to your knowledge, of a uvula that has caused a death by obstruction?

20 A. I believe so, yes.

Q. And that was an elongated and split uvula of a completely different category to Sarah's uvula?

25 A. I believe so, yes.

Q. So is this the case; that the kind of uvula that Sarah had has, to your knowledge, never been reported, as being a cause of death anywhere in the world?

30 A. That's correct, yes.

Q. So if Sarah's uvula was her cause of death it would be a first reported world event?

35 A. I believe so, yes.

Q. And I think that in relation to Sarah you found that her death was from undetermined causes?

A. That's correct.

40 Q. And - of course that also includes deliberate suffocation?

A. That's correct.

Q. Moving now to Laura; I take it you are aware of Dr Cala's qualifications?

45 A. Yes. Yes, I think I am.

Q. He is in fact your boss?

50 A. Yes, he is.

Q. You wouldn't disagree that he is an eminent pathologist?

A. No. At my peril, I would think.

55 Q. Dr Cala had the benefit of actually seeing the heart itself?

A. That's correct, yes.

Q. You have only had the benefit of seeing slides taken from the heart; so would it be correct to say that he was in a better position to be able to analyse the degree of myocarditis?

5 A. Not in this case.

Q. He also saw the slides that you have seen?

A. That's right, yes.

10 Q. So he saw what you saw but then he saw more because he actually saw the heart itself?

A. That's correct.

15 Q. So wouldn't he be in a better position than you to be able to assess the degree of myocarditis?

A. No. I don't believe so.

Q. Well, why do you say that?

20 A. Because the diagnosis has rested on the slides. The heart looked normal. I will accept Dr Cala's assessment that the heart look normal, so there was no advantage of looking at the heart. The diagnosis rests on the slides.

25 Q. But if the heart showed obvious changes, if the heart was - I think there was a particular colour and was flabby - then surely that would materially assist in a diagnosis of severe myocarditis?

A. If it was like that, yes.

30 Q. So by seeing the heart he was in a position to be able to exclude that sort of thing?

A. Yes.

35 Q. Whereas you didn't see the heart, so you didn't have the benefit of those observations to be able to make that sort of judgment?

A. No. I'm accepting his observations.

40 Q. And he was of the view, you have seen his evidence, that the myocarditis was an incidental finding and not the cause of death?

A. I believe so, yes.

45 Q. Now, you, yourself, have written, have you not, a number of articles and a number of chapters on the dangers of mistaking incidental findings for a cause of death?

A. Yes, particularly one paper on myocarditis, yes.

50 Q. And do you agree that it is a constant challenge for pathologists to try and distinguish incidental findings from causes of death?

A. Yes.

55 Q. And it is relatively frequently very difficult for pathologists to actually distinguish the two?

A. Yes, not uncommon.

Q. Now, one of the articles you have written is in the journal of, I think it is Medical Science and Law?

A. Medicine, Science and Law.

5 Q. Medicine, Science and Law. And it is an article that you wrote in 1997 called Significant Coincidental Findings at Autopsy in Accidental Childhood Death?

A. That's correct.

10 Q. And one of the incidental findings that you warn against, because it can be mistaken as a cause of death, is established myocarditis?

A. That's correct.

15 Q. And what you say - or you report a number of cases that you were aware of where it would have been quite easy to have made a mistake about an incidental finding of myocarditis as the cause of death?

A. That's correct.

20 Q. Do you state in this article that in determining the role played in a death by inflammatory infiltrates, that is by things like myocarditis, in sudden infant deaths, it is often difficult to determine whether it is the cause of death or incidental?

25 A. Yes.

30 Q. And do you also refer to something that I asked you about before lunch, that sometimes a pathologist may attribute death to a particular lesion or disease because of a lack of another explanation, rather than from specific evidence of organ dysfunction?

A. Yes.

35 Q. And do you agree that in this case, with Laura's heart, there was no evidence of organ dysfunction?

A. Not - no, I don't. I can explain, if you let me.

40 Q. Could I just clarify that; was there any evidence that her heart had a dysfunction or malfunction?

A. I don't want to mislead the court.

45 Q. I am sorry; you should be able to answer that "yes" or "no". Was there any evidence at all that her heart had malfunctioned or disfunctioned?

A. There was no cardiac failure.

50 Q. So is it correct to say that there was no evidence of malfunction or dysfunction of her heart?

A. That's correct.

55 Q. And do you agree that this is precisely the kind of situation that you were warning against in your article in that journal of 1997?

A. No, it is not.

Q. Have you also written a chapter of a book where you comment on cardiovascular conditions, including

myocarditis - I think chapter 4 is headed "Infectious Conditions"?

A. Yes.

5 Q. Can you tell us the name of the book?

A. That is Sudden Death in Infancy Childhood and Adolescence.

Q. And you are the author?

10 A. That's correct.

Q. And is that an accepted textbook in the area of sudden infant death?

A. Yes, it is.

15

Q. And in that book also do you refer to myocarditis with certain death of heart cells, also being an incidental finding in some autopsies?

A. Yes, that's true.

20

Q. And do you state that an important step in any autopsy in which myocarditis is suspected is the taking of blood and myocardium - I take it that is heart tissue?

A. That's correct, yes.

25

Q. For microbiological testing and DNA hybridisation studies?

A. That's correct.

30

Q. Now, in this case, in Laura's case, were those tests done?

A. I don't believe so.

35

Q. So in the absence of those tests being done, do you agree that that was an important step required before you could say that myocarditis was a cause of death?

A. No.

40

Q. I quote from your book "an important step in any autopsy in which myocarditis is suspected is the taking of blood and myocardium for microbiological and DNA hybridisation studies". Do you agree with that?

A. Yes, I do.

45

Q. In the absence of that testing, do you agree that when one cannot say whether or not Laura died from myocarditis?

A. No.

50

Q. Have you also been referred to in the Australian Doctor Magazine?

A. Possibly, yes.

55

Q. I am referring to an edition of the magazine - and I am afraid it is undated. Perhaps I might just show it to you to see if you recognise it. It has got your photograph in black and white. (Relevant document shown to witness).

A. Yes. Yes, I remember this.

Q. Did you participate in that article being written?

A. Yes, I believe I gave the interview.

5 Q. If I could have it back please. (Relevant document returned to Crown Prosecutor). The Australian Doctor is a magazine that is one of the most popular and widespread professional magazines for doctors of all sorts in Australia?

10 A. I will take your word for that, I am not sure about that.

Q. It is for GP's, specialists, any kind of doctor?

A. It is widely circulated.

15 Q. And in that article, did you say, when you were interviewed, that there were many instances where significant disease had been found in infants at autopsy but the disease was obviously unrelated to the cause of death in cases such as accident or trauma?

20 A. I don't remember the quote but I think it would be reasonable.

Q. And do you agree with that?

25 A. Yes. I think that's true.

Q. Now, do you agree that Laura's myocarditis could be incidental to her death?

A. Yes.

30 Q. And do you agree with Dr Cala, that the myocarditis is probably unrelated to her death?

A. No, I don't.

35 Q. I would like to put a hypothetical situation to you. If a child, like Laura, had a cold or a flu that had caused mild myocarditis, and the child's mother deliberately smothered her, without leaving any signs, then do you agree that many pathologists would wrongly conclude that Laura had died from myocarditis if they were viewing Laura's case on its own?

40 A. Yes.

Q. And do you agree that that is a distinct possibility in this case?

45 A. I think that is a possibility.

Q. Now, you have given us some statistics for some testing - sorry, for a survey that you did on myocarditis cases?

50 A. Yes.

Q. And I had to jot down your figures very quickly, but correct me if I am wrong, but you said that you studied children who had died in Adelaide over a 35 year period?

55 A. That's correct.

Q. And I think that you said again, please correct me if I have got it wrong, but you said there were 32 cases of

myocarditis causing death?

A. There were--

Q. 32 cases of children with myocarditis?

5 A. That's correct.

Q. Is that right?

A. That's right.

10 Q. So, to give us an idea; how often you get myocarditis in a child who dies in Adelaide, it is a bit less than one per year?

A. If that. It is rare.

15 Q. Is that for the whole of South Australia or just for Adelaide?

A. That's the whole of South Australia.

20 Q. So in the whole of South Australia you get less on than average than one child a year with myocarditis who dies?

A. That's correct.

25 Q. Now of those 32 cases that you looked at, that is 32 cases of children who have died who had myocarditis, there were 16 cases - correct me if I am wrong - where the myocarditis was the cause of death?

A. That's correct.

30 Q. So in about 50 percent of the cases that myocarditis was the cause of death, and in about 50 percent of cases the myocarditis was incidental?

A. That's correct.

35 Q. And I take it there would have been a whole host of these other children would have died of other causes that had myocarditis?

A. That's correct.

40 Q. That would include other infections?

A. I believe so, yes.

Q. SIDS?

45 A. Not, not SIDS.

Q. Car accidents?

A. Possibly. I'm really - I don't actually remember the exact details of that paper.

50 Q. Accidental suffocation?

A. Yes.

Q. Deliberate suffocation?

55 A. It is possible. I can't think of any cases that I had.

Q. And probably other reasons as well?

A. Yes. Yes.

Q. Now of those 16 cases that died of myocarditis, five of those 16 died unexpectedly?

A. That's correct.

5 Q. So I take it that of those 16 cases there were 11 children out of 16 who died of myocarditis whose deaths were not unexpected?

A. They weren't sudden, I would say.

10 Q. They weren't sudden?

A. Yes.

Q. In other words, 11 out of 16 cases did not die suddenly?

15 A. Yes, I think that's correct.

Q. And of the five who did suddenly, three of them had no symptoms of myocarditis?

A. That's correct.

20 Q. So only three out of 32 cases were children with myocarditis whose cause of death was myocarditis, who had died suddenly with no symptoms?

A. That's correct.

25 Q. So would those statistics, to your knowledge, be similar in other parts of Australia?

A. I don't think studies have been done like that, so I'm not certain. I assume it would be.

30 Q. Would those statistics be similar in other western countries?

A. I think that's probably not true because there are individual variations between communities.

35 Q. But would it be something like those statistics?

A. I wouldn't see why not.

40 Q. So is this correct; that of all the children who die, the percentage who die of myocarditis unexpectedly, with no symptoms, is quite small?

A. Yes, it is.

45 Q. And of course that is the situation that you are postulating with Laura?

A. That's correct.

50 Q. Would you agree that there is a much larger percentage of children who had myocarditis who died of other things?

A. Yes.

55 Q. Perhaps five times more children who had myocarditis died of other things than the number who died suddenly of myocarditis?

A. You've lost me with that.

Q. There were five times the number of children who had myocarditis who died of other things?

A. Yes.

Q. Where the myocarditis was incidental?

A. Yes.

5

Q. Compared to the number of children who died suddenly of myocarditis with no symptoms?

A. Yes.

10

Q. So is this the case; that if those statistics are uniform across Australia, or similar across Australia, if a child dies suddenly and has myocarditis, there is a greater chance that there is a cause of death from another cause than there is of myocarditis being the cause of death where the child has died unexpectedly with no symptoms?

15

A. I suppose based on those figures, yes.

20

Q. And those figures, the 3 and 32, that category is the category that Laura was in?

A. That's correct.

25

Q. So would you agree with me, that there is a greater chance that she died of some other cause than she died of myocarditis?

A. I do find it difficult to agree to a statistical approach like that. Could you rephrase the question for me?

30

Q. Yes. Based on the accuracy of those statistics, that study that you have done?

A. Yes.

35

Q. Do you agree that there is a greater chance that she died of some other cause than that she died of myocarditis?

A. I suppose if we are speaking purely statistically, yes.

40

Q. And there is nothing that you have seen in any of the medical records relating to Laura that would cause you to doubt the applicability of those statistics to her case; is that right?

45

A. Yes, I think that's right.

Q. Would you also agree that most people - and I deliberately say people, meaning adults and children - most people who have myocarditis, don't die?

50

A. I think that is probably correct, yes.

Q. And of those who do die, of those people - adults and children - who do die, most of them have symptoms?

A. Yes, I think that's correct.

55

Q. Most of them do not die suddenly?

A. That's correct.

Q. So for all of those reasons, would you agree with

this; that if myocarditis was the cause of Laura's death it was a quite unusual case?

A. Yes.

5 Q. Professor, you have given evidence that it is possible in this case that all four of these children died from suffocation?

A. Yes.

10 Q. And I take it that you also agree that it is possible that Patrick's ALTE was caused by suffocation?

A. Yes.

15 Q. And by suffocation you would include deliberate suffocation by an adult?

A. That's correct.

20 Q. Would you agree with this; that it is not a reasonable conclusion to say that they all died from the same natural cause?

A. I think that's - could you repeat that again?

25 Q. Yes. Do you agree with this: That it is not a reasonable conclusion that they all died from the same natural cause?

A. Yes. I think that's a reasonable statement.

30 Q. Do you agree with this, that - would your Honour pardon me for a moment?

HIS HONOUR: Yes.

(Counsel confer.)

35 CROWN PROSECUTOR: I understand there is an objection to one or both of my next two questions.

40 HIS HONOUR: Ladies and gentlemen, this is a matter that I shall have to deal with. Would you mind withdrawing? I don't think we will keep you long.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Crown, would you like Professor Byard to leave the court or to remain in?

5

CROWN PROSECUTOR: No, I am content for him to remain here. He can possibly think about the answer.

10

I would like to ask him whether it is unlikely that these children all died from four different natural causes; and whether it is more likely or alternatively more accurate, to say that they all died from acute asphyxiating events of unknown origin.

15

HIS HONOUR: Yes, Mr Zahra?

ZAHRA: Would your Honour allow me one moment just to--

20

HIS HONOUR: Yes.

25

ZAHRA: Your Honour, on some reflection I think the first question probably does not infringe your Honour's ruling but I am concerned about the second one, your Honour. It is, with its emphasis on the global view, whether this witness is able to come to a conclusion without application of the--

HIS HONOUR: That does--

30

ZAHRA: -- Of the foundation of the ruling.

HIS HONOUR: I do not think it does, Mr Zahra.

35

ZAHRA: I am finding some difficulty with that. I don't know whether it could ever be answered without, in a sense reference to the other deaths, in coming to that conclusion. For example, if the second question were asked specifically to each particular child, that there would be no problem with that. But in a sense it is the global view that raises the question as to whether this could be answered without reference to the deaths of the other children.

40

45

HIS HONOUR: It depends really upon whether, assuming the professor can answer the question. It really depends on what he is taking into account in giving his answer.

50

ZAHRA: Yes. I think that is why I am quite concerned about the question.

HIS HONOUR: Mr Crown, I will permit you to ask the second question on the voir dire, if you wish to do so.

55

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: In order that you or Mr Zahra may then inquire, if you get an answer you want, what the necessary basis of the answer is.

CROWN PROSECUTOR: Yes. Perhaps I might ask both, your Honour, because they are linked.

5 HIS HONOUR: Yes.

ON EVIDENCE ON VOIR DIRE

10 CROWN PROSECUTOR: Q. Professor, is it unlikely that these children all died from four different natural causes?
A. I am taking my time, your Honour. I find it a very, very difficult question to answer.

15 HIS HONOUR: Yes, please do.

WITNESS: I think I would have to agree given that four deaths in the family is unlikely, an unlikely event anyway.

20 CROWN PROSECUTOR: Q. And is it more accurate to say that each of these children died from an acute asphyxiating event of unknown origin?
A. There I have difficulty because of the epilepsy and the myocarditis. With Caleb and Sarah, it could be an
25 acute asphyxiating event. I have difficulty excluding the epilepsy and the myocarditis.

EVIDENCE ON VOIR DIRE CONCLUDED

30 CROWN PROSECUTOR: Your Honour, I am content just to ask the first question.

35 HIS HONOUR: Well, given the answer that you got, Mr Crown, I am not sure whether you should be allowed to. Do you want to ask anything about this, Mr Zahra?

40 ZAHRA: Yes, I am concerned that, in the absence of my friend asking the second question, that the first may be unfair in the circumstance, your Honour.

45 HIS HONOUR: Well, the question is: "Is it unlikely that all these children died from four different natural causes?" The answer is: "I think I would have to agree, given that four deaths in the family is an unlikely event."

HIS HONOUR: No, I think that I prefer that that question not be asked, Mr Crown.

50 CROWN PROSECUTOR: Yes, your Honour. Would your Honour pardon me just a moment; I will try and formulate another question?

55 HIS HONOUR: Yes. You may do that, if you would like to. The difficulty may lie not in the question but in the process of reasoning which is called upon, intentionally or not, which produces the answer to it.

5 CROWN PROSECUTOR: Yes, I understand. Your Honour, I would seek to just refer to my immediate past question, namely that they didn't die from the same natural cause, and then to ask him whether he has ever come across another case, in his experience, his colleagues experience, and the medical literature, of another instance where there have been four children that have died in the one family from different natural causes.

10 HIS HONOUR: Well, I think questions of that kind have already been asked.

CROWN PROSECUTOR: I have asked very close to it, yes.

15 ZAHRA: Yes, I think that is so.

CROWN PROSECUTOR: I would seek to conclude with that.

20 HIS HONOUR: You would have no objection to that, Mr Zahra?

ZAHRA: No.

HIS HONOUR: May we have the jury.

25

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: Q. Professor, just before the jury went
that you agreed that it was not a reasonable conclusion
that these children could all have died from the same
natural cause. Have you ever, yourself, had experience or
heard of your colleagues having the experience, or read in
the literature, a case in which four children in the one
family have all died from four different natural causes?
10 A. You mean suddenly unexpectedly?

Q. Yes?

A. No, I don't.

15 <RE-EXAMINATION

ZAHRA: Q. Professor, you were asked a question about
whether Dr Springthorpe was qualified to check and analyse
a simple pelvic floppy larynx, and I think you replied a
20 floppy larynx is not simple?
A. That's correct.

Q. What do you mean by that?

25 A. I think I explained this morning that a floppy larynx
just referred to a whole group of possible disorders. It
could be a structural problem with the larynx. It could
be some mucosal fault. We can have problems with the one
larynx function without it actually appearing abnormal. So
it is a more dynamic situation, so it is a complex area.

30 Q. Some of those conditions can be quite significant
ones?

A. Yes.

35 Q. And significant enough to possibly cause and upper
airway obstruction?

A. That's correct.

40 Q. You indicated also that in relation to Dr
Springthorpe's diagnosis, that this was in fact very, very
mild, you said in fact that that surprised you?

A. That's correct.

45 Q. Why did that surprise you?

A. It surprised me because although he said that Caleb
hadn't gone blue, he did notice the muscles between the
ribs were being drawn. That suggests to me a respiratory
obstruction to cause and external sign, so I would call
that mild.

50 Q. I think some questions later you were asked about that
opinion, it was very, very mild. And you said that you
would agree in part, but there are some observations that
have been missed?

55 A. I'm not quite clear what the context was.

Q. I might read it to you. Can I refer to this series of
questions and answers; 1232 line 29:

"Q. Would you agree with his diagnosis, that hearing all of that" -

5 sorry -

 "Bearing in mind, all that in mind, and taking into account he examined the live child -- that probably this was indeed a very, very mild stridor in the baby, if he had?"

10 A. Can I elaborate?

 Q. Do you disagree with that or not?

 A. It is hard to actually put it in a 'yes' or 'no', because there are elements in his report that you haven't mentioned that concern me."

15

What do you mean?

 A. Well, I was concerned about the retraction of the muscles, and I think there had been other statements that indicated a classic stridor. So it seems that he has definite clinical findings which fit with an upper airway problem. And although I don't know the exact significance of it, I can't really exclude it as a factor.

20 Q. You were asked whether death, as a result of a floppy larynx, was unlikely. Then you said "no", you do not agree?

 A. Perhaps I should clarify that. I think death from the floppy larynx, I am not aware, has been described. I think we have respiratory arrests from floppy larynxes, so it is obviously a very, very rare event, but it is a possibility. I may not have made that clear.

25 Q. You were asked questions about haemosiderin and a question of whether it was most likely to indicate suffocation. Is it proof of suffocation?

 A. No, it is not. There are a number of different causes and I think in some cases - I have had a case where we just simply don't know why it happens.

30

 Q. In particular, it is not proof of an asphyxiating event in relation to Caleb?

 A. That's correct.

35 Q. So far as what has been called scavenger cells, do they die at the time of death?

 A. No. There are a number of different types of death. There is death of body and the brain, and heart stopping.

40 CROWN PROSECUTOR: I object. It doesn't arise.

 ZAHRA: I withdraw that, your Honour.

45 Q. You can't exclude the fact that the first epileptic seizure, sorry, the ALTE, was the manifestation of the first epileptic seizure?

 A. No, no, I can't.

50

Q. You were asked whether it was unusual that if that first manifestation of -

ABOVE QUESTION WITHDRAWN

5

Q. You were asked questions about whether, if the ALTE was the sign of the first seizure, that it was unusual because there were no other signs of epilepsy, and you answered you wouldn't agree with that?

10 A. You have to run that by me again.

Q. Sorry. In relation to the first ALTE, it was put to you that if this was the manifestation of first epileptic seizure, wouldn't it be unusual that there was no other sign of that? I think you indicated you wouldn't agree with that?

15

A. That's correct.

Q. Why wouldn't you agree with that?

20

A. I mentioned to the jury this morning that I have had four cases of people who have actually died of epilepsy over the last year, and they have no external signs, like biting of the tongue, or one had a small bite on the cheek, but they didn't have unusual positions of hands or anything to indicate that there had been a fit.

25

Q. You were asked a number questions why Professor Wilkinson wasn't in a better position than you to exclude various pathologies, and you have indicated he was in fact not a paediatric pathologist?

30

A. That's correct.

Q. What is the significance of that different, if any?

35

A. I think the importance is that I spend my days looking at death and trying to work out why people have died and how they've died. Dr Wilkinson spends his days with the living. I wouldn't think his death rate would be all that high. So, really, I think in all likelihood of death from various conditions, then somebody of paediatric pathology experience, somebody should rate reasonably in the field.

40

Q. You were asked this question: Whether you agree whether there was nothing in the neuropathology to indicate Patrick died of epilepsy and you agreed?

45

A. Yes.

Q. Does neuropathology include that?

A. Not at all, it is very specific.

50

Q. The fact that there are no findings of neuropathology to indicate Patrick died of epilepsy, that that exclude that he died of epilepsy?

55

A. No, there are no markers to say. You can't look at someone's brain and say, yes, he died of epilepsy. What you can say is, yes, they have got a very damaged brain. That would fit very well with epilepsy, but also nothing definite as obviously a heart attack, when you look at the heart.

Q. And you were asked in relation to the pathology of Sarah, in isolation, whether it will include deliberate smothering?

5 A. Yes.

Q. And you said it would include deliberate smothering?

A. I mean I couldn't exclude it.

10 Q. To understand that, your answer is that you can't exclude it because there are no symptoms?

A. There are no findings at autopsy.

Q. With smothering?

15 A. That's right.

Q. You were asked questions about whether Dr Cala was your boss?

20 A. Yes.

Q. Is that a boss in an administrative sense?

A. That's correct, yes.

25 Q. If that reference to suggest that because of that he was more experienced than you; what do you say about that?

A. No, no. He is called the chief pathologist because he has to go to all of the forensic science committee meetings. That is the extent of his being the boss.

30 Q. You were asked whether he was in a better position to make an assessment as to whether myocarditis caused Laura's death or not because, firstly, he had an opportunity to see macroscopy?

35 A. Yes.

Q. With the naked eye of the heart itself?

A. That's right.

40 Q. Do you understand there were no relevant macroscopic findings?

A. That's my understanding.

Q. So far as looking at myocarditis.

45 CROWN PROSECUTOR: I object, that is not true. There were no relevant macroscopic findings. He found there was nothing abnormal.

50 HIS HONOUR: I think Mr Zahra understood your point.

ZAHRA: Q. You understand that in fact there were no relevant findings?

55 CROWN PROSECUTOR: I object. No abnormal findings?

ZAHRA: Q. No normal findings?

A. Examining the heart showed no abnormal findings, yes.
~~Macroscopy.~~

Q. Does that assist you one way or the other in relation to determining whether myocarditis was the cause of death or not?

5 A. No.

Q. What about the microscopic examination?

10 A. Well, the microscopic examination is on the slides and we can look at every section that has been taken that has information in it.

Q. Is he in a better or different situation from you?

A. I think we are all in the same situation.

15 Q. You were referred to extensive, your researches in relation to whether myocarditis at times can be mistakenly considered as the cause of death when it may be and incidental finding?

20 A. That's correct.

Q. Did you take heed to your own warnings when you looked at myocarditis in these slides?

25 A. Yes, the reason for a number of my papers was because there are some pathologists in Europe who'll diagnosis very small numbers of inflammatory cells as a myocarditis, and they were getting very high rates of myocarditis which I didn't agree with. So I wanted to actually draw attention to the significance of myocarditis with other diseases, without other diseases.

30 Q. You were asked questions about whether in the examination of Laura's heart that there was no evidence of organ dysfunction?

35 A. Yes.

Q. And that there was no evidence of malfunction of the heart?

A. Yes.

40 Q. Does that exclude death as a result of myocarditis?

45 A. No, it doesn't. I found that a difficult question to answer because there is no evidence of organ dysfunction as in heart failure. But I have got cardiac muscles that are dying, so that is over all dysfunction, but it is on microscopic level.

Q. Again, you were referred to your researches and articles about whether it would be appropriate to diagnose death ~~of~~ myocarditis without taking blood and heart tissue and undertaking micro biological testing and DNA hybridisation?

50 A. Yes.

55 Q. Does that prevent you in the present case from reaching a conclusion about the connection between the myocarditis and death in Laura's case?

A. No, not at all. What I said in the text is it is important to do these as part of the whole autopsy. But it

doesn't exclude my making a diagnosis or saying that myocarditis caused death.

5 Q. You were asked questions about the possibility of Laura's myocarditis being incidental to her death?

A. Yes.

10 Q. Can it, however, be excluded?

A. No.

10 Q. As the cause of death?

A. No, I don't believe so.

15 Q. You were then taken through your own researches in relation to the number of children who died without there being any previous indication; in other words, to die suddenly with myocarditis?

A. Yes.

20 Q. I think of the 32 cases of children where there was death and myocarditis, that there were three where those, the deaths of those children was unexpected?

A. That's correct.

25 Q. That would amount to about ten cases?

A. Actually I think that there were, I am trying to remember. I think there were five that were sudden and unexpected and I think three had no symptoms, I think that's correct.

30 Q. Is that still quite significant?

A. Well, I think it means that it occurs and it is a recognised phenomenon and that I have had cases.

35 Q. Looking at the statistics and percentages, you agree with my friend's question that this would then cause those percentages, make that quite unusual case?

A. Yes.

40 Q. Could you, however, exclude that mechanism, the myocarditis causing death?

A. Not at all.

45 Q. Can you exclude that Caleb died of natural causes?

A. No, I can't.

Q. Can you exclude that Patrick died of natural causes?

A. No, I can't.

50 Q. Can you exclude that Patrick's ALTE was as a result of have natural mechanisms?

A. No, I can't.

55 Q. Can you exclude that Sarah died of natural causes?

A. No, I can't.

Q. Can you exclude that Laura died of natural causes?

A. No, I can't.

ZAHRA: Nothing further.

5 HIS HONOUR: You may step down and you're excused from further attendance.

WITNESS: Thank you, your Honour.

10 <WITNESS RETIRED AND EXCUSED

ZAHRA: We don't have any witnesses available right now. We have three short witnesses tomorrow morning and that will be the end of the evidence. I would expect possibly to finish about morning tea.

15 HIS HONOUR: Now, that means the end of all the evidence, Mr Crown. It might be a good idea if we then raised a matter mentioned to me earlier while the jury were here. Tomorrow is Thursday. We were not intending to sit on 20 Friday and counsel think it appropriate that final addresses do not start until Monday. Are you still of that view?

25 CROWN PROSECUTOR: Yes, I am.

ZAHRA: Yes, I am your Honour.

30 HIS HONOUR: This looks like the pattern of what will happen from now on ladies and gentlemen: We will finish all the evidence in the trial some time tomorrow morning and then we will adjourn until Monday morning and then the final addresses will begin. I will tell you more about that at the time but the stages are that the Crown will address you and then the defence will address you and I 35 will sum up the case to you. That is all going to take some considerable time. But you understand the detail of it as we go on with the process. I raise this now so you can understand when things are going to happen. That is the end of proceedings today then and I will let you go 40 now and bid you a good afternoon and we look forward to seeing you tomorrow at ten o'clock.

45 ADJOURNED PART-HEARD TO THURSDAY 8 MAY 2003 AT 10AM

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TWENTY-SECOND DAY: THURSDAY 8 MAY 2003

10 70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG

15 HIS HONOUR: Good morning ladies and gentlemen.

ZAHRA: I call Owen Jones.

<OWEN JONES (10.20AM)
SWORN AND EXAMINED

20 HIS HONOUR (To witness): If you wish to refer to any notes
that you have in order to answer any question, you may do
so?

A. Thank you.

25 ZAHRA: Q. Your name, doctor, is Owen Jones?
A. Correct.

30 Q. Do you hold the qualifications of Bachelor of
Medicine, Bachelor of Surgery at Cambridge University?

A. I do.

Q. Are you a specialist medical practitioner?

A. I am.

35 Q. Is your specialty paediatric cardiology?
A. It is.

40 Q. Have you been a consultant paediatric cardiologist for
20 years?

A. I have.

Q. Firstly, at the Guy's Hospital in London between 1983
and '87?

45 A. Correct.

Q. And since 1987, at the Sydney Children's Hospital?

A. Correct.

50 Q. Now, in relation to the child Laura Folbigg, did you
receive medical files of that child?

A. I did.

Q. Did you receive a post-mortem report?

55 A. I did.

Q. From an examination of those medical records and
reports was it apparent that there was in fact no

congenital or acquired heart abnormality in Laura Folbigg?
A. That was my opinion.

5 Q. Do you understand the history of Laura Folbigg prior to her death was that she was noted to have cold or flu-like symptoms from about 21 February?

A. I noted that.

10 Q. An that prior to her death that she was asleep, and obviously unwell, when she was put to bed at about 11am on 1 March?

A. Correct.

15 Q. Do you understand the history, that approximately half an hour or so later, that her mother heard her cough, and when she made a check on the child, that she found the child lifeless?

A. That is my understanding.

20 Q. You understand that she commenced CPR and called 000?

A. That is my understanding.

Q. And the Ambulance Service arrived at about 12.14pm?

25 A. Yes.

Q. And that the ambulance officers observed the child in cardiorespiratory arrest?

A. Yes.

30 Q. And that an ECG showed that as asystole CPR?

A. I do make a further comment about that in my report. The observation of asystole, I guess, is a combination between the clinical finding, that there had been no pulse which is showing that there is no effective output from the heart; and the electrical evidence of what the heart activity is, asystole, is technically sort of the flat line on the ECG, with no electrical activity at all. In fact the ECG tracing are able to review there was still some residual electrical activity present, but this was extremely slow and wide, complex, and what we would call and agonal rhythm, which is residual electrical activity that can be seen in a patient who is essentially deceased.

45 Q. So far as that agonal rhythm is concerned, how long would you expect that to continue?

A. It can certainly continue for several minutes, and I'm not sure that there is information available as to the longest that it can possibly go on for; but I have certainly observed it personally continue for many minutes after the clinical death of the patient.

50 Q. You have had the opportunity of reading the transcript of proceedings in this court of Dr Bailey?

55 A. I have.

Q. Dr Bailey expressed view that in looking at that tracer ECG, that one might be able to determine the sequence of breathing and cardiac arrest leading to death?

A. I don't believe that it's possible to state the sequence to which you refer.

5 Q. In the autopsy report of Dr Cala, did you note that there were no observations of any abnormality on macroscopic examination?

A. I did note that.

10 Q. Did you note Dr Cala's microscopic examination?

A. I did.

Q. What did you note from that?

15 A. The description of the microscopic findings in the heart were those of myocarditis, which is an inflammation of the heart muscle.

Q. Did the microscopic examination reveal there was a moderately dense infiltration of lymphocytes?

20 A. It did.

Q. That those lymphocytes as aggregated in certain areas?

A. It did.

Q. Particularly subendocardially?

25 A. I imagine subendocardially on the epicardial surface of the heart.

Q. Which is the superficial surface?

30 A. The outside of the heart.

Q. What is the significance of that?

35 A. It is a description of the distribution of the infiltration of the inflammatory cells in a way it describes how widespread the process is.

Q. Did you understand that further sections were taken of the heart which showed large aggregates in the central area of the left ventricle?

40 A. Yes. I noticed that.

Q. In these areas was it observed that there were large clusters of lymphocytes surrounding degenerate myocytes?

A. Yes.

45 Q. Did you note a history that myocytolysis was present?

A. I noted that.

Q. The finding that there were no viral inclusions observed?

50 A. I noted that.

Q. Was the appearance microscopically one of the myocarditis?

55 A. Yes.

Q. And was that probably of viral aetiology?

A. That is the most likely.

Q. Now, do you understand that there was further histological examination of the tissues of the heart?

A. Do you mean, by other pathologists?

5 Q. Yes?

A. Yes.

Q. Are you aware that a number of slides were prepared?

10

Q. In fact there was seven slides showing eight areas of the heart and all those contained myocarditis?

A. That is my understanding.

15

Q. Would that indicate that the myocarditis was diffuse?

CROWN PROSECUTOR: I object to leading.

20

HIS HONOUR: Please don't lead, Mr Zahra.

ZAHRA: Q. What can you glean from the fact of that consideration?

25

A. In the sections that were taken from and examined, there was evidence of myocarditis. The pathologist would select areas of the heart as blocks, and subsequently embed that in paraffin and sections from those blocks. Now, in this particular case there were no naked eye abnormalities when the heart was examined, so I would expect that these blocks would have been taken in a random fashion, and it would indicate that in those areas there was myocarditis present.

30

Q. Is it possible that myocarditis represented an incidental finding?

35

A. It is possible.

Q. Are you able to say whether or not, in your view, that the myocarditis in the present case would have accounted for Laura Folbigg's death?

40

A. I believe it could. The medical literature in that regard is very helpful, and I might refer to a study from the pathological medical literature that was published in a pathology journal in September 2001, which reports on the examination of the heart in patients who have died suddenly, and this report makes mention of 13 cases where the death was attributed to myocarditis.

45

Q. Stopping you there doctor. Firstly, can you refer to the report?

50

A. Yes, I can refer to this paper. This is a paper entitled Histologic and Insitu Viral Findings in the Myocardium in Cases of Sudden Unexpected Death, and its authors are Cioc, and Nuovo, and it comes from the Ohio State University Medical Centre, Columbus, Ohio, and it is published in Modern Pathology 2001.

55

Q. What did that study reveal in relation to those particular individuals?

5 CROWN PROSECUTOR: I object. In effect, my learned friend
is asking about and a paediatric cardiologist to give
expert evidence about and article on pathology. One would
have thought, at first glance, it is not and area of his
expertise, and he should not be asked to say whether or
not, in his view, it is and accurate article or whether it
has a validity to the findings because it is not his area;
it is a pathology article, and in a pathology magazine

10

ZAHRA: Your Honour, I press the question. I will address
the question about the witness's expertise, if your Honour
wishes me to do that.

15

HIS HONOUR: Perhaps we could ask the witness. He might be
able to tell you?

Q. Dr Jones, do you think you can answer this question?

20

A. I believe I can, because in our clinical practice we
deal with patients who have myocarditis where we are
involved in liaison with pathologists about the
histopathological findings in cardiac biopsy specimens
that are taken from such individuals.

25

ZAHRA: Q. These are cases of individuals that you would be
treating and who subsequently die?

30

A. These are cases of patients who I have been, who I
have been treating, who may or may not have subsequently
died. They may have recovered naturally. They may have
recovered in response to treatment, which has been
delivered to them but, nonetheless, I believe that a
cardiologist, an adult cardiologist have experience of
liaising with pathologists in the management of patients
with myocarditis.

35

HIS HONOUR: I think the question can be answered.

40

ZAHRA: Q. What did this study reveal in relation to
persons dying unexpectedly who are later found to have
myocarditis?

45

A. The study showed, on gross examination to the naked
eye examination of the heart, that there were no abnormal
findings. The hearts were of normal weight, and the cut
surface of the heart looked perfectly normal to the naked
eye. On the histological examination of the heart, there
were varying degrees of myocarditis present. There were
cases in which the myocarditis was described as diffuse,
and there were cases where the myocarditis was described
as being focal. The cases also varied according to the
degree of myocytes that is was in the heart muscle,
myocyte necrosis present. In some cases myocyte necrosis
was absent. In some it was minimal. In others it might be
extensive. So there is clearly a range, in terms of
distribution of inflammation, and a range of the
consequences of that inflammation, so far as muscle cell
death is concerned in these patients who have all died
suddenly, with no other explanation for their death.

55

Q. In determining whether or not the child Laura died of myocarditis, would you be assisted by descriptions of the myocarditis as being mild or moderate?

5 A. I think it is clear from this publication that the myocarditis might be focal and mild, and nonetheless be implicated in the sudden death of that patient.

Q. In determining whether or not the child died of myocarditis, is one assisted -

10

ABOVE QUESTION WITHDRAWN

Q. In determining whether the child died, the conclusion that the child died of myocarditis, does that depend on a finding of necrosis?

15

A. It does not.

Q. Why is that?

20

A. Because in this series of reported patients, there are examples where myocyte necrosis is described as absent.

Q. Are you aware, from Dr Bailey's evidence, that he was of the view that 5 to 10 percent of the persons who have a cold could have myocarditis?

25

A. I have read the transcript. I'm aware, from my person experience, and from the medical literature, that perhaps about 5 percent of people who have viral illnesses, may complain of symptoms that could have a cardiac basis. I would not be in a position to say that for all of those patients they had myocarditis, because that would depend on having a myocardial biopsy specimen available for further investigation, and that clearly is not the case in the majority of the people with viral illnesses.

30

Q. If there was a video of Laura the day before, of and apparently well child, is that a diagnostic basis upon which to exclude myocarditis?

35

A. It is not. What we are talking about here is sudden unexpected death. By the World Health Organisation criteria, sudden death is a death where symptoms are present, for the longest period, up to 24 hours, and indeed in the majority of cases of sudden cardiac death, death is instantaneous or has premonitory symptoms of up to about two hours duration.

40

45

<CROSS-EXAMINATION

CROWN PROSECUTOR: Q. I think you said you have been a paediatric cardiology for 20 years?

50

A. Correct.

Q. That means you specialise in the hearts of the children?

55

A. That's correct.

Q. Are you able to estimate, or even estimate over that time, how many patients you would have seen?

A. Probably - I mean my data base grows by about a

thousand a year.

Q. So maybe 20,000 patients; is that right?

A. Perhaps that number, yes.

5

Q. Something like 20,000 patients?

A. Maybe 10,000 patients.

10

Q. Of those, are you able to tell us how many had myocarditis?

A. I can't give you a precise figure, but I would see, on average, perhaps three cases a year. It does vary but it seems that, you know, there are peaks and troughs in the incidents of myocarditis; you might go for some years where it seems to be a fairly uncommon happening, and some years where it seems to be much more common, and that would be borne out by discussions we have with our colleagues.

15

20

Q. Of the approximately 2,000 patients that you see per year -

ZAHRA: I would object to that. That was not his evidence.

25

CROWN PROSECUTOR: Q. Of the approximately 1,000 patients that you see per year, would there be about three that you see that are suffering from myocarditis?

A. That's probably a reasonable guesstimate.

30

Q. Doctor, I know that doctors don't like answering questions like this, but of your patients that have had myocarditis are you able to tell us how many of them have died?

A. I would think, overall, that less than a quarter of them die.

35

Q. Of course the patients that you see with myocarditis are the ones that have symptoms?

A. That's correct.

40

Q. They wouldn't come to you if they had asymptomatic myocarditis, would they?

A. That's correct.

45

Q. Is it a fact that is accepted in the medical community, that most cases of myocarditis are thought to be completely asymptomatic, that is without symptoms?

A. I don't know that there is firm evidence for that. I think that that is somewhat speculative, because we don't have a denominator to talk about the prevalence of myocarditis in the community, because so far as I'm aware, there have been no studies done which would determine that end point, and therefore its frequency.

50

55

Q. If you assume something like 5 percent of people - adults and children - who have viral infections, like colds and the flu, have some myocarditis, can we assume there are hoards of people out there that have

asymptomatic myocarditis that are never seen by the medical profession?

5 A. I think it is fair to say that there will be people in the community who have myocarditis who are symptom free. I don't know that we can use the word "hoard" to describe the number of them.

10 Q. You say the vast majority of the cases of myocarditis are probably asymptomatic but never come to the medical profession?

A. I don't know that we can even say that. We don't know that they have myocarditis.

15 Q. Do you agree that in most cases myocarditis is entirely self-limited?

20 A. Again, you're asking really and impossible question, because the same argument applies, that we do not know the denominator there. We do not know - we can't define the proportion of myocarditis. Therefore we can't say to what extent it is a self-limited illness. We do know that of cases with myocarditis, a proportion of those are going to make a complete functional recovery. These are people who we know have myocarditis.

25 Q. Could we say this: That the majority of the people who have myocarditis recover without any health consequences at all?

A. I don't know the answer to that question.

30 Q. Now, do you agree that there are three types of myocarditis: Mild, modern and severe?

A. I think it is fair to say that there are various ways of grading the severity the condition.

35 Q. And in the case of Laura Folbigg, did you, yourself, examine the slides that were taken of her heart?

40 A. I didn't examination them myself. I relied on the reports of several experts pathologists who had examined the slides.

Q. You haven't been shown the slides at all?

A. I have not examined the slides myself.

Q. Did you ask to see the slides?

45 A. I didn't ask to see the slides because I considered that this was in the area of the pathologists expertise who had provided reports in that regard.

50 Q. You are aware that the post-mortem examination on Laura was conducted by Dr Carla, the head of the Forensic Science Service in South Australia at the moment?

A. Yes.

Q. At that time he was here?

55 A. Yes, I am aware of that.

Q. At the time he was here in Sydney?

A. Yes.

Q. Have you read his post-mortem report?

A. I have.

5 Q. Have you read his evidence?

A. I have read the - I have read his report. I haven't read his evidence to this court.

Q. Have you read his histological report?

10 A. I have had read that, yes.

Q. Would you defer to his better judgment about his histological findings?

15 A. I believe that he is making objective observations and descriptions from the practice of his field of expertise.

Q. Would you answer my questions please: In view of the fact that you have not seen the histological slides, would you defer to his judgment as to the histological findings?

20 A. Yes.

Q. His evidence was that the microscopic examination revealed inflammation that was patchy and rather mild - sorry, I am referring to his evidence to the Court, the report?

25 A. The report which I have read was the report that was contained in the medical files, and I have that in front of me, and I refer to that in my report.

30 Q. Do you agree that he found the information was quite patchy and rather mild?

A. I don't think that that is quite as stated in the original documentation.

35 Q. Doctor, for the purposes of your evidence?

A. Yes.

Q. Would you assume that Dr Cala's view, as given in evidence, was that the inflammation was quite patchy and rather mild. I ask you to accept that - and I am referring to page 7 - and there was moderately dense infiltration lymphocytes?

40

A. What I have in front of me, can I read from his report?

45

Q. Sorry, but your evidence has got to be based on his evidence, because that is what is before the jury.

ZAHRA: The report is also an exhibit.

50

HIS HONOUR: And the witness is arguing with the questioner as well, and that should not happen.

CROWN PROSECUTOR: Q. Dr Cala, in essence, categorised the myocarditis as mild; you wouldn't disagree with that, would you?

55

A. I think that there are perhaps various classifications which are alluded to the severity of the myocarditis. I

mean I am - I accept his report, as he described it, that myocarditis is present, and that the criteria of making that diagnosis is satisfied. I'm not in a position to say anything different from my interpretation of his original report, I think.

Q. Do you agree that mild myocarditis almost never leads to death?

A. I know that mild myocarditis can lead to death.

Q. That is not what I asked you, doctor: Do you agree that mild myocarditis almost never leads to death?

A. I think that is a correct statement, yes.

Q. And that even with moderate myocarditis there are very few instances where sudden death occurs?

A. I would agree with that.

Q. Do you also agree that myocarditis is often given as a possible cause of death incorrectly in cases where, in reality, it is and incidental finding?

A. I can't make a comment about that.

Q. Why is that?

A. The reason for that is that you are presenting me with a scenario where presumably there is a report by the pathologist that there is myocarditis, and that some other more substantive explanation for the death has been given but you've given me no detail of that.

Q. Now, you have given some evidence about an article that you referred to on histologic viral findings in cases of sudden death?

A. Yes.

Q. That is an article, is it not, about 13 cases that were analysed in Columbus, Ohio?

A. That's correct.

Q. Those 13 cases were individuals who were aged up to 67 years of age, is that right?

A. That's correct, yes.

Q. And only two of the 13 individuals were children?

A. That is also correct, yes.

Q. So do you agree that the study is really of not much assistance to you in this case, because it relates predominantly to adults?

A. I don't agree with that. We are talking about a similar pathologic process that happens in a wide variety of the ages.

Q. Do you agree that it is pretty rare in a child of around 19 months to get myocarditis which shows clinical signs?

A. I think it's uncommon to see children with myocarditis. I don't know how many children of that age

have myocarditis, because there is no study to tell me the answer to that.

5 Q. In people, adults and children, myocarditis which is severe can present with a number of symptoms; is that right?

A. Yes.

10 Q. Those symptoms can include fatigue?

A. Yes.

Q. Congestive heart failure?

A. Yes.

15 Q. You have to help me pronounce this - mild dysphnoea?

A. Yes. That's breathlessness.

HIS HONOUR: Q. Is that d-y-s-p-h-n-o-e-a?

20 A. Or simply e-a, yes.

CROWN PROSECUTOR: Q. Fever?

A. Yes.

25 Q. Myalgia?

A. Yes.

Q. Myalgia is pain in the muscles. This is what you might encounter if you have had flu?

30 A. That you get headaches and pains around your body.

Q. Malaise?

A. General feeling of lack of well-being.

35 Q. That is one of the symptoms that people with severe myocarditis sometimes present with; is that right?

A. Yes.

Q. Chest pain?

40 A. Yes.

Q. Palpitations?

A. Yes, sir. Yes.

45 Q. Respiratory distress--?

A. Yes.

Q. -- in children poor feeding?

A. Yes.

50 Q. And cyanosis?

A. Yes. I would agree with all of those things.

55 Q. Now, those are cases in which there are symptoms that would perhaps cause a patient to consult a medical practitioner?

A. I agree.

Q. What we are talking about in this case with Laura is

considering the case of a child with no symptoms at all?

A. Yes.

5 Q. Do you agree that it is unlikely that the myocarditis that she had caused her death?

A. I don't think that I can comment on the probability. I think that we are aware that sudden death occurs in myocarditis, and I really can't speculate on the probability.

10

Q. Do you agree that the finding of myocarditis in Laura may well represent an incidental finding?

A. I also agree that it's possible that it is an incidental finding, I agree.

15

Q. Do you agree it may well represent an incidental finding?

A. What do you mean, in terms of probabilities when you use that?

20

Q. Do you have difficulty with those words?

A. May well; you're meaning likely or possible?

25 Q. Would you agree that it is more likely to be an incidental finding than a cause of death?

A. I don't know. The reason I don't know is that you know it is a pathologic process that has been demonstrated at post-mortem in that person, and I believe that regard has to be taken of that in the circumstances.

30

35 Q. Do you agree if you take into account the fact that it was mild myocarditis, that the heart looked normal to the naked eye and that she had no clinical features, makes it more likely than not that the myocarditis was an incidental finding, not related to the death?

A. I don't think it helps to make that distinction.

40 Q. Whether it helps or not, are you able to agree or disagree?

A. I would disagree with your statement.

45 Q. Why would you disagree?

A. I would disagree because it is documented in the medical literature that sudden cardiac death occurs in patients with myocarditis of all ranges of severity.

50 Q. Doctor, I am not asking you to exclude to comment on excluding myocarditis as a cause of death. My question was this: Do you agree that if you take into account the fact that it was mild myocarditis that the heart normal to the naked eye and that she had no clinical symptoms of myocarditis, that it is more likely than not that the myocarditis was an incidental finding rather than a cause of death?

55

A. I can't agree with that statement.

Q. Is it that you cannot agree with it or you don't feel

qualified to comment on it?

A. I feel qualified to comment on it. I don't feel in a position to attribute value to that statement or its converse.

5

Q. You're not able to comment on my question, is that what you're saying?

A. Your question, well, your statement as framed, I would disagree with.

10

Q. But you do feel qualified to disagree with it?

A. From the point of view of logic, yes.

15

Q. You see, in your written report which you provided to the defence did you say this:

"I am not qualified to speculate on the overall--."

20

ZAHRA: I object, your Honour.

HIS HONOUR: I will have to see the report.

25

CROWN PROSECUTOR: I hand it up to your Honour.

HIS HONOUR: Do you feel free to speak in the presence of the jury?

30

ZAHRA: No, in their absence your Honour.

HIS HONOUR: Ladies and gentlemen, this is something I will have to deal with in your absence; would you mind withdrawing?

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: May I say at first, Mr Crown, that I suspect
that you and Dr Jones may be as cross purposes? If I am
wrong I apologise for this because I am butting in where I
should not. But you were asking Professor Jones to agree
to a proposition that something is more likely and Dr
10 Jones is not prepared to agree with that statement. That
does not seem to be inconsistent with the last paragraph
of the report which you have handed to me. This point be
putting the cart before the horse. What is the nature of
the objection, Mr Zahra?

15 ZAHRA: Well, your Honour, only that I previously asked the
doctor what he meant by that. It relates to issue your
Honour ruled upon. This is not an instance where the case
has been in isolation in relation to others. I can ask the
witness on the voir dire about that. That is as I
20 understand what is meant by that: The reference to the
over all picture.

HIS HONOUR: I see. May I have the report again, please?
(Handed.)

25 HIS HONOUR: It doesn't say that, Mr Zahra.

ZAHRA: If your Honour looks at the previous paragraph.

30 HIS HONOUR: Sorry to hold you up, I have in mind some
evidence Dr Jones gave a few moments ago and I wanted to
go back and have a look at it. Sorry, the evidence was not
as I remembered it.

VOIR DIRE EXAMINATION

35 ZAHRA: Q. Doctor, do you have a copy of your report? Can I
take to you last two paragraphs; have you read those?
A. Yes.

40 Q. Can you tell the court what you meant by the last of
those paragraphs?
A. In the last paragraph I am really saying that the
time, that I'm not in a position or not qualified to talk
about aspects other than cardiological aspects in the
45 matter of her death and that I essentially believe that
there is evidence that she had myocarditis and I know that
myocarditis can result in sudden death. So I am saying in
my penultimate paragraph that I believe from the stand
point of my specialty that her death could be due to
50 myocarditis. In my specialty I am not able to say what the
probability is that a known cause of sudden cardiac death.
I'm not in a position to comment on that probability,
whether it was the cause or whether it was incidental, I'm
just not in a position to do that.

55 Q. What did you mean by the phrase "I am not qualified to
speculate in the over all picture"?

A. Well I am really talking about the condition of Laura and her death rather than the broader issues of the family.

5 Q. What do you mean by the "broader issues" of the family?

A. What I mean is that I can't, my expertise is not such that I would be able to judge the probability of myocarditis being the cause of death when I know that
10 there are pathologists who are considering more than that.

CROWN PROSECUTOR: I am content to elicit that from him, your Honour. I will withdraw my immediate question that was objected to. I'm sure I can frame some questions that
15 are in accordance with the evidence that he has given now.

HIS HONOUR: Mr Zahra, is that likely to lead to any difficulty?

20 ZAHRA: No, your Honour.

CONCLUSION OF VOIR DIRE

HIS HONOUR: Mr Zahra, Dr Cala's report about Laura can
25 you remind me of the exhibit number, please?

ZAHRA: I think it is AL.

HIS HONOUR: I think I made a comment before which was
30 unfair to Dr Jones and I propose to say so when the jury come back. I accused him of arguing with you, Mr Crown. I think I should not have done that. In the controversy about what Dr Cala's evidence exactly was.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Thank you ladies and gentlemen. Mr Crown?

5 CROWN PROSECUTOR: Q. Doctor, is this the case: That you don't feel qualified to comment on whether or not Laura's myocarditis was a cause of death?

10 A. I'm prepared to state that it's a possible cause of death but I'm not in a position to state that it is the cause of death.

Q. Is this the case: That neither do you feel qualified to be able to say whether it is likely or unlikely to have been her cause of death?

15 A. I'm not in a position to comment on that probability.

Q. Is this the case: That you would defer on issues like that to the better judgment of pathologists?

20 A. I would defer to the extent that there may be other issues that in their judgment make the consideration of myocarditis as being incidental in her case.

Q. Now, you were asked a number of questions by my learned friend Mr Zahra, about the agonal heart rhythm that was detected by ambulance officers?

25 A. Yes.

Q. Have you seen MFI 34, which is the heart tracing for Laura done by the ambulance officers?

30 A. Yes.

Q. Can I ask you to have a look at that? (Handed.) Could you indicate the time of the last agonal rhythm that you can see on that tracing?

35 A. These are still in the sequence that were originally provided.

Q. Sorry?

40 A. Sorry may I just refer to my note?

Q. Could I take you to the last page of the rhythm?

A. Well, this is marked the latest time on here is marked as 12.29.59.

45 Q. If you assume that, is there, I have agonal rhythm at 12.29?

50 A. I believe that there is, one would need to know the precise circumstances of what was happening at that time, that this could be a factor, it could be agonal rhythm, it is very hard to know for sure.

Q. Can you tell us what is the last time of some rhythm that is definitely agonal rhythm?

55 A. That is definitely agonal rhythm.

Q. Can I suggest you work back backwards because I am

asking you for the last time?

A. Okay. It is often just easier to follow. Mm, the problem is here that these aren't actually sequentially numbered from page to page.

5

Q. You can see the times?

A. I can see the times but they are not sequentially numbered. When I go from the approximate penultimate page that you have given me, I go from 12.29.23, I go to 12.28.29. So these are not in time sequence.

10

Q. Would you like to have a look at the original tracing?

A. That might be more helpful.

15

Q. Tell us the last time of an agonal rhythm?

A. There is certainly a complex advisables, I regard as agonal at 12.29.23.

20

Q. Would you agree that at 12.29 her heart is still showing agonal rhythm?

A. I would agree, yes.

25

Q. I would like you to accept that the ambulance call was booked at 12.08?

A. Yes.

30

Q. So we assume the called was made at around 12.08?

A. Yes.

35

Q. If we assume that the mother supposedly discovered the child according to her version, some short time before that?

A. Yes.

40

Q. Let's say 12.05?

A. Yes.

45

Q. So we are looking at about 24 minutes?

A. Yes.

50

Q. From cessation of breathing according to the mother's version?

A. Yes.

55

Q. Until the end of that tracing?

A. Yes.

Q. When there is still agonal rhythm?

A. Yes.

50

Q. Now, is the fact that there was agonal rhythm 24 minutes after the cessation of breathing, does that help you agree with the proposition that breathing stopped before the heart stopped?

55

A. I don't think it helps me.

Q. Is it consistent with breathing stopping before the heart stopped?

- A. It could be consistent with that. It could also be consistent with the heart stopping before the breathing. I don't think this in any way allows me to make that distinction.
- 5
- Q. You have told us that agonal rhythm can go on for more than many minutes?
- A. Many minutes, I don't know how many minutes but many minutes.
- 10
- Q. Does it assist you to say that death had occurred very recently to see that agonal rhythm?
- A. Talking in terms of minutes rather than hours, sure.
- 15
- Q. Are you able to say how many minutes?
- A. I'm not able to say how many minutes.
- Q. Do you agree with the evidence given by Dr Bailey that the agonal heartbeat is consistent with injury due to lack of oxygen?
- 20
- A. Due to lack of oxygen delivery to the heart muscle, I would agree with.
- Q. Do you agree with his evidence that it is most likely that breathing stopped before the heart stopped given that tracing?
- 25
- A. I don't know how that judgment could be made.
- Q. So you disagree with that?
- 30
- A. I would have to disagree with it because I can't agree with it, yes.
- Q. Is it the case of you disagreeing with it or case of you saying you're not able to make a judgment?
- 35
- A. As I said earlier I don't think I am presented with anything here which allows me to make that distinction about whether breathing stopped before the heart stopped. I might be able to help by making a comment of observations that are, that I have made in my own practice over the years and that is if a patient has been determined to have brain death who is on supportive treatment with a mechanical ventilator, then when that ventilator support is withdrawn then there could be some significant lapse of time in terms of minutes before all electrical activity would disappear from the recording.
- 40
- Equally, I'm aware of patients in whom you can still see agonal rhythm on an ECG monitor who are still attached to a functioning mechanical ventilator. So I would have to presume that the mechanical aspect of breathing isn't necessarily the determining factor here.
- 45
- 50
- Q. Would you expect to find agonal rhythm if a person had died of myocarditis?
- A. It is the final electrical activity that is seen from the wide variety of mechanisms, so I would not be surprised to see it.
- 55
- Q. Do you agree it is something that you would expect to

see in a case of death from suffocation?

A. I think it would be seen, it would be seen in that case, yes, I would agree with that.

5 <RE-EXAMINATION

ZAHRA: Q. In relation to that last question sir, my friend asked you would you expect to see it, are you saying it was consistent with?

10 A. I think I would expect to see agonal rhythm in the dying patient.

Q. Virtually every case of a dying patient?

15 A. I think, as I say it is the final pathway electrically in a dying patient from a variety of causes.

Q. You were asked or you referred to Dr Cala's reference to myocarditis being patchy; do you recall being asked questions about that a moment ago?

20 A. I recall, yes.

Q. You indicated that you had reliance on Dr Cala's post-mortem report?

25 A. That's correct.

Q. In that post-mortem report consisting of the questions I asked you in examination in chief, was it noted that in the myocardium was a moderately dense infiltrate of lymphocytes?

30 A. Yes.

Q. And they had aggregated in certain areas?

A. Yes.

35 Q. Particularly subendocardially?

A. Yes.

Q. And along the superficial surface of myocardium?

40 A. Yes.

Q. And that further showed large aggregates in the central area of the left ventricle?

A. Yes.

45 Q. And that in those areas there were large clusters of lymphocytes surrounded by degenerate myocytes?

A. Yes.

Q. And myocytolysis was present?

50 A. Yes.

Q. Would you consider they're significant findings?

A. Yes.

55 Q. And in those circumstances what can you say about the possibility of myocarditis causing the death of Laura Folbigg?

A. I would say that this examination is consistent with

the diagnosis of myocarditis in Laura and that it is an explanation for the death of Laura.

5 Q. You were asked about a number of symptoms in relation to severe myocarditis?

A. Yes.

Q. And you were taken to those symptoms?

10 A. Yes.

Q. Does it necessarily follow in the absence of any of those symptoms that you can rule out in this present case the death of the myocarditis?

15 A. It certainly doesn't rule this out.

HIS HONOUR: Q. Doctor Jones, when you were being asked questions about the Crown about Dr Cala's findings?

A. Yes.

20 Q. Concerning the heart. And the distribution of detectable myocarditis; some disagreement arose between you and the Crown about what Dr Cala's evidence had been and I accused you of arguing with the Crown. I think that accusation was unfair and I withdraw it. I'm sorry about that?

25 A. Thank you.

HIS HONOUR: You may step down Dr Jones and you are excused from further attendance?

30 A. Thank you.

<WITNESS RETIRED AND EXCUSED

35 HIS HONOUR: That seems a suitable time to take the morning tea adjournment.

RESUMPTION

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Are we ready for the jury?

10 CROWN PROSECUTOR: In one second. Your Honour will recall that at the end of the Crown case I indicated that we would wish to place a chronology before the jury of the critical events shortly prior to the deaths of each of the children.

15 We have got a draft, which is not complete, and there have been a few printing problems, but just to give your Honour an idea, and the defence an idea of what it is we would like to include in the exhibit; we have a draft that, I now hand up to your Honour and it has been provided to the defence.

20 HIS HONOUR: Thank you.

(Relevant copy of chronology handed to his Honour.)

25 HIS HONOUR: The sheriff's officers took counsel at their word yesterday and have not ordered lunch for the jury. The jury were expecting to be released before lunch. What is the estimate now, Mr Zahra?

30 ZAHRA: We have two short civilian witnesses.

HIS HONOUR: That sounds as if one o'clock might be gettable?

35 ZAHRA: Yes; if not, probably marginally later.

HIS HONOUR: If not by one I think the jury would prefer to sit on rather than have a formal luncheon adjournment to come back at 2.

40 ZAHRA: Yes, I think that is appropriate.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, things have not moved as quickly as counsel gave you and me cause to believe yesterday, but I think we shall probably finish by one o'clock. If we are still going at one, I would prefer, unless any of you had a reason why this should not happen, for us to continue until the evidence is finished and then I can release you all for the day.

10 In the event that that happens, I will ask you again and you can let me know if there is any difficulty about it.

15 Yes, Mr Zahra?

COOK: If Debbie Goodchild can be called.

<DEBBIE GOODCHILD(11.59AM)
AFFIRMED AND EXAMINED

20 HIS HONOUR (To witness): Please position yourself as you comfortably can to the microphone and try to speak a little more slowly than you ordinarily would.

25 COOK: Q. Is your name Debbie Goodchild?

A. Yes, it is.

Q. What area do you live in?

30 A. Singleton.

Q. And what is your occupation?

A. Housewife.

Q. And in 1998 and 1999 did you know Kathleen Folbigg?

35 A. Yes, I did.

Q. And how did you meet her?

A. I met her at the gym.

40 Q. And when you met her did she have a child with her?

A. Yes.

Q. And that child was Laura Folbigg?

45 A. Yes.

Q. About how old was Laura when you first met Mrs Folbigg?

A. She was about one.

50 Q. And did you meet her at the gym because you were going to the gym to do exercise classes?

A. Yes.

55 Q. And did you have a child as well at that stage when you met Mrs Folbigg?

A. Yes, I did.

Q. How old was your child?

A. Two.

5 Q. And when you did exercise classes would your child be minded in a creche that was at the gym?

A. Yes, she would.

Q. And how often would you see Mrs Folbigg at the gym after you first met her?

10 A. Three or four times a week.

Q. And in that time did you come to be friendly with her?

A. Yes.

15 Q. And did you see her at places other than the gym?

A. Yes, I did.

Q. What other places?

20 A. Sometimes we would stay and have coffee. She has been to my house and I have been to her house.

Q. At times when she has been to your house was Laura there as well?

25 A. Yes.

Q. And at the times when you have been to her house was Laura there as well?

A. Yes, she was.

30 Q. And did you form some opinion or impression about the relationship between Mrs Folbigg and her daughter Laura?

A. I thought they had a good relationship.

35 Q. How did Laura present, in terms of dress and apparent--

A. She was always beautiful. She was always spotlessly clean. She was gorgeous.

40 Q. Did you ever see Mrs Folbigg losing control of her temper with her daughter Laura?

A. No, I didn't.

Q. Now, did you ever see the child demonstrating fear?

45 A. No.

Q. In the company of Mrs Folbigg?

A. No.

50 Q. On 1 March 1999 Laura Folbigg died; you are aware of that?

A. Yes.

Q. Did you see Mrs Folbigg that day?

55 A. Yes, I did.

Q. Whereabouts did you see her?

A. I saw her in the morning at the gym.

- Q. And had you been at a class at the gym that morning?
A. No, I hadn't.
- 5 Q. Did you go there to meet people or talk to people?
A. Yes, I did.
- 10 Q. And did you see Kathleen after she had finished her class?
A. Yes.
- 15 Q. And did you talk to her then?
A. Only briefly.
- Q. How did she seem, that is how did her mood or demeanour seem when you saw her there?
A. She seemed fine.
- 20 Q. Did you see Laura Folbigg then?
A. Yes.
- Q. And did you see her with her mother?
A. Yes.
- 25 Q. And how did they appear to be getting on with each other that morning?
A. Fine. Same as always.
- 30 Q. Did you see any problems at all between the mother and the child that morning?
A. No, I didn't.
- Q. Now, later on did you hear that Laura had died?
A. Yes, I did.
- 35 Q. Can you tell us approximately when it was that you heard that?
A. I'm not 100 percent sure of the time. It was in the afternoon, after lunch.
- 40 Q. Of the same day?
A. Yes.
- Q. Did you do something when you got that news? Did you go somewhere?
45 A. I went home and called my husband and told him.
- Q. Did you see Mrs Folbigg?
A. Not that day.
- 50 Q. When did you see her?
A. The following day at her house.
- Q. Did you go there for the purpose of consoling her or comforting her?
55 A. Yes.
- Q. And can you describe the way she seemed?
A. She was devastated.

- Q. What was she doing?
A. She was crying.
- 5 Q. And how long did you spend there on that occasion?
A. Maybe an hour.
- Q. And did you see her again after that?
A. Yes, I did.
- 10 Q. Can you tell us how long after that particular day it was?
A. I saw her a couple of times at her house in the week leading up to the funeral.
- 15 Q. So in the week between Laura's death and the funeral you saw her a couple more times at her house?
A. Yes.
- 20 Q. And how did she seem on those times you went back?
A. Always very upset.
- Q. What was she doing?
A. Just crying and - (witness nodded).
- 25 Q. And did you go to the funeral?
A. Yes, I did.
- Q. And did you observe Mrs Folbigg at the funeral?
A. Yes.
- 30 Q. How did she appear to be to you at the funeral?
A. Upset. Crying.
- 35 Q. Now, did you go to what has been described as a wake at the Folbigg household after the funeral?
A. Yes, I did.
- Q. And were there quite a few people there?
A. Yes.
- 40 Q. Friends of both Craig Folbigg and Mrs Folbigg?
A. Yes.
- 45 Q. And how would you generally describe the behaviour of Kathleen Folbigg at that - on that occasion?
A. I don't know. Sad. I don't know. Just, like you would imagine her to be.
- 50 Q. Well--?
A. For a mother who has just lost their child.
- Q. Do we take it from that, that you didn't see anything in her behaviour that you found inappropriate, given the circumstances?
A. No.
- 55 Q. That's right, is it?

A. No. I didn't see anything inappropriate.

Q. Was there any smiling or reminiscing about Laura that you heard?

5 A. Yes, there was.

Q. Who was doing that?

A. Everybody.

10 Q. Were there stories told about things that had happened in Laura's life?

A. Yes.

COOK: Yes, thank you.

15

<CROSS-EXAMINATION

CROWN PROSECUTOR: Q. Mrs Goodchild, did Kathleen confide her feelings to you?

20 A. Sometimes.

Q. Did she ever confide in you that she was not really happy and that she would daydream about starting life on her own?

25 A. No.

Q. Did she ever tell you?

A. No.

30 Q. About that?

A. No.

Q. Thoughts like that?

35 A. No.

Q. Did she ever tell you that she was tired 90 percent of the time?

A. No.

40 Q. Did she ever tell you that she would get periods of great stress?

A. No.

Q. How many times did you go to her house?

45 A. After Laura died?

Q. No, sorry, at all?

A. At all.

50 Q. When Laura was alive, how many times did you go to Kathleen's house?

A. Oh, a lot of times. I couldn't put a number on it.

Q. How many times did she come to your house?

55 A. Oh, quite often.

Q. And would she often confide in you about her?

A. Oh, no, I wouldn't, I wouldn't say that.

Q. Did she ever tell that you her and Craig were having real trouble?

A. No, she didn't.

5

Q. Did she ever tell you that the stress of Laura was showing?

A. No.

10

Q. Did you see any signs of that?

A. No.

Q. So if she had feelings like that was she successfully hiding them from you?

15

COOK: I object to that.

HIS HONOUR: Yes, you need not answer that question, Mrs Goodchild.

20

CROWN PROSECUTOR: I withdraw the question.

ABOVE QUESTION WITHDRAWN

25

Q. Did she ever tell you that she felt as though she was being deprived of her freedom?

A. No, she didn't.

30

Q. Did she ever tell you about disagreements with Craig about whether or not she should be leaving Laura with other people so much?

A. No, she didn't.

35

Q. Did she ever tell you that she had lost it with Laura?

A. No.

Q. Or that she was taking it out on Laura?

A. No.

40

Q. Did she ever tell you that she had snapped at Laura?

A. No, she didn't.

Q. Did she ever tell that you Laura was getting on her nerves?

45

A. No.

Q. Did you ever see her growling at Laura?

A. No.

50

Q. Did she ever tell you that when she lost her temper with Laura that she would growl?

A. No.

55

Q. On the day of Laura's death did she mention anything about Laura having had the shits with her the day before?

A. No. I only spoke to her very briefly that day.

Q. Did she tell you that the previous day that she had

lost it with Laura?

A. No, she didn't.

Q. And had knocked Laura over and screamed at her?

5 A. No.

Q. Did she tell you anything about any event that had happened earlier that morning at home whereby she had pinned Laura's hands to the highchair?

10 A. No, she didn't.

Q. Do you think that you really got to know Kathleen Folbigg?

15 A. Yes, I do.

<NO RE-EXAMINATION

<WITNESS RETIRED AND EXCUSED

20 HIS HONOUR: Yes, Mr Crown?

COOK: If Judy Patterson could be called, your Honour.

<JUDITH ANNE PATTERSON(12.14PM)

25 SWORN AND EXAMINED

HIS HONOUR (To witness): Seat yourself as close as you comfortably can to the microphone and speak more slowly than you normally would.

30

COOK: Q. What is your full name?

A. Judith Anne Patterson.

Q. And are you from the Singleton area?

35 A. Yes, that's right.

Q. And do you know Mrs Kathleen Folbigg?

A. I do.

40 Q. When did you first get to know her?

A. It would have been after Laura was born; probably from the December of '97 onwards.

Q. And whereabouts did you meet her?

45 A. At the Bodyflex gymnasium.

Q. And when you first met her was Laura a little baby?

A. Yes.

50 Q. And were you at the gymnasium for the purpose of doing exercise classes?

A. Yes.

Q. At that stage did you have any children when you first met Laura Folbigg - sorry, Kathleen Folbigg?

55 A. Yes, I did.

Q. How old and how many?

A. He was only a baby in arms. He was born the November of the same year that Laura was born.

5 Q. So he was about three months younger than Laura, is that right?

A. Yes, that's about right.

Q. And how long did you continue going to the gym?

10 A. I was actually a member of the gym before I had my son, and I had him and then I had a few weeks off and then I went back to the gym, and that's when Kathy and I got to know each other.

15 Q. And did you generally see her at morning classes at the gym?

A. I seen her at morning classes. I seen her after classes. I seen her at home.

20 Q. Now, did you continue to see her regularly at the gym until the death of Laura Folbigg in March 1999?

A. Yes.

Q. And did you also see her at other places in that period?

25 A. Yes. Yes, I did.

Q. What other places did you see her?

30 A. There was my home. There was Kathy's home. I seen her at other friends places. There was a group of women that, we got together and had lunch, and the children got together and played, and I seen her at those places.

Q. And did you make some observations about the relationship between Laura and her mother?

35 A. Yes.

Q. And what is your opinion of the relationship?

40 A. I found - a good relationship. It was mother and daughter, and Laura was a happy little girl, and she was lovely, like, they both got along fine.

Q. Did you ever see Kathleen Folbigg show any unusual anger towards her daughter?

45 A. No, not unusual anger, no.

Q. Now, did you ever see the daughter, Laura, showing any fear or sign of being uncomfortable in the company of her mother?

50 A. No.

Q. Now, at the gymnasium when you went there, would one of your children play with Laura?

A. Yes; James would.

55 Q. Is he the one that was born in November 1997?

A. That's right.

Q. Three months younger than Laura?

A. That's right.

Q. And did you live quite close to Mrs Folbigg?

5 A. I did. I lived in Granger Crescent, which is a street which goes around past Millard Place, so basically just around the corner.

Q. And would you drop in casually sometimes?

10 A. That's right, yes.

Q. And would she occasionally drop by your house sometimes?

A. That's exactly - yes, that's right.

15 Q. Sometimes would you mind Laura Folbigg?

A. That's right. Kathy went back to work at Retravisision and she asked me if I would babysit Laura those times, and I did.

20 Q. Can you recall how old Laura was when that started, when you started to babysit her?

A. I don't know exactly, but she was well over 12 months.

Q. Was she still wearing nappies?

25 A. Yes.

Q. Would you sometimes have to change her?

A. Yes.

30 Q. Change her clothes?

A. I had to change her nappy. I had to change clothes, when she spilled juice, that kind of stuff.

Q. Would you often see her without any clothes on?

35 A. I had a few times. Yes.

Q. Would you be close up when you were dressing her, undressing her?

40 A. Oh, yes.

Q. Did you see any marks or anything of that sort on Laura?

A. I never seen anything on Laura's body.

45 Q. Now did you see her after the death of Laura, that is see Kathleen after Laura's death?

A. I did, yes.

Q. Whereabouts did you see her?

50 A. I seen her at her house.

Q. And can you tell us when that was?

A. Yes. That was the Tuesday morning after Laura's death on the Monday.

55

Q. So that is the day after?

A. That's right.

Q. And how long did you spend at the Folbigg house on that day?

5 A. I was there on more than one occasion on that day. I didn't actually stay for any set period of time. I was just there to be supportive and be a friend.

Q. And how would you describe the way that Kathleen Folbigg was behaving when you saw her?

10 A. Oh, she was hysterical.

Q. Can you give us more detail about what she was doing?

15 A. She was crying; shaking when she was crying. Sometimes she could hardly stand up because she was crying that much. She would settle down, like for a little while, like most people do, and then burst into tears, all right. It would only take a thought - and it would only take me saying something about Laura, or her thinking something, and she would be just devastated.

20 Q. And did you see her in the days following?

A. I seen her every day up until the funeral.

Q. Would she cry every day you saw her?

25 A. Oh, yes.

Q. And when you saw her at the funeral, can you describe her behaviour then?

30 A. She looked to me as if she had been sedated and she needed a helping hand to actually walk up the aisle to sit down for the service.

Q. And did you see her later on that day at the wake at the Folbigg household?

35 A. Yes, I did.

Q. How did she seem then?

40 A. She had tears in her eyes. She was talking a little bit more than what she did at the church, which is normal, and, yeah, she was still very upset.

Q. Was there talk about Laura, Laura's life at the wake?

45 A. Yes, there was. We reminisced just about the little things that Laura had done in her short time, and just brought little smiles to our faces that we remembered such silly things at such a time.

COOK: Yes, that is the evidence, your Honour.

<CROSS-EXAMINATION

50

CROWN PROSECUTOR: Q. Mrs Patterson, you got to know Kathleen about December 1997. Laura would have been about four months old then?

A. That's right.

55

Q. Would you often go over to Kathleen's place?

A. I was there quite a bit, yes, if I wasn't--

Q. Did she often come over to your place?

A. Yes, that's right.

5 Q. And when she come over to your place would she sometimes, would Laura sometimes go to sleep at your place?

A. Laura went to sleep at my place only when I babysat her.

10 Q. How often was that?

A. Depending on Kathy's shifts at Retravision, sometimes it was two or three times a week.

15 Q. Whilst Laura was still under 12 months of age did she ever sleep at your place?

A. No, she did not.

20 Q. Were you ever present when she was under 12 months of age and you were at Kathleen's home and Laura was sleeping?

A. No, because Laura's sleep time was usually the same time as my son's.

25 Q. So you never saw her sleeping?

A. No.

Q. Under 12 months of age?

A. No.

30 Q. Is that right?

A. That's right.

35 Q. Did Kathleen Folbigg ever discuss emotion issues with you, feelings and thoughts that she had about important things in her life?

A. No, not really, no. No.

Q. She didn't have that sort of relationship?

40 A. We were friends and we were close, because of our children - we liked the same things - but as far as what was happening, like, in our house, our marriage, whatever, like that, no, that was not discussed. That is our business, no-one else's.

45 Q. You didn't discuss her marriage to Craig at all?

A. No.

Q. Did she discuss with you any frustrations that she had with Laura?

50 A. No.

Q. Did she discuss with you about being stressed about Laura?

A. No.

55

Q. About being constantly tired?

A. No.

Q. About not being able to cope with Laura?

A. No.

5 Q. About any battle of wills?

A. No.

Q. Did she ever tell you that she used to fantasize about leaving?

10

A. Leaving?

Q. Leaving. Leaving her home?

A. Oh, no.

Q. Never told you that?

15

A. No.

Q. Was it a rather superficial sort of friendship that you had with her?

20

A. I wouldn't call it superficial, no.

Q. Did she ever tell you that she was scared of losing Laura?

A. No.

25

CROWN PROSECUTOR: Yes, thank you.

HIS HONOUR: Yes, Mr Cook?

COOK: Nothing arising. May the witness be excused?

30

HIS HONOUR: Mrs Patterson, you may step down and you are excused from further attendance.

WITNESS: Thank you.

35

<WITNESS RETIRED AND EXCUSED

HIS HONOUR: Yes, Mr Zahra?

40

ZAHRA: That is the case for the accused, your Honour.

CLOSE OF CASE FOR THE ACCUSED

45

HIS HONOUR: Now, will there be any other evidence in the case then?

CROWN PROSECUTOR: That's it, your Honour.

NO CASE IN REPLY

50

HIS HONOUR: Well, ladies and gentlemen, we have come to the end of the evidence, and what will happen next is that the Crown Prosecutor will address you. As I indicated to you yesterday, that will not happen before Monday morning. So once again, you will get a long weekend.

55

May I just mention that old topic again to reinforce it in your minds.

5 You have heard all the evidence now, and you have heard
the propositions put to witnesses in cross-examination,
back and forth, by both sides, and you are already aware
of the sort of issues that are arising for your
determination. It is absolutely crucial now that you keep
yourselves in violet from influence from anybody, other
than your fellow jurors, when you are all present in the
juryroom. This is the last time that I shall say this
10 thing to you, that it is very important now.

I wish you all a pleasant weekend, and I look forward to
seeing you again on Monday at 10 o'clock. Will you go with
the sheriff's officer please?
15

IN THE ABSENCE OF THE JURY

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: I think for the purposes of my closing address, there is only one issue that I need to know in terms of what your Honour is intending to say in the summing up.

10 HIS HONOUR: Yes.

CROWN PROSECUTOR: And that is whether your Honour intends to give any directions to the jury in relation to the alternative verdict of manslaughter. We would submit that 15 the occasion has not arisen for such a direction, but we would invite any contrary submission from Mr Zahra.

HIS HONOUR: Yes. I think that I should hear from Mr Zahra about this. Mr Zahra, will you be asking me to lead 20 manslaughter to the jury?

ZAHRA: Yes, your Honour. I think it naturally follows. The Crown, as I understand, are putting their case on two 25 bases. One which includes reckless indifference, so I would assume from that that they are going to tell the jury that there are lesser states. But no doubt there could be a state of mind which is in fact less than reckless indifference, in other words, the probability of death, that that may include an unlawful and dangerous 30 act.

HIS HONOUR: How would - I don't see how that arises.

ZAHRA: If my friend is putting to the jury - and I 35 understand he is you putting the case on the basis of reckless indifference - that that would be on the basis that there was no intention to put forward grievous bodily harm, that there was awareness of the probability of death. It would naturally follow that if there was no 40 intention to kill or cause grievous bodily harm, but there was an intention to commit an unlawful act, then if that state of mind was less than an awareness of the probability of death, then manslaughter would be available for all.

45 I understand from what my friend put in the opening, that in a sense that he will be putting to the jury that there was an intention in fact to control the children, in a sense of putting or smothering the child with an intention 50 to put them to sleep, in other words, to regulate their sleeping, so one would expect that if that is the inference he is seeking to draw, that there may be a number of corresponding inferences that are to be drawn as to the state of mind, one of which is short of the 55 realisation of the probability of death which is the basis of the reckless indifference.

HIS HONOUR: It is difficult, Mr Crown, to draw logical

distinction, given that there is no intent to do really serious injury, which cuts off, if I can put it this way, below the state of mind necessary for reckless indifference.

5

CROWN PROSECUTOR: Your Honour, I will certainly, in making a submission to the jury, say that there are two possible scenarios that I identified in my opening address, namely that she either intended to kill the children or, alternatively, she intended to deliberately smother them into unconsciousness so as to, in effect, put them to sleep.

10

The way that I opened was that if the second factual scenario was found to be the one which the jury accepted, that that was still murder on two bases: First, the cause to deliberately render someone unconscious amounts to an intention to do grievous bodily harm, and also because it would involve, on the Crown allegation, a reckless indifference to human life.

15

20

If one looks only at the issue of reckless indifference to human life then I would have to concede, that particularly with the first child, that there is a very real issue of an awareness that the child may well die, or an awareness of the probability that the child may well die. Because the term "probability" has been held in a Court of Criminal Appeal decision not to mean "more likely than not", in this context but, rather, to mean "may well die", and I can dig up that authority if your Honour wishes me to. It does not mean that the accused has to contemplate that it is more likely that the child may die than the child may not die. If that were the case, then if a person put a single bullet into a six chambered revolver then that wouldn't be murder because there would be less than a 50 percent chance that the person would die.

25

30

35

However, with the subsequent children there is obviously a much stronger evidentiary basis for suggesting that she knew that the children may well die, if in fact what she did was to deliberately render them unconscious. But that of course still leaves the issue of whether the act of deliberately rendering someone unconscious amounts to an intent to do grievous bodily harm.

45

In order to come to my learned friend's position, the jury would have to, firstly, not be satisfied of an intent to kill; secondly, not be satisfied that an intent to render unconscious is an act done with the intention of rendering or of inflicting grievous bodily harm, and then they come to reckless indifference to human life.

50

Now, my inclination at this stage, your Honour, is to - and I must admit that I am thinking on my feet - is to submit that your Honour should act with abundant caution in relation to this request from Mr Zahra, and that if he makes the request, that your Honour should accede to it. Although it is hard to see how they could get over the

55

hurdles to arrive at that last situation where
manslaughter would be an appropriate verdict, so I suppose
what I am saying is, my first inclination is, with some
reluctance, to submit that your Honour should accede to Mr
5 Zahra's request for abundant caution.

HIS HONOUR: I think perhaps I should, Mr Crown. I want to
give it some thought over the weekend, but it would be
better, I think, for the purposes of your preparation, if
10 you were to assume that I shall leave manslaughter on each
of the murder counts. I will give you good notice, I will
give you both good notice if I change my view about that.

CROWN PROSECUTOR: There is one further legal issue.
15

ZAHRA: Can I just say one further thing in relation to
that last matter?

HIS HONOUR: Yes.
20

ZAHRA: That ultimately the Crown's case as to the state
of mind relies on inferences, and I submit that it is very
difficult to cut off some of the available inferences on
the basis of whether the jury are likely to say that it
25 may well be or may well not be. I think that is the
difficulty in the present case. It is a matter for the
jury to draw that inference.

HIS HONOUR: I think that is what I had in mind when I said
30 that I find it difficult to come to a logical position at
which one can draw a line.

ZAHRA: As to where it is cut off, yes.

HIS HONOUR: Yes, Mr Crown?
35

CROWN PROSECUTOR: There is one further issue. I don't
think there is any difference between my friend's
position and mine on this.
40

If the jury came to the conclusion that Patrick's death
was not occasioned by some act of the accused shortly
before his death, or at the time of his death, but, rather
was a consequence of the original ALTE, that your Honour
45 ought to direct the jury that if they are satisfied that
the accused caused his ALTE, that she is then responsible
in law for his death because the death would have been
occasioned as a direct result of the causing of the ALTE.

HIS HONOUR: What happens in that event to the second
50 count? Do you get a conviction on both the second and the
third?

CROWN PROSECUTOR: It is an interesting question. I would
55 have to think about that.

HIS HONOUR: You don't have to answer that now but it is
something that had occurred to me as we have been having

this trial. The date and place of death in count three of course, they are only particulars. No - I will withdraw what I just said. Whatever happens, the date and place must be accurate, as set out in the indictment.

5

CROWN PROSECUTOR: And they are, your Honour, because it is the death that constitutes the crime.

10

HIS HONOUR: Yes. My initial thinking is that if the jury come to the view that - I will withdraw that.

15

If the jury are satisfied beyond reasonable doubt about the elements necessary to prove the second count, but are not satisfied beyond reasonable doubt about the elements necessary to prove the third, something is still left unsaid or unconsidered, what is necessary for the jury to be told in order to find that, they must find - in order to convict the accused on the third count arising out of her actions on the occasion mentioned in the second count?

20

25

CROWN PROSECUTOR: Assuming that it is not duplicitous, what they would be told in relation to the third count, is that if they are satisfied that the actions that the accused caused the death of Patrick, either her original actions when he was four months or her subsequent actions when he was eight months, that they could convict her of the third count. My learned junior has raised the interesting proposition: What if somebody stabs a victim, is convicted of malicious wounding, and then subsequently the person dies, can they be charged with the murder? We would submit they can, because they couldn't have been charged with the murder at the time, prior to the death occurring. So you can have the same actions resulting in conviction for two different offences.

35

40

HIS HONOUR: Yes. That neatly gets around the problem of duplicity in that case, that here you have both the GBH and the death and the possibility of a finding about the one act caused both. It is an interesting question. I want to consider it. I would be grateful for your thoughts on that.

ZAHRA: Yes.

45

HIS HONOUR: There are some transcript corrections. Is it convenient to deal with them now?

50

1. Page 1083 line 16 "the doctor has already explained" to read "Dr Dezordi has already explained it".

2. Page 1176 line 44 "Bristol" to read "Busutill".

55

3. Page 1189 lines 48 and 49 "ZAHRA" to read "COOK".

4. Pages 1190 lines 15 and 14 "ZAHRA" to read "COOK".

HIS HONOUR: Now this may be of some consequence. Page

1208 line 21, I am having trouble with the second word on that line, the word "if".

5 ZAHRA: It should be "it is not". I do not think there is any place for the "if".

10 HIS HONOUR: I think probably what was said was, "the problem, in all these cases, is that it is not specific". I would propose that the word "that" be substituted for the word "if".

5. Page 1208 line 21 the word "if" to read "that".

15 6. Page 1209 line 51 "epileptic epilepsy" to read "epileptic seizure".

7. Page 1210 line 29 the word "stopped" to read "stop".

20 8. Page 1212 line 42 the word "objection" to be deleted.

HIS HONOUR: Another, possibly of more consequence, at page 1215 line 14, the answer in full is "as I said, I would defer to the clinicians on that. Looking at the pathology, I don't think so. We can exclude encephalitis".
25 What I think the answer was is: "I don't think we can exclude encephalitis". So the second and third sentences should be one sentence, and the word "so" should be deleted)

30 10. Page 1215 line 14 answer to read: I don't think we can exclude encephalitis".

35 11. Page 1216 line 42 first sentence of the answer which commences "that is a short watershed type" to read "that is a watershed year".

40 12. Page 1226 line 29 word "diagnosis" to read "diagnose,". Comma to be deleted which follows, and word "be" to be deleted so sentence reads: "I have my own summary of the answer written down 'Would you have diagnosed cause of death as myocarditis but in view of other deaths in the family, would diagnose cause undetermined'".

45 13. Page 1234 line 2 line to be deleted.

14. Page 1240 line 44 the word "Littleton" to read "Hilton's".

50 15. Page page 1241 line 44 after the word "it" the word "you" to be inserted

55 16. Page 1255 line 51 the word "that" first appearing to be deleted and substituted for the word "does".

17. Page 1256 line 58 the word "Macscopy" to read "macroscopically".

18. Page 1257 line 49 the word "of" to be deleted and word "by" to be substituted.

5 CROWN PROSECUTOR: On a completely different matter, your Honour, I have prepared a list of the coincidences that the Crown will be seeking to bring to the jury's attention during the course of submissions. Your Honour, rather than literally dictating these - there are ten points in all -
10 rather than dictating it to them, I would seek to give them a list of coincidences that the Crown relies upon. So perhaps if I might hand up a copy to your Honour and give a copy to my friend to consider.

15 HIS HONOUR: Mr Crown, has the Crown served a tendency notice on the defence which might be broadly described to rely on the tendency of the accused to lose her temper in relevant circumstances? This is something that you are going to be dealing with in your closing address.

20 CROWN PROSECUTOR: Yes.

HIS HONOUR: And it is going to require a direction from me; is that the position?

25 CROWN PROSECUTOR: Yes. Just very broadly, what I propose to say is that the first approach is the coincidence approach, which is that they can look at all of the circumstances of all of the deaths in the ALTE in coming to a conclusion on any particular one of them.

30 The next approach is the tendency approach, that if they are satisfied beyond a reasonable doubt that she has committed even one or even a number of the five incidents they can use that to assist them to come to a conclusion
35 in relation to the others.

The first approach does not have a starting point. It is a consideration of all of the factors together. The second approach requires a starting point on one or more of the
40 charges.

HIS HONOUR: Yes, I follow that. Thank you.

45 Now, how long do you think your closing address will last?

CROWN PROSECUTOR: I think I will be most of Monday.

HIS HONOUR: And, Mr Zahra?

50 ZAHRA: Your Honour, I would have thought about a day, a day and a half.

HIS HONOUR: Well, thank you for your assistance, gentlemen. We will adjourn now until Monday.
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ADJOURNED PART-HEARD TO MONDAY 12 MAY 2003 AT 10AM

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TWENTY-THIRD DAY: MONDAY 12 MAY 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: I think counsel probably already have heard the news by now; one of the jurors is ill and not able to attend today. There is a medical certificate, which I shall have marked 37 for identification.

20 MFI #37 ABOVE IDENTIFIED MEDICAL CERTIFICATE

25 HIS HONOUR: I direct that the medical certificate be sealed in an envelope marked "Confidential. Not to be opened or inspected without the approval of a judge".

30 I can tell counsel and those others present, that the medical certificate, and a message which the sheriff has relayed to me, having spoken to the juror, that all the indications are that the jury will be able to take part in the trial tomorrow and is anxious and intending to do so.

35 So I will ask for the jury to come in now.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Good morning ladies and gentlemen. Once
again, as you are aware, you are one short. The juror who
is absent has been in touch with the sheriff, has seen a
doctor, and a medical certificate has been provided to me.
10 The juror is not well enough to take part in the trial
today, but all the indications are, both from what the
juror has said to the sheriff about the way she feels and
the way she intends, that she will be able to take part in
the trial tomorrow and thereafter; and the medical
15 certificate seems to bear that out. So I have every hope
and expectation that we shall be able to continue the
trial at 10 o'clock tomorrow.

15 As before, as you are aware, if all twelve of you are not
present we cannot go on; it is not appropriate to go on in
the absence of any of you. So that there is nothing for us
20 to do, at least so far as you are concerned today, but to
adjourn the trial until 10 o'clock tomorrow.

So I will ask you to leave now and return in time for a
start at 10 o'clock tomorrow.

25 JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: During the course of my summing up, I am
intending to provide some written directions for the jury,
and some questions for them to work through which will
enable them to apply the law as I give it to them and
produce appropriate verdicts.

10 I have drafts now, and I will hand them down, one copy for
the Crown and one copy for the defence. I won't ask for
your response to them now, though you may respond if you
wish to do so.

15 I will draw your attention to one matter, however, and
that concerns - I think you will probably find the written
directions unremarkable. When it comes to the questions,
however, you will see that I have taken counts 3 and 2 out
of order, so far as the chronology, and so far as the
20 indictment is concerned. I have done that deliberately
because I want to identify the fact, if it be the fact,
that the jury find the accused criminally responsible for
the death of Patrick, but only because of an event that
happened in October 1990.

25 I should say this, Mr Crown. We had a preliminary
discussion about this, without taking the matter to a
conclusion, and I understood your preliminary position on
the matter. I have thought further about it and my view at
30 present, which you will have a chance to talk me out of,
is that if the jury are satisfied beyond reasonable doubt
that the accused smothered Patrick in October but not in
February, then the Crown cannot have two convictions
arising out of that single criminal act. You will see that
35 questions 11 and 12 are designed to identify that
position, if it arises, and to instruct the jury
accordingly. These are all open to discussion and
redrafting, as appropriate. I simply let you have them now
at the earliest possible opportunity.

40 Are there any matters that counsel wish to raise this
morning?

45 ZAHRA: Only the last matter in fact that that was to be
our submission this morning, that your Honour would take
the plea for 2 and 3 around the other way.

HIS HONOUR: It seems the only way to be able to identify
the problem, if the problem exists.

50 ZAHRA: Yes. It may also be helpful if the proceedings go
to another stage, no doubt, to be able to identify whether
they have to discern two separate acts or one.

55 HIS HONOUR: Yes. Anyway, have a look at what I have
drafted, and please feel free to criticise anything I have
said and I will hear anything that counsel want to say
about it, and that does not have to be now. Mr Crown?

CROWN PROSECUTOR: We have reached substantial agreement with the defence in relation to the three documents that we intend to give to the jury to assist them. There are one or two areas that we still have to look up the
5 evidence, but we are in substantial agreement, and we hope to resolve the remaining areas of possible difference between us within the next half hour or so. So we don't anticipate that we will need any ruling from your Honour, except there is one area that my learned junior will
10 address your Honour on.

HIS HONOUR: Yes. Just give me a moment, Madam Crown.

CULVER: The only remaining area of dispute concerns the
15 defence that the Crown adds into the table of medical evidence, reference to exhibit 6. Your Honour may recall that was a letter sent by Dr Ian Wilkinson to Mr and Mrs Folbigg not long after Patrick's death. The Crown's approach to that exhibit--
20

HIS HONOUR: This was a letter dated about October, wasn't it? It was quite a long time, quite a number of months after the death, wasn't it?

CULVER: September 19 of 1991. The Crown's approach to that
25 letter is that the doctor's view in respect of the cause of death of Patrick and the seizures, has now changed to his position that he spoke about in court, and that is the doctor was able to absolutely, and I quote "exclude
30 encephalitis as the cause of Patrick's seizures and ultimate death". It is for that reason that the Crown does not see it as being necessary to refer to exhibit 6 in this table of medical evidence because the doctor's view, as expressed before the jury, was quite clear and has
35 evolved since that letter quite some time ago.

HIS HONOUR: That may not make it inappropriate to include it, however. It depends what you intend the schedule of documents should be, whether it is - do I have my copy
40 here?

CULVER: I can hand your Honour an updated version which takes into account many of the areas discussed between the parties more recently.
45

Your Honour will see on page 2 of that table there is a reference to Patrick's ALTE at .6 in relation to the evidence given by Dr Wilkinson.

The defence have asked, or in the defence letter to the Crown, it is indicated by the defence "it will be recorded that Dr Wilkinson expressed the opinion that (see exhibit
50 6) the changes which were seen were of a type which could occur after seizures and encephalitis". The medical evidence given by Dr Wilkinson to the jury is in
55 accordance with .6, as indicated in that table. The Crown's submission is that it would be confusing to have reference to exhibit 6 because the doctor did not adopt

that letter or that opinion before the jury and in fact was quite clear as to his opinion as set out at .6.

5 HIS HONOUR: So this is intended to be a list of final positions, is it, and nothing else?

CULVER: It is a list of the evidence, your Honour.

10 HIS HONOUR: Then if it is a list of the evidence then the letter should go in.

15 CULVER: Your Honour, with respect, the letter was not adopted by the witness. He admitted that - he accepted that that was a letter sent by him.

20 HIS HONOUR: That is as I understood it. I think the letter should go in, in the schedule, and there can be added to it a remark that Dr Wilkinson did not adopt that position in his oral evidence.

CULVER: Certainly, your Honour.

HIS HONOUR: I do not think that that will confuse at all.

25 I did not raise this matter before the jury, I was feeling a little bit tentative about it. Your indication, Mr Crown, is that you will finish in a day or inside a day?

30 CROWN PROSECUTOR: About a day, a little bit less, a little bit more; it is difficult to tell.

35 HIS HONOUR: So by fairly early on Wednesday morning we will be in a position for the defence address to begin, you said a day and a half?

ZAHRA: I think probably closer to a day than a day and a half.

40 HIS HONOUR: So I shall be summing up this week on those indications but it does not look as though we will be in a position to send the jury out this week, we might be looking towards the jury retiring, say, on Monday.

45 CROWN PROSECUTOR: Yes. Does your Honour intend to sequester the jury?

HIS HONOUR: I had not intended to do that, but I would hear counsel about it, if they had a view about it.

50 CROWN PROSECUTOR: Perhaps we might think about that, your Honour. The other thing is that at some stage it would be appropriate for the accused to go into custody; certainly by the time the jury goes out, maybe even during your Honour's summing up, but that is a matter for your Honour.

55 HIS HONOUR: Yes. I think those points are well taken, Mr Zahra, hearing what you are saying.

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ZAHRA: Yes.

HIS HONOUR: Very well, we will adjourn until 10 o'clock
tomorrow morning.

5

ADJOURNED PART-HEARD TO TUESDAY 13 MAY 2003 AT 10AM

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TWENTY-FOURTH DAY: TUESDAY 13 MAY 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

HIS HONOUR: Are you ready for the jury, Mr Crown?

20 CROWN PROSECUTOR: In relation to the written directions
that your Honour handed out yesterday, your Honour I have
been rather concerned that the difficulty that the
alternative hypothesis for causation of Patrick's death
causes, the reason being this: Despite your Honour's best
endeavours to put it in a form intelligible for the jury,
it leaves this issue: If the alternative causation were
25 left to the jury, strictly speaking if the jury were
satisfied that one of the two acts caused the death of
Patrick, one of the two acts of the accused, that they
were not able to say which, it might have been back in
1990 or it might have been in February '91 but not able to
30 say which, strictly speaking they could still convict her
of murder.

35 That raises untold complications for the grievous bodily
harm charge, because how would they then approach the
grievous bodily harm charge if they're satisfied that she
murdered her son Patrick but they're not able to say which
of the two causations, acts, was the causation, but
they're satisfied it was one of the two.

40 What we elect to do your Honour is in effect abandon the
alternative causation argument and to go to the jury on
the basis that we initially presented it in the opening,
namely, in order to convict the accused of the third
count, the murder count, they would have to be satisfied
45 there was a subsequent act in February 1991 that caused
his death, and to keep completely separately the grievous
bodily harm incident in 1990 with the death in 1991.
That would mean, in effect, if the jury were not satisfied
that she subsequently caused his death she would be
50 entitled to acquittal on murder charge. It alleviates the
untold complications that arise for the jury, the
duplicity issue in particular.

55 HIS HONOUR: You're not asking me for my view on that.
You're announcing. I don't see the problem exists, as you
seem to think or that, if it exists, it is not susceptible
of a solution.

5 CROWN PROSECUTOR: The difficulty is this: If as
individual jurors they're satisfied that one of the two
acts caused the death but not sure which, then they could
still convict her if these instructions went to the jury,
but that raises the difficulty: How do they then approach
the grievous bodily harm charge? Or alternatively, if
some of them feel it was caused by the act in 1990 and the
act in February 1991, could they convict her of the murder
and, if they could, how do they then approach the grievous
10 bodily harm charge?

HIS HONOUR: Question twelve in the draft questions solves
that problem, I think. It identifies the state of affairs
in which - no perhaps it doesn't. It is a matter for you
15 Mr Crown, I'm not satisfied that the problem is incapable
of a solution. I thought it was solved by the draft
questions. If it is not, I think that it may still be
soluble, but if you wish to take a position now of course
you may do that.

20 CROWN PROSECUTOR: It is just I have to take one position
or the other for the purposes of my address, and the way I
intend to present my case to the jury is on the basis that
there was a subsequent act in February 1991 that caused
25 the death, and not to refer to the alternative causation
hypothesis. That doesn't bind your Honour of course, but
that is the way I intend to present my case.

30 HIS HONOUR: Thank you for that indication, Mr Crown. You
have made that clear.

35 CROWN PROSECUTOR: I was going to ask your Honour if the
jury could be asked to bring into court with them all
their folders and papers.

HIS HONOUR: Yes. Officer, could you ask the jury to bring
with them all their papers?

40 CROWN PROSECUTOR: Does your Honour wish me to refer to
transcript references where I have them?

HIS HONOUR: If you are referring to individual pieces of
evidence, would you mind just stating the page and page
45 number?

CROWN PROSECUTOR: I won't be reading out many transcript
references, but I can refer to where that evidence
appears.

50 HIS HONOUR: If it is not inconvenient, would you mind
doing that?

CROWN PROSECUTOR: Yes, your Honour.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Good morning ladies and gentlemen. It is good to see that you're all here and fit and well again.

5

The Crown is going to be addressing you throughout the rest of the day. There is a particular reason why it is desirable for the Crown Prosecutor to finish his closing address to you today. As I always do, I am going to leave it up to counsel to determine for themselves when it is appropriate to have an adjournment during the address, and I so invite counsel. Counsel have forewarned me that it may be desirable to have a shorter morning tea adjournment than usual. So would you please be ready for that if it happens, and it is possible if the Crown can finish today; but that in order to do so it is desirable to sit a few minutes after four o'clock, I might ask you whether you would be prepared to do that? That can await developments later in the day. Yes, Mr Crown?

20

CROWN PROSECUTOR: Ladies and gentlemen, it is now my function to give you the closing address on behalf of the of the Crown. I will start by burdening you with even more paper. I have a copy of the exhibit list, which hopefully will assist you in going through the exhibits which will all be before you in the jury room. I have a copy for each juror and a copy to your Honour

25

HIS HONOUR: I think these documents better all be marked exhibit MFI 38.

30

MFI #38 EXHIBIT LIST

35

(MFI 38 distributed amongst jury and handed to his Honour.)

40

CROWN PROSECUTOR: Ladies and gentlemen, what I hope to do during this address is not to start at the beginning of the evidence and go through summarising it until the end of the evidence. Rather, what I would like to do is try and identify for you what the issues are that arise in the trial, and to collect the evidence from a whole lot of the sources on those issues. So hopefully it will be of some assistance to you in coming to your conclusions.

45

50

The fact of the matter is that there is a lot of the evidence in this case that is not in issue. So far as the circumstances of each child's death is concerned, that is the surrounding circumstances other than the actual cause of death itself, a lot of the evidence is not in issue, except for the circumstances surrounding Sarah's death. You will recall there was dispute between the Crown and defence as to whether or not, when Craig woke up about 1.10, if Kathleen and Sarah were in the bedroom or not. That is very much in issue. Other than that, the surrounding circumstances of the deaths are not really in

55

issue. The authenticity of the diaries is not in issue. And as surprising as that might sound to you, there is actually very little difference between the Crown medical witnesses and the defence medical witnesses. It is almost
5 a matter of difference in emphasis more than a difference in their views, but I will come to that a little bit later.

10 The Crown case in essence consists of four separate areas of evidence. Firstly, there is the evidence about the circumstances of each child's death, and predominantly that evidence comes from three sources: From Craig Folbigg; from the ambulance centres; and from the
15 accused's record of interview; and I suppose also her two earlier statements or her earlier statement and earlier police statement. That is the first area of evidence. The circumstances of each child's death.

20 The second area of evidence is what we rather loosely call the coincidence evidence, but really it is evidence showing the similarities between the four deaths and the ALTE to prove this was not mere coincidence; that there is some pattern which indicates a common element and common
25 cause for each of these five events. We will loosely call it coincidence evidence, because that is what we lawyers call it.

30 The third area of evidence is the medical evidence which consists of doctors who saw these children while they were alive; doctors who saw these children when they were admitted very shortly after their deaths or ALTE; the post-mortem doctors, and also the overview of medical
35 evidence, those doctors or experts who reviewed all the death and gave opinions about each of them.

40 Finally, the fourth area of the evidence are the diaries. Now, what I would like to do now is to consider each of these five events, looking at the first second and third category of evidence, leaving the diaries until last, because the diaries are really in a category of their own. I will in part refer to some few select extracts from the
45 diaries where they are particularly relevant to a particular child's cause of death, or a particular piece of evidence relating to that child. By and large, I am going to consider all the other evidence and then come to the diaries.

50 I would like to start with Caleb. We know from the evidence that Caleb was a good sleeper a good eater. Born healthy. He had a very healthy 19 days of his life, except for some mild stridor, stridor being a floppy larynx.

55 His parents noticed he had difficulty, both in breathing and drinking at the same time. They took him to see Dr Springthorpe. Of course he was the first child. You might think a parent with their first child, they are a little bit more anxious and concerned about their first because it is the first time - and they took their child to see Dr

Springthorpe. He, you might think, is a most eminent paediatrician, the kind of paediatrician you would take really complex medical issues to. Here he was faced with the most simple of problems of stridor. Now, this is a man
5 who has been a consultant paediatrician for, I do not know how many years, who set up the Child Development Unit at the Royal Newcastle Hospital, and had been the head of that unit for donkey's years - who was faced with what you must think was a very, very minor medical complaint. He
10 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. And he said
15 this: That it was nothing of the severity that would cause complete collapse of the airways. It was just noisy breathing. It was "very, very mild". In his opinion Caleb's stridor had nothing to do with his death.

20 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 the post-mortem to look for some sort of webs of cysts in the vicinity of the airways that may have caused an obstruction. We know from
25 Dr Cummings 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.

30 Dr Springthorpe also told you that it is possible to smother a young baby and leave no external signs at all - "a pillow over the face could certainly have caused this child's death and not leave any marks whatsoever. It is possible that a hand could also be used". He also gave
35 evidence that over the years people have looked for absolute signs that baby's have died from SIDS, and although there have been very theories floated, none of them actually stood up to the test of time. At this stage he explained to you that SIDS is a cause of death unknown
40 origins.

Now, there are lots and lots of doctors who have subsequently given evidence about SIDS. I will come to that a little later in my address. But Dr Cummings was
45 faced with the first child to die in a family. He was faced with the death of a child that was a little young for SIDS, at 19 days, but in essence unable to find the cause of death. You might think a diagnosis for SIDS that said 'I do not know why this child died. I can't tell,
50 because I have been unable to find any cause of death.' Numerous doctors came and gave evidence and explained to you that that is what SIDS means. SIDS means: We don't have any suspicious circumstances. We don't have any doubts about this case, but we cannot find a cause of
55 death. So we write it down as "SIDS".

Undetermined" is a little bit different, because "undetermined" means we can't find a cause of death, but

we cannot exclude some suspicions that we might have, and it might be a natural death or unnatural death. We don't know. "Natural death" of course means death from disease or illness. Unnatural death really means homicide or
5 accident. With Caleb's case, we are reduced to the extent of saying there was no known cause of death found.

On the night of his death in February 1989 Caleb was put to sleep at about 8pm. He was seen about 10 or 10.30 by
10 his parents. The next thing that Craig knew he was woken to Kathleen screaming "My baby, there is something wrong with my baby". Kath was standing in Caleb's room at the end of the bassinet screaming. Caleb was still in his bunny rug, in his bassinet on his back. He was warm to the
15 touch. Craig told us he was still warm to touch, and one of the ambulance centres told us that he was still warm to touch. The other ambulance officer wrote down in his report that he was not warm to the touch, that he was cold. Our submission to you would be that's clearly wrong.
20 Caleb was still warm. His father noticed it and the main ambulance officers noticed it. The ambulance call was in fact made at 2.55, that is when the callout was. We know that from the ambulance report that you have a copy of.

Now, there is an immediate question that arises about the circumstances of discovery of Caleb, the deceased. I want to you place yourselves in the position where you have come across your child suddenly and unexpectedly at night and you think that child is not breathing. It might be
30 difficult for some of you - you look too young to be parents - but it is not too hard to imagine what it would be like with your first child. You come across that child in the middle of the night and you think that the child has stopped breathing. What would be the first thing that
35 you would do - the very, very first thing that you would do? My submission to you is that the very first thing you would do, is you would lift that child up you would perhaps shake the child or tap the child on the face, but you would lift it up you would cradle that child. You
40 would not leave the child lying in the bed, or the bassinet. Our submission to you is that this child was left lying in its bed by his mother, the accused, because she had caused his death and she was physically unable to touch that child and lift him up because she had just
45 smothered him.

Let us have a look at the accused's account of what happened that night. The first account is exhibit T. Exhibit T is a statement by a police officer who says that
50 on the very day of Caleb's death he spoke to the mother. The mother stated that when she had fed the child about 1am the child was apparently in good health. About 2.50am she checked the child, which is the usual practice; she found the child to be cold and apparently dead. She called
55 her husband, who commenced CPR, and the mother called the ambulance. Exhibit AK is the accused's own statement to the police about this, also it is updated, but you might think it is from the very day of Caleb's death. She says

this:

5 "On 2 February 1989 I gave birth to Caleb this morning at around 1am. I fed Caleb and then put him to bed about 2.50. I checked him. I usually do this a few times during the night. However this time I found him to be cold and I called my husband and we then called the ambulance."

10

Now, you also have in evidence her interview, her lengthy videoed interview, which was conducted by Detective Sergeant Ryan back in 1999, which of course is ten years later. Let us look at what she says to Detective Sergeant Ryan. I will refer to the question numbers. Feel free, if you want to write them down and look at them at your leisure: "Question 37 - this on page 6 -

15

20 "All I remember is walking in and just doing a check like I used to. He had had his early morning feed. You know, he used to wake up two or three times even at that age. I put him back to bed and walked in. I can't tell what time, but it was dark. So I am assuming it was early
25 in the morning, just to check on him, and I used to always put my hand on them to make sure they are covered or to check they're all right, and he just didn't seem to be moving. Didn't stir. Didn't do anything. So I sort of flicked on a
30 light and noticed he wasn't breathing, and then it was just panic from there I think."

Then go to question 4:

35

"Q. Can you tell me about the early morning feed?

A. ...I just went and laid him down and covered him up."

40

Then question 92.:

"What happened after?

A. Well, actually ...

45

Q. And you placed him in the bassinet?

A. Yep."

Then later, the next question:

50

"Q. He was on his back?

A. ...go back to bed, so."

Then we go to question 103:

55

"Q. What happened then?

A. ...rushed over to see why."

Ladies and gentlemen, that is the verse that she gave Sergeant Ryan.

5 We then come to exhibit L. Exhibit L is the diary pages for the month of February 1989, and I think you should have a copy of the entry for Sunday 19 February 1989, which is the night that Caleb died, going into the morning of the 20th.

10 Now, let us have a look at what she wrote. What she wrote was this: 120 mls. Wind okay. 1 o'clock. Put back to sleep? 1.30: A little bit restless" In the margin is written what looks like "wind", and then 2 o'clock:
15 "Finally asleep!" Exclamation mark. Exclamation mark. The word "asleep" looks at though she is virtually comatose. So what this diary demonstrates is that this child hadn't just had a normal feed and gone back to sleep and she just happened to wake up a little while later. This child had been up from 12 until 2 or thereabouts. For nearly two
20 hours the child had been up.

She says that during the time she was up feeding him, she went to the toilet. Why on earth would she wake up 50
25 minutes later to go to the toilet again? It just doesn't make sense. The only conclusion that you can come to is that shortly before Caleb's death Kathy Folbigg had been kept awake by him for about two hours. There is only one reason why she would get up again 50 minutes later, and that was if he cried. We submit to you when he cried
30 again, in her exasperation, in her stressed state, desperate for sleep, she smothered him.

Now, we now go to questions and answers in her record of
35 interview about this particular 1989 diary question 424, after it has been read to her:

"Q. Can you tell me why 'asleep' seems to be scrawled like it is?

40 A. ...by the looks of that he has been restless and windy, and I got him to go to sleep and thought 'You beauty. He is now asleep and I can go to bed myself and start again' sort of thing."

45 Then we go to 426. She said this:

"It was 1 o'clock. I'm assuming by 2 o'clock I would have been a total mess...that I just would have gone to bed."

50 Ladies and gentlemen, this is the night her first born son died. She describes it as just a normal usual feed where he has taken his feed and just drifted off to sleep and gone back to bed. She has gone to the toilet, and it has
55 been an uneventful night. Yet here she is being presented with this diary entry and saying that "phew", she has been able to finally get to sleep "you beauty", and by 2 o'clock she was a total mess. This of course is a

completely different sort of account to the account she gave to the police when interviewed in 1989, and different to the account she gave Sergeant Bernie Ryan when he first asked her about Caleb's death. This is a woman who was
5 desperate for sleep and highly stressed when it was denied to her. How could she forget the hours of exasperation? How could she forget by 2am she was a total mess? Why did she go to the toilet again? These are all questions which I would ask you to bear in mind when you consider Caleb's
10 death. I don't know what my learned friend, Mr Zahra, is going to say to you about Caleb's death or about any of the deaths or the ALTE, but I would ask you to keep these questions in mind during the course of his address as well. Why did she go to the toilet again? Why did she
15 wake up at all if she was so relieved to be able to go back to sleep at 2am? Why didn't she lift this little baby up if she thought that he was not breathing? How could she be sure that he was not just asleep, particularly being an inexperienced first-time parent that she was?

20 Then, ladies and gentlemen, we come to one diary entry I would like to refer you to in my submission which is particularly appropriate when you consider Caleb's death, and it is an entry in the diary for 1990 which, it is a
25 book that we have only drawn your attention to one particular entry, the entry for Patrick's date of birth. What it reads is this - this is the day her second born child came into this world. This is a day, you might think, would have been cause for such happiness, a
30 celebration, a day you might have thought after the death of her first child she might have had some joy, that she had been granted the privilege of a second child. This is the day of Patrick's birth the following year. It is in exhibit G. You have a copy of this. She wrote this in her
35 handwriting:

"This is the day that Patrick Allen David Folbigg was born. I had mixed feelings this day
40 whether or not I was going to cope as a mother or whether I was going to get stressed out like I did last time. I often regret Caleb and Patrick, only because your life changes so much, and maybe I'm not a person that likes change, but we will see."

45 So here she was on the day of her second child's birth, expressing mixed feelings about the birth, mixed feelings about whether or not she was going to be able to cope, or whether she was going to get stressed out like she did
50 last time. So one asks the inevitable question: When was it she got stressed out last time? What was it that she did when she got stressed out last time? Why was it such an overwhelming event that it caused her, on the birth date of her second child, to think back to it and to
55 wonder whether or not it was going to happen again? What else could it be other than that she was responsible for Caleb's death; she was musing on whether or not she was going to get stressed out with this second child like she

had with the first, causing his death, as she had caused the first? Ladies and gentlemen, in conclusion we submit to you that Kathleen Folbigg knew perfectly well that Caleb was not just asleep or holding his breath, because she had smothered him.

I would also like to remind you about some evidence concerning Caleb's post-mortem, that some testing was done on some lung tissue and a substance called haemosiderin was found. Haemosiderin according to the medical evidence, is a sign of a previous asphyxiating event causing bleeding into the lungs. Now, it can be caused by other causes. It is caused - basically it is a sign of old bleeding in the lungs, but it is consistent with previous asphyxiating events. What I would like to do, to make all the medical evidence a little bit easier for you, is to give you a summary of the prosecution medical evidence for each of these children, and I have a copy for each juror and a copy for your Honour.

HIS HONOUR: The summary of prosecution medical evidence will be marked 39 for identification.

MFI #39 SUMMARY OF PROSECUTION EVIDENCE

(MFI 39 distributed.)

CROWN PROSECUTOR: Now, ladies and gentlemen, what I suggest to you is that you read this at your leisure and in the privacy of the jury room, but by giving you this, it is going to mean there is a lot of medical evidence that I can just very briefly refer to and suggest that you refer to this summary.

The summary of course is merely that. It is not evidence in itself. It is merely to remind you about the evidence that was given.

Now, you will see there that there is a summary of all the expressions of opinion about Caleb's floppy larynx. You will see under .8. Professor Berry said the haemosiderin in Caleb lungs indicates there may have been a previous episode of asphyxia. It is an unusual finding in SIDS cases, and Professor Berry would not say that SIDS caused Caleb's death. And you will see that there are a number of doctors who have said that the findings from Caleb's post-mortem examination were consistent with him having been deliberately suffocated. A lot of them explained how you would not really expect to see signs of smothering, and a number of doctors said their finding, if they had done the post-mortem, would have been undetermined as opposed to SIDS. Dr Beal, for instance, at .6 said, looking at Caleb's death in isolation of the other deaths, Dr Beal could have diagnosed the caused of the death at SIDS, with the proviso "Caleb was...to be the cause of death."

You might have noticed that all of the overview doctors

which, in the Crown case, was: Dr Cala in relation to everybody, except Laura; Dr Berry, Dr Herdson, and Dr Beal and the defence case, the overview expert, or Professor Byard, so the five overview experts who have given
5 evidence in this case. You would have noticed, I am sure, that each of them was asked to give evidence about a diagnoses for each child, looked at in isolation. It might have surprised you why didn't anybody ask these doctors to look at the overview of all of them together, at the
10 significance of so many deaths in the one family? His Honour will explain to you that the rules of evidence required the doctor to look only at each individual case. For reasons I won't go into, they are technical legal reasons you do not need to be bothered with. You, as
15 jurors, have the task of looking at the overview. That is not for some expert to do, but you as jurors, because what you are being asked to look at is: Look at the combination of events, not as experts, but just as
20 ordinary members of the community, because you are looking at logic arguments and looking at chances, looking at possibilities; you are looking at things that you do not need and expert for. So because the doctors were asked to look at each child in isolation does not mean that you have to do that. In fact you are required to look at all
25 of them. Anyway, that is all I wish to say in relation to Caleb's death.

Let us now move to Patrick's ALTE. Again, born a healthy child. You will recall that Craig Folbigg gave evidence
30 that he stayed home for the first three months of Patrick's life. So that he could contribute to those, that early period of Patrick's life, assist Kathleen and enjoy having a child after the death of his first child.

Patrick had no health concerns whatsoever. In fact Kathleen told the ambulance officer that he was perfectly healthy. Dr Marley, the local GP, seen Patrick on five
35 occasions. He had the usual sorts of the coughs and colds you would expect any child to have. It was only three days after Craig went back to work that the ALTE happened; just three days. I would be submitting to you later on there is some significance in that. What happened is that Patrick was put into his cot at night to go to sleep. He was seen
40 by his parents about 10.30 pm, sorry, I might pause there: I have another document I will burden you with which will hopefully assist you. It is a chronology for each of the children on times of day of death or just before the day of death, a chronology that has the different times. Might I give you each a copy of that?
45

50

(Handed to jury and his Honour and the court)

Again, I don't suggest you read that in detail now but it is something that might assist you in the jury room
55 because it sets out the times different events are said to have happened

MFI 40 CHRONOLOGY

.13/05/03

1316

5 CROWN PROSECUTOR: Patrick, if you would like to go to the
page, have a quick look at the chronology. You will see
that the first page relates to Caleb. It has the times on
it that I have already referred to. On the left-hand side
10 it has the time; middle it has the event, on the
right-hand side it has the source of that information. The
second page relates to Patrick's ALTE. On page two of the
chronology, 8.30 he was put in his cot, about 10.30 he was
15 seen in his cot. He was on his back with a sheet and a
blanket over him.

Now, I said to you that there is some significance in the
15 fact that this ALTE happened just three days after Craig
went back to work. I would like to read to you an entry
from Kathleen's second diary, that is the diary that was
found at her former home after her interview in 1989 and
it is an entry you might like to make a note, for
20 20/9/1997, it is exhibit J. I will refer you to the third
paragraph. One has to remember that this is written many
years after Patrick's death but in my submission it is of
significance to Patrick's ALTE and in fact it happened
three days after Craig had gone back to work. What she
25 wrote later was this, talking about Craig:

25 "How dare he complain to me about lack of sleep.
What the fuck would he know? I think he will
have to sleep in the other room just so he's not
30 disturbed, selfish prick. Well, now I know
where I stand. Craig is refusing to help and
hasn't even intended to in any way. Just wants
me to bear all the stress so he can keep selling
his cars and making money. I suppose the stress
of having to provide for us is real but it's
35 nothing compared to this."

Now, at about 12 or 1 o'clock on the night of the ALTE
Kathleen fed Patrick. She told Dr Dezordi who was the
40 doctor in the emergency section of the hospital, that at
about 3 am she heard Patrick coughing, "but I went back to
sleep". And at about 4.30 am she heard him gasping. He
was blue, lifeless, floppy, making minimal respiratory
effort and he also made a high pitched cry. That is page
45 447.

High pitched cry. To make a high pitched cry you might
think he must have had some air in his lungs when he made
that high pitched cry. Craig says in the early hours of
the morning he was awoken to screams again. Kathy was
50 standing at the end of the cot, screaming. Patrick's
covers were at the end of the bed and Craig heard her make
a sound. I will attempt to replicate it; this is my
memory but it is of course your memory that is important.
But he made a sound like - (Crown Prosecutor indicated
55 audible sound three times.)

Again, ladies and gentlemen why would this mother not pick
up the child? He was warm to the touch. He was still

making noises when his father got into the room. He had some respiratory effort. Why would she not even lift him up? How could she know whether or not he was dead, whether or not he was breathing? He must have stopped breathing properly just minutes before because he was still, he was able to be revived by the ambulance officers. In order to be able to be revived it must have been in that very short period between unconsciousness and death, which is just a matter of a few minutes. If she says that she heard a high pitched cry, he must have been still breathing then. He didn't regain consciousness for hours. The ambulance was called at 4.30 and when he had the respirator put on by the ambulance officers he immediately revived, had revived further at the hospital when he got even more oxygen. Why would she not pick him up?

Now, he was treated at the hospital by Dr Dezordi who is now a neonatologist, a specialist in young babies and doctor Ian Wilkinson you might think is the most eminent Paediatric neurologist. That is, he studies or he works in the area of neurology which is brain and nervous system, especially for children. That is his area. And he has, he told you what his qualifications were. You might think he was a man of incredible expertise. What he found is that Patrick had stopped breathing. He subsequently, some days later, two or three days later, developed seizures two or three days after his hospital admission. Numerous tests were done including cat scans which showed changes in the back part of his brain. On arrival at the hospital an EEG, not ECG which is on the heart, but EEG on the brain. The EEG when he arrived was perfectly normal. A subsequent EEG a few days later showed increasing abnormalities progressive abnormalities and an extremely exhaustive array of testing was done. No inherited disease was found. It was never determined what had caused Patrick to suffer the extensive brain damage that he did suffer. The damage was consistent to use Dr Wilkinson's words, "absolutely consistent" with him having suffered from a catastrophic asphyxiating event from unknown causes. And he explained why the kind of damage that was seen in Patrick's brain was the kind of damage you get in drowning cases where the lungs are starved of oxygen or in suffocation. The part of the brain is one of the first to go and that was the area of Patrick that had gone, that's why he became blind.

Dr Wilkinson explained why it was that the he was epileptic seizures only started two or three days later. Because it was only after several days that you had the swelling and scarring from this dead brain tissue that caused the epileptic seizures to start: He was never able to determine what had caused the original starvation from oxygen. He excluded encephalitis. He did a vast array of tests for encephalitis because one of the very rare but possible causes of such brain damage is encephalitis, caused by herpes simplex virus or some other virus. He didn't have meningitis. Extensive testing they did excluded any form an encephalitis. They did lumbar

punctures extensively, didn't have a fever. When he came in they did blood tests and scans and they did EEG's. All of that enabled Dr Wilkinson to say this child did not have encephalitis. We were not able to determine what it was that had caused his brain damage. Of course Dr Wilkinson again saw Patrick when Patrick died. But I'll come to that in a little while.

We go to doctor Dezordi's evidence. Doctor Dezordi's evidence was that when oxygen was being administered in the hospital, the doctor noticed that Patrick was improving. He actually came to the conclusion that Patrick was improving without the need for oxygen. This lead Dr Dezordi to conclude that Patrick did not have any pathology, that means anything wrong with his lungs, chest or airways. Neurologically when he was admitted to the emergency section he appeared to be a normal child, nothing was obstructing his airway, no sign of longterm or general or acute illness. There was no evidence of trauma, no sign of meningitis. Blood tests disproved any severe infection.

His neurological examination on the first day was normal. No signs of pneumonia. Lots of tests for viruses were done which were all negative. However, Patrick had a high level of glucose in his urine which suggested a fairly catastrophic event such as an asphyxiating event or a prolonged seizure. Dr Dezordi and Wilkinson were separately trying to work out what it was this boy had and explored all types of possibilities to work out what he might have had and try and teeth out what he might have had, but in the end they were not able to determine what he had.

Again I will refer you ladies and gentlemen to the summary of the medical evidence in the prosecution case relating to Patrick's ALTE. You will see there that not only Dr Wilkinson and Dezordi referred to but the other doctors, Professor Herdson, Professor Beal, Dr Beal and Professor Berry were all of the view, and I am referring to item four; that it was very unlikely that the ALTE was caused by an initial seizure because one would expect a history of epilepsy. Patrick did not have a history of epilepsy. The last sentence, "it would be extraordinary if a first epileptic seizure coming out of the blue in an otherwise fit child caused the kind of brain damage which Patrick had suffered. The medical findings were consistent with Patrick's ALTE being caused by an asphyxiating event which resulted in damage to his brain causing epilepsy."

Over the page all the findings were consistent with Patrick having been deliberately smothered and that was attested to by doctor Dezordi, Wilkinson, Carla, Kahn, Herdson, Berry and Beal. In essence what they were saying was this: The defence suggesting to the Crown's experts that maybe this brain damage was caused by a first epileptic fit. They all said you would not expect a first epileptic fit to cause brain damage of this kind. That is

not, it would be extraordinary for that to happen. That is the effect of their evidence.

5 Let us look at what the accused said about Patrick's
ALTE. We go now to her interview in 1999 with Detective
Sergeant Ryan. And again, she happened to be going to the
toilet. This is not a case where she said, I heard him
10 gasping in his bedroom and I ran out to see what was wrong
with him. No, no. She happened to be going to the toilet,
just like he was with Caleb. Isn't it a coincidence,
ladies and gentlemen, or is it a coincidence, that in the
two minutes or so between unconsciousness and death that
Patrick was in, during his ALTE, that she just happened to
15 get up to go to the toilet and happened to go into his
room and discover him and raise the alarm? Realise what
was happening and raise the alarm? Let us look at question
149 in her interview. "At that stage it was close to only
waking up, sort of once a night." This is Patrick.

20 "So he used to feed around at twelve, one
o'clock in the morning mark. I had done that,
if I am remembering correctly, I had done that
feed and everything went well. He went back to
bed and so did I. Again it was a case of me
25 finding myself awake for some reason or other
and I've gotten up and thought, well, I need to
go to the toilet. I'll go now and I'll check him
on the way past because I had to go past to get
to the toilet, when I stopped at the door to
30 check on him, because again I passed his bed.
He was sleeping in across the door, so easy
access. I sort of listening for breathing and
noticed it was labored. It was as if he was
trying very hard to draw a breath and it was, so
35 I just immediately flung on a light and we've
gone into action from there. He was lethargic,
not really responsive. The eyes were shut and
he was just really trying to take a breath."

40 Again I ask rhetorically; why not lift him up? How could
any parent not lift up a child in those circumstances
unless they were responsible for the condition that the
child was in? We then go to question 172. "Was there
anything unusual about that feeding? No, no. It went
45 well. He was quite... An hour that particular morning."

And I submit to you ladies and gentlemen that that was why
she attempted to smother him that morning. She was
exasperated with this child, lost her temper with this
50 child who would not go to sleep when he was meant to go to
sleep. She was going to get him to go to sleep if it was
the last thing she did. She just totally lost her cool,
lost her control and attempted to smother him.

55 Question 186 she says "he used to only take 15, 20 minutes
to feed... And I could go back to bed."

In other words, I was entitled to my sleep, I couldn't go

to sleep if they were awake, so they had to go to sleep. Then she said she was up again at three o'clock, told Dr Dezordi that. Then we go to question 189. She says again, "I didn't look at the clock, I couldn't tell you
5 what time it was. I decided I am awake, I may as well get up and go to the toilet...he didn't sound like he was breathing properly."

10 She admitted question 445. That it may well have been Craig that picked Patrick up. It was put to her in a question that Craig had said that he would pick Patrick up and she agreed that that may have been the case.

15 Ladies and gentlemen, what a coincidence she happened to wake up in the approximate two minutes between the cessation of breathing and death. Between her hearing a high pitched cry and the few seconds later that it took for Craig to get into that room, he was unconscious and gurgling for breath. Between, say, one am the previous
20 feed and six am the next morning, there were three hundred minutes; that she happened to get up to go to the toilet in two minutes or so that he was gasping for air. Is that mere coincidence? The Crown says it's not. If you combine that with the fact that Craig had only just gone back to
25 work three days earlier, if you combine it with the fact that she failed to pick up Patrick, there is only one conclusion that you could reasonably come to, we submit, that is that she caused the acute life threatening event that Patrick suffered when he was four months old.

30 I am now, going to proceed to Patrick's death. Perhaps that might be a suitable time, your Honour.

35 HIS HONOUR: We will take the morning adjournment. We will resume at 11.30, ladies and gentlemen.

RESUMPTION

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Ladies and gentlemen, moving now to
Patrick's death. Apart from the fact that Patrick had
brain damage, which had caused blindness and epilepsy, in
all other respects Patrick remained a perfectly healthy
10 child. Dr Marley saw him a number of times and he had no
particular problems, apart from his brain damage.

I think that Dr Cooper also gave evidence that he did a
sleep study on Patrick which was normal.

15 The accused, Kathleen Folbigg, was very stressed by the
pressure of looking after this disabled child. The
evidence that Craig gave was that she would growl and get
angry every day, and he gave you a demonstration of what
her growl was like. It was in effect her way of suddenly
20 venting a very high level of anger, frustration and
stress.

It was after Patrick's ALTE and before Patrick's death
that Craig went, without permission, and read an entry in
25 Kathleen's diary and that entry told him that she was
intending to leave the home, not only to leave him, but to
leave Patrick as well; and the evidence which he gave
about that entry is as follows - and before I refer to it,
we do not have that diary - that was one of the diaries
30 which presumably she destroyed on Mother's Day in 1999, I
presume when she through them all out - but we have
Craig's version of what he read in that diary and his
version was this. (Page 113): I read one entry where
35 Kathy told her diary that she wasn't coping. It was all
too much drama that I, me and Pat, would be better off
without her, that he could bring Pat up with my family and
do it better than she could and that she was going to work
out some means and ways that she could leave and leave me
40 with Pat".

Craig told his sister, Carol Newitt and his sister, Carol
and Carol's husband came to see Kathleen to discuss it
with her and of course Craig also discussed it with her.

45 Now, Carol Newitt gave evidence that this was what Kathy
told her and I quote from page 893: "She didn't think that
she could stay with Craig and look after Pat, and she
thought at the time that they might be better off if she
50 did leave."

Ladies and gentlemen, why would a child be better off
without its mother? Why would a child like Patrick, who
was blind and suffering from epilepsy, be better off
without his mother? Why would she have intended to leave,
55 not just Craig, with whom she was undoubtedly having
marital problems, but her son, Patrick as well? And the
submission that I make to you is this; that this was a
desperate cry from Kathleen for somebody to remove this

child from her before she killed it, as she had killed the first one. She realised that this child was at risk. This child had already had an ALTE which she had caused. She realised that she was highly likely to do further injury to this child and decided that this child would be better off without her, because Craig and Carol knew it, with the best of intentions, thought that this little baby was going to be better off with his mother and they convinced her to stay. The question that I just asked of why would a child be better off without its mum is probably best answered by reference to one of the diary entries, and it is a diary entry for 4 December 1996, so it is from the first diary which you have in evidence before you and which you have a copy of. The second sentence of that entry reads as follows - and this of course from some years later, but in my submission to you, it bears a lot of similarity to the feelings that she must have had when she was thinking of leaving Patrick -

20 "I have already decided, if I get any feelings of jealousy or anger too much I will leave Craig and baby rather than answer being as before."

25 So here she is in 1996 - what is it, four - five, six years later - saying yet again that if she gets these feelings of jealousy or anger, that she will leave Craig and the baby rather than have another death, and our submission to you is that that was exactly the same feeling that she had when she made the entry in the diary that we don't have, that she was thinking of leaving Craig and the baby. Let us now go to the day of Patrick's death.

30 On that day, Craig had left for work at about 7.30. You should see this in the chronology. At about 10am he got a call from Kathleen. She said "it's happened again. I need you to come home. He got home in something like five to seven minutes. And at that time Patrick was still warm to the touch." Kathleen also called Carol at Carol's at about 10. Carol went straight over from her home and she got there in something like five and eight minutes. Carol was the first one to arrive.

35 When she entered the house Kathleen was on the lounge, directly in front of the front door, with her elbows on her knees, her head down and crying. Patrick was still in his cot. The side of it was up. Carol went in and was going to pick him up, went to pick him up and Kathleen said "no, don't." Which Carol took at the time to mean "he's already dead. Don't pick him up".

40 Now, ladies and gentlemen, how could she possibly know that this child was already dead beyond reviving, when previously he had an ALTE where he had been revived by the ambulance officers? Here she is again, yet again, failing to pick him up, failing to render any assistance to him, and in fact discouraging Carol Newitt from rendering any assistance to him. Why would she possibly, what reason would she have for stopping Carol Newitt from attempting

to render assistance to this child, unless she knew that this child was already dead and he was dead because she had caused his death by smothering him? The only explanation for all of that is that she was responsible for his death.

The ambulance call was booked at 10.03. At 10.10 they arrived at the house. Patrick was still warm to the touch. By that stage Craig had already arrived at the home, done what any parent would do - grabbed the child, took the child to a suitable place in the house and attempted to render assistance to him. And the ambulance officers came - one of the officers thought that either he or she saw, like, a last expiry of air, it was consistent with a last expiry of air just before death, but it was also consistent with air that had been put in during expiration attempts, resuscitation attempts by Craig, being expired so there is really not much significance that we can attach to that.

Now, at the hospital, ladies and gentlemen, Patrick was still warm, his colour was good but despite that, Dr Christopher Walker, who was the doctor who attended to him, said that he did not respond to resuscitation. Dr Walker was the Emergency Department Director. He could find no cause for Patrick's sudden arrest.

At the hospital Dr Walker said that no cause could be found for, in essence what was a cardiac arrest, that asphyxiation can cause cardiac arrest in a child; that there was no definitive diagnosis for what had happened.

Dr Wilkinson was also called on this occasion to see Patrick, and he gave evidence in relation to Patrick's death; that Patrick was still warm, indicating that his death was a fairly recent occurrence, his appearance was consistent, that he had suffered from an catastrophic asphyxiating event from an unknown cause. He explained to you that at the time he listed Patrick's cause of death on the death certificate as: Asphyxia due to airways obstruction when in fact he found no obstruction and it was never conclusively determined what had caused the asphyxiation.

He said that sometimes epileptics die because they vomit and then inhale their vomit during a fit. There was no sign of that; that often epileptics have swollen airways which causes an obstruction of their airways. There was no sign of that. And in fact there was no sign at all, either during his examination or at the autopsy, of Patrick having suffered an epileptic seizure.

Dr Wilkinson said that since Patrick's death he had examined the hospital records, the post-mortem report, and the histopathological findings by Dr Kan, and that after viewing all of those documents, that Dr Wilkinson was of the view that the direct cause of Patrick's death was a catastrophic asphyxiating event from unknown causes, and

that there was absolutely no other cause at the post-mortem to be found to explain his death, and that smothering cough caused this acute asphyxiating event. He said that the - that's what his evidence was in relation to the death.

The post-mortem examination was done by Dr Singh-Khaira. He gave evidence that he found no abnormality in the respiratory cardiovascular or any other of the body systems. He sought the opinion of Dr Kan who was a neuropathologist. We presume he is a pathologist that looks at brain and nerve tissue; that Dr Kan's opinion excluded effective causes of death, metabolic causes of death, genetic disorders, and that the changes in the brain from the past episode, the ALTE, appeared to have been caused by some event which is just a hypoxic event in the past. There was only signs of old damage to the brain, consistent with having been done four or five months earlier. Dr Kan and Dr Singh-Khaira were unable to find any cause of death.

Now, let us have a look at what the accused's account was of the circumstances of Patrick's death.

The accused gives an account to Craig a couple of days later. She said that she had just gone in, checked on Patrick and found him how he was, which is deceased. The accused was asked questions by Detective Sergeant Ryan in 1999 about the circumstances of Patrick's death and what she said was this, (question 223):

"I put him down for a morning sleep. I can't remember what time. He used to have a bit of a morning nap...and he was pale again and I thought, my first thought was 'not another fit', because we hadn't any for a while and we seemed to be going okay."

I pause there to say that Craig also gave evidence that Patrick's epilepsy was well controlled in the last few months of his life. I continue:

"So I thought oh, no, not another fit. But, yeah, it wasn't that...I can't remember if Craig was home or not, so that whole day was just, I can't tell you. The ambulances come, rushed him back up to hospital the...found some sort of life sign. That's why they sort of went and did the dash."

Now, what it amounts to, ladies and gentlemen, is this: The ambulance call was made at 10.03. The ambulance arrived at 10.10. She has sat there for seven minutes, rendering no assistance and then, in her interview, claims that she thought that the ambulance may have revived him. Now we submit that that is absurd. During the time that she was alone in her house with Patrick apparently deceased, she has made four phonecalls. She has rung the

triple "0", she has rung Craig, she has rung Carol and she also rang Dr Wilkinson. So in those few minutes that she is at home on her own with this baby that she leaves in his cot with the cot side up - doesn't even put the cot side down - she has made four phonecalls. Why would she do that rather than rendering any assistance to this child? There is only one reason why and that is because she knew he was dead. She knew he was dead because she had killed him. The only reasonable conclusion, we submit, is that this accused was responsible for Patrick's death because she has attempted to smother him on the day of his death and did succeed this time in smothering him.

We then look very briefly at the overview of the evidence, if we look at the summary that has been given to you. You will see all of the evidence relating to Patrick's death, summarised. I think that I, going over the page - you will see that cause of death was an asphyxiating event of unknown origin, consistent with him having been smothered, and the reasons why Dr Wilkinson, Berry and Herdson were of the view that this was not an epileptic fit which had caused his death, in particular, the absence of the normal signs that you would expect if he had had an epileptic fit.

We now go to Sarah's death.

Ladies and gentlemen, after Sarah's death - sorry, after Patrick's death, Kathleen got a job at Babyco, of all places. You might think that in itself was unusual, to say the least, having lost two babies of her own. In late 1991 she told Craig that she wanted to have another baby, and she put a considerable amount of pressure on him to agree to having another baby to the extent of even threatening to leave him if he didn't agree to cooperate.

Now, Craig, you might think, reluctantly, agreed to have another child in his desire to keep the wife, whom he very dearly loved, but he insisted that they should get the SIDS people involved - SIDS Association.

Sarah was born a happy and healthy child, just as the others had been. Dr Marley saw her four times, and she was fine. Dr Cooper, who is a sleep expert, did a sleep study on Sarah and it was perfectly normal, except for a few occasional normal episodes of what was called, what is called central apnoea. Central apnoea is quite common in young babies, particularly common in babies that are premature, and it basically amounts to short pauses in between breaths.

He was - Dr Cooper was not at all concerned about central apnoea that Sarah had shown, and normally it just resolves with age.

He noticed that despite the central apnoea, there was no reduction in the oxygen saturation in her blood, so that despite the central apnoea, she was getting as much oxygen

as she needed and he said that it was often something that was present in children.

5 Dr Cooper gave extensive evidence to you about SIDS and apnoea, and I just refer you very briefly to that. It is all material which I have referred you to in my opening address.

10 He gave evidence about the original theory that had originated back in the 70s by Dr Steinschneider, that it was familial and that it was related to ALTEs, that monitors had been used over an extensive period of time but that the monitors had shown no improvement in the SIDS statistics. So that it was eventually concluded after
15 extensive surveys that there was no link between apnoea and SIDS and no link between ALTEs and SIDS, and that the policy in the medical community in Australia since the mid 90s has been not to recommend monitors at home.

20 He describe the history of the back-to-sleep campaign and how that one simple change had more than halved the number of SIDS babies by placing, getting parents to place their babies on their backs instead of on their fronts when they sleep.

25 He also discussed the various environmental factors that seemed to correlate slightly with SIDS, including smoking, socio-economic status, drug use, the age of the mother and things like that, and he confirmed that the medical
30 community still does not know what causes death from SIDS.

A few difficulties after Sarah's birth; her parents were given a sleep monitor blanket, that is the old kind that the child would just lie on, and it was a monitor that was
35 liable to give a lot of false alarms. It often went off, and Kathleen was wanting to abandon the use of the monitor every other day during the time that they had it. Of course they had it right up until a day or two before Sarah's death. That monitor was on her cot, whichever
40 bedding she had, until a day or two before her death.

Craig insisted on it being used, even though Kathleen didn't want it to be used.

45 When Sarah was about two and a half months old, Kathleen went back to work at Babyco, she was sick of being at home and sick of being broke, and she organised for Sarah to be minded, Craig said, a huge amount of the time.

50 Craig also says that Kathy was very rigid and very regimented with Sarah and would get frustrated with her and growl a lot.

55 We also know that at one stage during Sarah's life Kathleen contemplated leaving Craig and Sarah, and we know that from a letter which was tendered by the Crown very late in the Crown case. It was right at the end of the Crown case. It was a letter that was tendered, exhibit AM.

I think that you have a copy of it - you don't have a copy of it. The significant part is on the fourth - it is actually the fourth page of writing; it does not have a number on it; it is only every second page that is
5 numbered. I do not think you have a copy of it. This is a letter which is undated, but it is obviously written after Sarah's death and before Laura's birth; but on the fourth page, at the top of the page what she has written to Craig - and this is a letter in which she is expressing her
10 dissatisfaction with Craig, a dissatisfaction with her situation at home, after Sarah's death - but what she writes in it is:

15 "I seriously thought of leaving Sarah with you because she made you happy, and going because my problems with us were still there."

So here she is, yet again, indicating an intention during Sarah's lifetime, of leaving, not just her
20 husband, but of leaving her daughter and again I ask you rhetorically: Why would she want to leave her daughter if only because she thought that her daughter was in grave danger of being in her mother's presence and care. Why would a child be happier or
25 better off without its mum? Again, ladies and gentlemen, the answer is in the diary entry for 4 December 1996, second sentence:

30 "If ever I get any feelings of jealousy or anger too much I will leave Craig and baby rather than being as before."

Now, one thought that you might have is she was -
35 Craig was such a devoted husband, they were so close during parts of their marriage, why couldn't she tell Craig about this? Why couldn't she tell Craig that her children were in danger? Well, ladies and gentlemen, the answer to that is in the diary. It is an entry on 28 January 98. It is the last paragraph.
40 It says this. This is again written during Laura's life so it doesn't relate to Sarah but it is relevant to Sarah's life as well. She wrote this:

45 "I feel like the worst mother on this earth, scared that she will leave me now, like Sarah did. I knew I was short tempered and cruel sometimes to her and she left, with a bit of help. I don't want that to ever happen again. I actually seem to have a bond with Laura. It
50 can't happen again. I'm ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me."

55 So her thought there is, "I can't tell Craig that these kids are at risk, because if I do he won't want to leave the child with me", which is a perfectly reasonable response. What would have Craig's attitude have been if she said to him, "Look, Caleb's death was not an accident

or a misadventure or an illness. I smothered him. Patrick's ALTE and death were not illnesses or disease or SIDS or anything like that. I smothered him. I attempted to smother him at his ALTE, and I smothered him to death when he died. We have now got Sarah here. I'm concerned that I might do harm to Sarah."

What would have Craig's attitude been? What do you think Craig might have done? Do you think it would have been happy families after that? Or do you think more likely that Craig would have immediately removed Sarah permanently from her mother to ensure her safety and probably notified the police? She would have been charged with two murders. So how could she possibly have gone and told Craig during Sarah's lifetime, or even Patrick's lifetime, let alone Laura's lifetime "listen, don't leave me alone with this child. This child is at risk with me". He would have said, "what do you mean at risk? What are you talking about?"

"I'm very scared that if you leave the child with me she might be in danger". "Who are you talking about? What do you mean?" One of his responses? And then of course his mind would have got working, you might think, to the previous deaths. That would have been the end of happy families for them. So she did not have the option of telling Craig what had happened. So the only option for her, you might think, when she realised that Sarah was also at risk, was to remove herself from Sarah's presence, and that is what she intended to do, but she did not. She chose to stay on. She chose to keep on being the mother and principal carer for Sarah, as she had been for Patrick and Caleb.

Let us now look at what happened the day before Sarah's death. This is 29 August 1993. Sarah had a runny nose. You might think a child with a runny nose is just that little bit more whingey, that little bit less co-operative, that little bit more difficult, that anybody who has been a parent who knows can just send up your stress levels. But she was otherwise normal and happy.

At home that night there was an incident and Craig described the incident as this:

"Kathleen became so frustrated whilst she was trying to feed Sarah that she pinned Sarah to her in a one armed bear-hug while patting her hard."

And you will remember the demonstration he gave of patting her on the bottom with the other. Craig told her to mellow out. And he then left the room - she then left - she then came to him in an absolute rage down the hallway. He by this time was sitting on the couch and she literally threw Sarah at him and walked

off, leaving Craig to deal with Sarah. She was just in a total rage with this child, to the extent that she threw the child and walked off.

5 Craig put Sarah to bed that night. Now, let us just compare that event with one of the diary entries for 28 January 1998. Again this is not in relation to Sarah. This is in relation to Laura. Instead of being 1993 it is 1998 - five years later, but five years
10 later she writes this, in relation to Laura:

15 "Very depressed with myself. Angry and upset. I've done it. I lost it with her. I yelled at her so angrily that it scared her. She hasn't stopped crying. Got so bad I nearly purposely dropped her on the floor and left her. I
20 restrained enough to put her on the floor and walk away, went to my room and left her to cry. Was gone probably only five minutes but it seemed like a lifetime."

Now, ladies and gentlemen, isn't that a very similar sort of incident to the kind of incident that Craig has described happened with Sarah where she has just
25 totally lost her cool, totally lost it with her child, and in one case purposely thrown her, in the other case nearly purposely dropped her on the floor?

Now, the night of Sarah's death was either the very first night they had stopped using the monitor or it was two or three nights later. It is the accused's version in her record of interview at question page 21 where she says it was the very night after they stopped using the monitor, but Craig's evidence was
30 that it was two or three nights after stopping to use the monitor.
35

Now, what is the significance of that? What is the significance of not using the monitor? The
40 significance is this, and again it is something that has been written during Laura's lifetime. There is an entry there, I will just locate it in a minute, there is an entry there where she says in effect that the monitor is a good thing because nothing can happen
45 whilst the monitor is on. Now what could that possibly mean, ladies and gentlemen? 'Nothing can happen while the monitor is on'? I will get you the actual wording of it, but it is a very significant entry and I will come back to it in a minute. It is
50 an entry of 25 August 1997.

At that stage Laura was two and a half weeks old. She says:

55 "Maternal instinct is what they call it. I now know that I never had it with the others. Monitor is good idea. Nothing can happen without the monitor going and since I am not game enough

to plug it in because they would want to know why I hadn't, everything will be fine this time."

5 What she is saying is this: If she was going to smother a child, she could hardly smother the child whilst the monitor is on because the alarm will sound and Craig might wake up. If she smothers the child and then puts the child into the bed and attaches the monitor or has the monitor
10 again, as soon as she switches the monitor on, it is going to alarm. So then either way she is up, the child is dead and Craig might wake up. So the monitor is keeping her honest. The monitor is stopping her from smothering these children because people would want to know and people
15 would want to know why it was not on if the child dies.

We would submit to you that that was exactly the same with Sarah. Here she was, either one day or two or three days after the monitor ceased to be used, that the monitor was
20 no longer keeping her honest, so she is now at liberty to smother the child and pretend that it was a death from some illness or disease or natural causes.

What happened that night? On the night of Sarah's death at
25 about 1 or 1.10 Craig woke up. The accused was not in bed. Sarah was not in bed. The door was closed, but there was light around the door that he could see and he assumed that Kathleen was up attending to Sarah. He then went back to sleep, and he is awoken about twenty minutes later,
30 roughly, by Kathleen screaming. When he awakes, the light is already on, Kathleen is at the doorway, Sarah is in her bed on her back, the covers are not on, her legs and arms are straight - you will remember that, he demonstrating for you on the floor the way her legs and arms were, which
35 was unusual for her - she was warm to the touch, she was not breathing.

The ambulance were called. Sarah was unable to be revived. Now what is the significance of Craig waking up at 1.10
40 and seeing Sarah and Laura not in the room - sorry, Sarah and Kathleen not in the room? The significance is this: ~~Firstly~~ the accused says: "No, no, no. I wasn't up. I got up to go to the toilet and when I came back from the toilet I looked at Sarah and noticed that she wasn't
4 breathing. I hadn't been up with her feeding her or anything like that." Craig on the other hand says: "No, no. Both Sarah and Kathleen were up. I assumed Kathleen was feeding Sarah. If she was feeding Sarah she was up
50 twenty minutes earlier."

That was an opportunity for her to have killed Sarah. So the significant question for you is: What is the evidence that confirms Craig's evidence that Sarah and Kathleen were really up at 1.10? What confirmation is there from
55 some other source, other than Craig, to confirm his evidence that when he woke at 1.10 there was no-one else in the room? Is there any evidence to confirm it or is it just Craig's evidence?

5 Now, it is particularly important for you to look for confirmatory evidence, because this was one area where Craig, in effect, withheld information from the police. You will recall that when the police first came to his home he told Detective Ryan about this.

10 Then he came, on the first day of his statement, he was going to give them the whole works but didn't finish it. Then he went back home. In the meantime there was a weekend reconciliation with Kathleen. When he went back to the police station he in effect withdrew what he had told the police about having woken up at 1.10 and seen that there was no-one else in the room.

15 So it is very important for you to ask yourselves, right: Craig now says, told lies to the police, but the real truth is that there was no-one in the room at 1.10. So what confirmation is there of his evidence? Because otherwise, you might think, how can we rely upon his evidence when he has changed his mind and told lies to the police? There is confirmatory evidence, ladies and gentlemen. The evidence comes from two sources. Firstly, there is the diary entry for 16 May 1997. That was a day when Laura was about - sorry, when Kathleen was about six months pregnant with Laura. She writes this:

30 "Night-time and early morning such as these will be the worst for me. That's when wishing someone else was awake with me will happen. Purely because of what happened before. Craig says he will stress and worry but he still seems to sleep okay every night and did with Sarah. I really needed him to wake that morning and takeover from me. This time I've decided if I ever feel that way again I'm going to wake him up."

40 Now in a police interview the accused specifically admitted, this is something that she wrote about Sarah's death "I really needed him to wake that morning and takeover from me".

45 Ladies and gentlemen, if her version was the truthful version, that she got up to go to the toilet and on her way back from the toilet she discovered Sarah not breathing, why would she be writing in her diary that she needed Craig to takeover from her? What did she mean by "purely because of what happened before"?

50 On the other hand, if she was up with Sarah, feeding Sarah and Sarah had been crying or not going to sleep or doing something that somehow irritated her and drove up her stress levels, stress levels to the extent that she just lost it with Sarah, that would explain why she later said, in effect, "I wish Craig had woken up and taken over from me on that morning that Sarah died". Because then perhaps, or then definitely, Sarah would not have died,

and "I'm decided, I am determined, that if ever I feel that way again, I'm going to wake him up". There is only one meaning that one can give to those words that she has written in that entry for 16 May 1997, and that is that she was doing something with Sarah that she lost her cool with Sarah. "If only Craig had woken up and taken over from" her, the death would not have happened.

Now, this was an entry in the first diary, the diary that Craig had given to the police and of course Detective Sergeant Ryan extensively questioned Kathleen about these entries. He questioned her about that entry. I would like to read to you what she said about that entry that I have just read to you. Question 755 is a lengthy answer, but I will only read to you part of it, the relevant part, the bit where she is referring to the diary entry -

"The bit where I really needed him to wake up that morning and takeover from me, that was probably because I had so much trouble waking him sometimes. It was, you know, third yell or whatever before he would sort of wake up. I don't think I was referring to any particular one of the three kids, just that his general lack of stirring, when I wanted him to wake up on purpose for something, that's what I was referring to."

So here she is, first effort, first go at explaining it, saying I wasn't referring to Sarah, I was just referring to the kids in general - first three kids in general - just referring to the difficulty in waking Craig up.

Then a few questions further on, question 758, reading from the diary:

"This time I have already decided that if ever I feel that way again I am going to wake him up."

"Feel what way?", says Detective Ryan.
Answer:

"If I feel like I haven't had enough sleep or if I felt like basically, if I had felt like I didn't really want to have to get up and feed her or, or put her down, if I was tired I was just going to wake him up and get him out of bed, so."

Second try she was saying:

"If I had to get up for her, sometimes I would, sometimes I would feel it would be better if Craig did it."

And then she continues:

"I really needed him to wake that morning and

takeover from me. This time I have already decided that if I ever feel that way again I'm going to wake him up."

5 Sorry, question 759:

"Q. Were you talking about the night that Sarah died when you got up with Sarah, is that what you were talking about in that entry there?"

10

And then he reads the entry again. Answer:

15

"No. They are two separate, the, the bit where I said that I wanted him to wake and takeover from me, that's Sarah. This time I have already decided that's referring to future, as in Laura.

...

20

Q. But you most certainly agree that that sentence relates to Sarah?

A. The bottom one, yeah...of checking her and that sort of thing."

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Now, ladies and gentlemen, that submission to you is that these are deliberate lies by the accused to try and evade the clear meaning of that diary entry. First, she says, oh it wasn't about Laura. And then she says oh, - first she says it wasn't about Sarah. Then she says oh, yes, it was about Sarah, I was just referring to him doing the night-time routine. And then finally when she is pressed even more she says, oh, what I meant was if he had been the one to get up he would have been the one to find her dead.

35

If you read those words for yourself and you decide what you think they mean. Our submission is that there is one clear logical, rational clear English meaning of those words and that is that she was saying: 'If only Craig had got up and taken over from me Sarah would not have died.' Why would Sarah not have died if Craig had got up? The only reason was that she lost her cool with Sarah and killed her.

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Now, I said that there were two areas of confirmation of Craig's evidence, that they were both out of the room at 1.10 or thereabouts. Lee Bowen gave evidence, that is the foster sister of the accused, gave evidence that Kathleen had told her, within hours of Sarah's death, about what had happened that night. She gave evidence - this is at page 771, that Kathleen told her that she had got up that night, went to the toilet and either put on the hall light or the toilet light, and from seeing from the toilet she could tell that there was something wrong with Sarah. So in two respects - this is different to the version that the accused has given - firstly, the toilet light was on, and secondly, she claimed to have been able to see from the toilet that there was something wrong with Sarah.

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Now, after Kathleen's interview with the police Lee Bowen
came to Kathleen and told Kathleen what Lee Bowen had
told the police about how Sarah had died. Kathleen became
5 very angry and said "that's not how Sarah died. Anyway,
there was no light on". So it is a little bit of extra
evidence only, but it is significant, because you will
remember that Craig gave evidence that when he looked up
at about 1.10 there was a light on, that he could see
10 around the outline of the door.

Kathleen's version is there is no light on. I went without
putting a light on, to the toilet, came back, found her
not breathing, then switched the light on. The account
15 that Kathleen has given to Lee Bowen on the very day of
Sarah's death is consistent with Craig's version, not
consistent with her later version to the police. So the
only conclusion we submit that you could come to is that
the accused had been up with Sarah that night at about
20 1.10, that she had been so stressed that she needed Craig
to takeover and that that is why she was determined that
if it ever happened again she would wake Craig up.

Now, I would just like to make a few brief submissions to
25 you about why Craig lied to the police.

Ladies and gentlemen, here he was, a man who, at the time,
was devoted, some might each say besotted by his wife, and
you might think somewhat dominated by his wife. Here he
30 was, having gone through the trauma of having lost his
third child - sorry, the time of the lie he had lost all
four children - imagine how difficult it would be for any
human being to acknowledge the fact that the person that
they had been living with for all those years, the person
35 that they had had four children with, may be responsible
for those deaths? Imagine how all of that must be to even
have a suspicion that your husband or wife might be
responsible for the deaths of the children that you have
both had?

40 You might think that his initial reaction of, on finding
the diaries are - sorry, finding the diary and reading the
entries in it, and having those suspicions raised, that
all it took was just a little bit from her to cause him to
45 think "that couldn't be right. How could I possibly have
thought that she might have killed our four children? I
must be mental thinking that. I must be an awful person,
thinking that my wife might have killed our children. Here
she is having suffered the loss of four children and I'm
50 thinking those awful thoughts".

You might think that it took him a long, long time, until
he finally came up with the full truth to the police, for
him to accept, or for him to come to a full realisation of
55 her culpability. You might think that that provides a very
ready explanation for why, when he was first approached by
the police, he initially told them the truth, then decided
that it was too awful to contemplate, and that he was

going to go into defensive mode and protecting his wife, and he protected his wife by withdrawing the significant parts of his evidence, in particular the most significant part.

5

1.10am, the observation he made about Sarah. You might think ladies and gentlemen, from your general knowledge of the world, that, for instance, to think of a situation totally removed from the facts of this case, if you as a spouse were suddenly confronted by an allegation that one of your children had been sexually molested by your spouse, your initial reaction might be one of abject horror and your immediate thought would be "I've lived with this person for all these years. Can I, can I really believe that this person might have done these things?" And it might take a considerable time for you to accept, in yourself, that this might really have happened, and to cooperate with the police.

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Now, what my submission to you about Craig is that he went through exactly the same sort of process; that when he was first interviewed by the police he was still in this wavering state - he had the evidence of the diary on the other hand - it was just too awful to contemplate, and he then did an about-turn and that was why he lied to the police. Now, of course he should not have lied to the police. It was wrong. But you might think that it is perfectly understandable why he did.

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Why did Craig agree to have more children? Well, again I think the answer is readily there: He loved this woman. He dearly loved this woman. She, at least in relation to her third and fourth children, put enormous pressure on him - either he was going to have this child or else she would leave - and so he reluctantly agreed to take the risk of yet another death occurring. As to why Kathleen want to have more children, I will come back to a little bit later.

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Just one further point that I would like to make about Craig's evidence about the circumstances of Sarah's death. You will recall that he gave evidence that it was at 1.30 that he was awoken by Kathleen's screams and that he attempted to revive Sarah, because he looked at the clock as he was attempting to revive her, and saw that it was 1.30. That must be wrong, because the ambulance call was at 1.25. He continued to attempt resuscitation of Sarah during the ambulance call and after, until the ambulancemen came, at about 1.30. So you might think that if he has look at the clock, he has seen the time, but it was during the time that he was attempting to resuscitate Sarah just before the ambulances arrived. That is of no significance. I don't know what my learned friend Mr Zahra is going to say to you about that. It does not cast doubts on Craig's veracity. It just means that in the heat of what was the most terrible cataclysmic event he has looked at the clock at a time when he was attempting to resuscitate his daughter, but not at the beginning of that

resuscitation but towards the end of it.

Let us now look at the different versions that the accused gave for Sarah's death.

5

The first version that she gave was to ambulance officer McDermot, to whom she said (page 570): "The child had not woken. It's been placed in bed that evening p.m. The child usually woke at approximately midnight. Mother had checked her, as she had not woken. The child had recently been removed from the monitor".

10

The next account she has given is to a police officer at the scene, Constable Steven Saunders, who was told information by the parents - and I think if my memory serves me correctly, he is not able to distinguish which of the parents told him, but he was told this: "Mother woke at 12 or 12.30 and heard the child turning over. Mother woke again at about 1am to go to the toilet, and on her return to the bedroom was unable to hear the child breathing".

15

20

The next version after that is the one that I have already referred to, where Kathleen spoke to her sister Lee Bowen.

25

Craig gave evidence that he tried to bring up the fact that he had woken earlier and seen that they were not in the room, that the accused had said to him "Oh, I got up and went to the toilet. I came back, turned the light on and found her", and that she activity discouraged any further discussion of it, and he explained how difficult it was to discuss things with her if she was determined not to.

30

The next version comes from her videoed interview in 1999. I direct your attention to question 269 where she gave a version as follows:

35

"I got up to go to the toilet. I went to the toilet because she was in the room with us. I sort of just glanced over and saw a little lump in the bed so I sort of, okay, I sort of up and got to the toilet. When I walked back in...but there was, just seemed to be light in the room so I cannot remember if I had her or if Craig had her."

40

45

Now later on she went on to say that she accepted it might have been Craig who had lifted her up.

50

At question 298 she said:

55

"I've stopped at the door to check. The lump was still in the bed so I assumed that she was still in the bed and I just, I didn't sort of stop to listen or anything...had another look, and I think that time I stopped to have a listen. I didn't the first time, but I just did before

getting into bed that time. I always used to walk around in the dark."

Then at 308:

5

"All I remember is waking up and wanting to go to the toilet. I come back in, stopped to look at her again. I don't know if she was flat on her back when I went to the toilet, but all I remember seeing was her arm out"

10

and she then goes on,

15

"I can't say whether she was breathing or not when I left the room the first time...behind me to go to the toilet, come back in, and because I was a bit more awake I have stopped to, actually noticed her arm was out, and to check on her. That's the day I will probably recriminate for the rest of my life, but I wasn't sort of awake properly when I got out of the bed."

20

At 317:

25

"I went straight over to the bed and pulled, touched her arm to see if she would respond...but wasn't cold like with the other two kids. I was waiting for her to take a breath, because I thought to myself 'I don't remember you taking one, you haven't taken one' sort of thing, so I sort of touched her arm and still she didn't take a breath or stir even slightly, so I pulled back the covers then and I just woke Craig up."

30

35

Now, ladies and gentlemen, again why did she not attempt to render the slightest bit of assistance to Sarah? She thought she wasn't breathing. She wasn't sure. Why didn't she go up to her daughter and try to render assistance to her? Why did she just stand near the doorway and say "Oh, oh, oh, woe is me. Craig. Craig. Craig"? Isn't it again an incredible coincidence that she gets up and goes to the toilet, so soon after Sarah's death that Sarah is still warm. If you accept Craig's evidence about what he saw at 1 or 1.10 is correct, why would she lie about being up with Sarah at about 1 or 1.10? What did she have to hide? What did she have to lie about?

40

45

50

Finally, ladies and gentlemen, I finally direct your attention, in relation to Sarah, to exhibit H. I do not know if you have a copy of this one. It is the August 1993 calendar. I do not think you have a copy of it.

55

Ladies and gentlemen, what it says for 30 August 1993, the night of Sarah's death, the day of Sarah's death, it says "Sarah left us 1.00am". Not 1.30 but 1.00 - "Sarah left us 1.00am".

5 If we then look at the diary entry for 9 November 1997
where she wrote "With Sarah, all I wanted was her to shut
up and one day she did". "All I wanted was her to shut up
and one day she did". Is that the writing of a woman
consumed with grief at the death of her daughter? Is that
10 the writing of a woman who is so overcome with grief that
she is just totally and utterly lost in her grief? "I
wanted her to shut up and one day she did". That's only
consistent, in our submission, with one interpretation and
that is that night she, yet again, lost her cool. She lost
her cool with Sarah because she wanted Sarah to shut up
and she wouldn't, so she made sure that she shut up, by
smothering her.

15 If we then go to another diary entry for 28 January 1998,
which I have already read to you, "Scared that she will
leave me like Sarah did. I knew that I was short tempered
and cruel sometimes to her, and she left with a bit of
20 help". What help? What sort of help did she, did Sarah
have to leave? What does she mean by "a bit of help"?

Finally, ladies and gentlemen, question 547 in her record
of interview, she gives an answer which, in our
25 submission, has a Freudian slip in it. She is being asked
about Craig's account of having woken up earlier that
night and seen a light on, and with her and Sarah not
being in the room. Question 546:

30 "Question: Do you understand the significance of
that statement that Craig made to me at your
family home in May this year?
Answer: Yep, but that's not how it was. She
never left the bed. She was in the bed and I did
shut the door. Yes, but I didn't turn any lights
35 on."

So where she has got: "There was a light on, I don't
know" and "I don't recall turning lights on. As I said, I
40 just remember when I finally went over to the bed to
uncover her and find her and I've yelled at Craig, the
lights were on" when I finally went over to the bed to
uncover her and find her". Why would she go over to the
bed to uncover her and find her? She knew where she was.
Why would she want to uncover her daughter? That, we
45 submit, is a Freudian slip by a person who knows the real
truth, and that was that having smothered her daughter she
put her back into her bed and then went to find her and
uncover her, supposedly having discovered that she was
deceased. So, ladies and gentlemen, we submit that all of
50 that will assist you in coming to the conclusion that this
accused was responsible for Sarah's death as well.

I will very, very quickly, in the last five minutes before
55 lunch, just refer you to the medical evidence in relation
to Sarah. If you go to the summary which I have given you
you will see the evidence in relation to Sarah's death
summarised there.

You will recall that I cross-examined Professor Hilton, even though I was the counsel who called him - I cross-examined Professor Hilton about two things: Firstly, about his failure to photograph the two punctate abrasions below her lower lip, and I suggested to him that in effect a cautious pathologist ought to have photographed those punctate abrasions. He disagreed with that, but you might think that a lot of the other pathologists said that they would have taken photographs of those abrasions; and I what I suggested to him, in effect, was this, that in the light of the previous history of this family it was not appropriate for him to find that Sarah had died from SIDS.

Now, ladies and gentlemen, SIDS is a diagnosis of death from unknown causes, in the absence of a suspicion of homicide or accident; and you might think that it was not appropriate - and my submission to you is that it was not appropriate for Professor Hilton to find that Sarah had died from SIDS because, in effect, what that did is it excluded a possible view that she may have died from unnatural causes, that is from accident or from homicide. It meant that there was never a full police investigation. It meant that there was no coronial inquiry into Sarah's death, and my submission to you is that a prudent pathologist, in Dr Hilton's position, ought to have found a cause of death from undetermined causes rather than from SIDS.

Now it is true that there is only a small difference between the two - they are both deaths from undetermined causes - but the consequences of each diagnosis are quite different. You will see from the summary of the evidence that Dr Cala did not believe that Professor Hilton excluded deliberate or accidental trauma. He said that in his view it was inappropriate for Professor Hilton to diagnose SIDS.

Professor Berry said that if he was looking at Sarah's death in isolation he probably would have said SIDS but he would have had misgivings. Of course Professor Hilton was not looking at Sarah's case in isolation. He knew perfectly well what had happened to the previous children. The conclusion is that Sarah died from undetermined causes. She had a displaced uvula. That was the only thing that Professor Hilton could find that was in the slightest bit out of the usual, a displaced uvula. He was of the view that that was not the cause of death.

Dr Cala and Professor Berry and Dr Beal were of the view that that was not the cause of death. The defence expert, Professor Byard, and the Crown expert, Dr Berry, both said that they have never had a child who has died of a displaced uvula. Their colleagues have never had a child who has died of a displaced uvula. In all of the medical literature there has never been a case of a case of a child that has died from a displaced uvula; there was one child who had a very elongated and split uvula who died, that is referred to in a French article. So, in other

words, what they were saying is this: If Sarah died from a displaced uvula, this was the first reported incident of such a death worldwide, so far as they are aware.

5 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
10 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 reported who has died from floppy larynx. Now I
will come to consider that a little bit later, and I think
it is an appropriate time for the luncheon adjournment.

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

CROWN PROSECUTOR: Yes I did, your Honour.

20 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.

25 HIS HONOUR: We will take the luncheon adjournment.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Mr Crown, as always, I will leave it up to you
to decide whether you need an adjournment at any
particular time.

CROWN PROSECUTOR: I will probably have a short break at
3 o'clock.

10 HIS HONOUR: You keep your eye on the jury. I will leave
those matters up to you.

LUNCHEON ADJOURNMENT

15

RESUMPTION

HIS HONOUR: Mr Crown, I think you're quite right what you said this morning about the second and third counts.
5 Unless the jury are unanimous that the accused smothered Patrick in February 1991 on the day of his death, then the only basis upon which they could convict him of that count would be if at least one of them was relying solely on the smothering in October 1990. In that event if there was
10 also a conviction on count two, it would mean that at least one juror was convicting the accused of two offences for one criminal act.

CROWN PROSECUTOR: Yes, your Honour.
15

HIS HONOUR: The question which I drafted did not do the job that I hoped it would do. It was inadequate when I set about redrafting it. I came around to the view that the effect of any redrafted question would lead us to the
20 position which you took up at 10 o'clock this morning.

In view of that, I will redraft the questions and I will take them in the order in which they appear in the indictment and I will only include the first two questions
25 as they relate to the second count.

CROWN PROSECUTOR: One other suggestion I would like to make, your Honour. In each of the murder counts, perhaps going to the first page. About halfway down the page about
30 the middle of paragraph two "if the answer to any of A B and C is yes" this is probably, for lack of ambiguity, we would submit the answer to any of A, B or C--

HIS HONOUR: I don't agree it is a grammatical
35 disagreement, Mr Crown. I understand what you would mean. I think there is no ambiguity, but if I redraft it and say: "If the answer is yes to A, B or C, find the accused guilty of murder". I will do that, and that will satisfy your sensibilities.
40

CROWN PROSECUTOR: Thank you.

HIS HONOUR: Did you have anything you want to say, Mr Zahra?
45

ZAHRA: My friend flagged the test for reckless
indifference was fully realised. The deceased may well have died. My friend indicated there was authority for that. I have not been able to find any authority. I don't
50 know if your Honour has done so.

HIS HONOUR: Do you want me to say "probably", do you?

ZAHRA: Going back to Crabbe, in the repeat decision of the
55 Court of Criminal Appeal of Crabbe where they revisited reckless, where they use the Crabbe test.

CROWN PROSECUTOR: I will locate that decision.

5 HIS HONOUR: That is open, and I will hear from you further about that. The last time I gave directions upon that basis for murder I used the word, "probably", but I think probably there is no difference. There may be no difference. It is the same with the expression, "realisation and contemplation". They're synonymous.

10 ZAHRA: If the term is "may well" I think your Honour used "might well".

HIS HONOUR: That was putting it in perfect tense. So it means the same thing.

15 CROWN PROSECUTOR: Your Honour, I wouldn't like the jury to think I have abandoned ship after my address, but if you could tell the jury I have to attend a funeral.

20 HIS HONOUR: Yes. I will tell them this afternoon. Yes, I had intended to do that.

CROWN PROSECUTOR: Thank you.

IN THE PRESENCE OF THE JURY

5 CROWN PROSECUTOR: Ladies and gentlemen, before I proceed
with our submissions in relation to Laura. Might I point
out on the exhibit list we have provided to you some of
the exhibit numbers have a tick underneath them. That
means you have been given a copy of them. Exhibit J, the
description of the exhibit, is diary '97, 8 photocopy plus
10 typed extracts. In fact that exhibit is your folder which
has both the 96, '97, '97, '98 diary and the extracts, so
it is a bit of a miss description. So correct that on the
copy of your exhibit list.

15 Before we proceed to the case of Laura, I would like to
raise this interesting question. Why was it, if the
accused was so stressed by her children, that she chose to
have more children? Why was it that if she was so
overcome with resentment at the impositions they made on
her life, as disclosed in the diaries, that she chose to
20 have children four times over? Why was it she expresses
all these things in her diary or diaries about the
difficulties of coping and her resentment of Craig and her
resentment of the children, and her need to get to the gym
and need to get out. All those things, I'm sure you have
25 read yourselves. Why was it she was still anxious to have
another child, to the extent that she was threatening to
leave Craig unless he cooperated?

30 Well ladies and gentlemen, we only have to go to the
diaries themselves to see what her reasons were for
wanting to have children. If we start at the entry in the
diary for 4 February 1997. She said this:

35 "I wonder whether having this one" -

I pause there to say when she was pregnant with
Laura -

40 "wonder whether having this one wasn't just a
determination on my behalf to get it right and
not be defeated by my total inadequate feelings
about myself. What sort of mother am I, have I
been? A terrible one. That is what it boils
down to. That is how I feel and that is what I
45 think I'm trying to conquer with this baby: To
prove that there is nothing wrong with me. If
other women can do it, so can I."

50 Then we go to the next entry in the extract on 17 February
'97. She said:

"This time I'm prepared, and know what signals
to

55 watch out for in myself, changes in mood"
etcetera.

"I will get help if need be."

Another entry on 14 October 1996 case:

5 "I suppose I would like to make all my mistakes
and terrible thinking be corrected and mean
something, plus I'm ready to continue my family
time now. I think losing my temper and being
frustrated with everything has passed. I now
just let things happen and go with the flow and
attitude I should've had with all my children.
10 If given the chance I'll have it with the next
one."

And finally 28 April 1997:

15 "I think this baby deserves everything I can
give
her, considering I really gave nothing to
the others.
I think even my feelings towards this one
are already
20 deeper. Shame, but that is the way it is. I
think it
is because I'm 30 now, and time to settle
and bring
up a child. Obviously I wasn't ready before
25 all
that."

30 From all of those, our submission to you is that her
reason for having a baby is that she wanted to prove to
herself that she was capable of having a baby and bringing
up a baby, just like any other woman is; she wanted to
prove to herself that she had grown from the previous
experiences of having a child when she had lost it and
killed it.

35 Each time she believed that she was that little bit more
mature, that little bit more able to keep control, that
little bit wiser, so that it wouldn't happen again; and
each time she believed that this next time she would know
40 what the warning signs were, she would instantly recognise
them, because she had seen them in the past before, and
rather than the answer being as before, she would call on
Craig to take over or call on other people to help her and
remove herself from the situation.

45 So each time she thought: Now is the time, now I can do
it, now I am that little bit older and more mature and
more able to cope now. I know the warning signs this
time. It won't happen again.

50 Now, when Kathleen suggested to Craig that they should
have a fourth child - Craig actually gave evidence that
they had this strange conversation - Craig expressed his
reluctance to Kathleen to have more children after all
55 they had been through, and he said, he gave evidence that
Kathleen said to him that it wouldn't happen again, as
they were more mature, more patient people, older and
wiser. He thought that was very strange, and you can

understand why, because he would have thought: What does our maturity these have to do with having lost our children?

5 Craig eventually agreed to having their fourth child, if they got help. You will recall the evidence that Craig gave, that he made that a condition of having a fourth child; but despite that, it was not the accused who made the effort to go and get genetic advice from, I think Dr Seton, after a few weeks. When he asked, if my memory serves me correctly, she said, "You're the one who wants to have this assistance so you go and get it".

15 They eventually found their way to Professor Hilton who referred them to Dr Seton. Laura was born on 7 August 1997, a healthy and happy child, just like her brothers and sister. There was extensive testing done at the Westmead Children's Hospital over three or four days, and there was no abnormality found. They were lent a monitor, one of the new kinds of monitor, the corometrics monitor, to take home with them and this monitor had a download facility.

25 The first thing to note about the early period of Laura's life is that the accused, after about two or three months, according to Craig, didn't use the monitor during daytime sleeps. Margaret Tanner was the person at the children's hospital who was coordinating this programme, who had given instruction to Craig and Kathleen how to use the monitor, and who was receiving the downloads. She noted that the monitor was not used during the day after about 30 two months, that is two months after Sarah's birth, except for whole of the December-January period. Margaret Tanner gave evidence that she had told the parents to use the monitor with all sleeps for twelve months (page 677).

40 Now, in relation to the use of the monitor, we go to the diary entry on 25 August 1997, which I have already read to you about "nothing can happen without the monitor knowing". We also go to the diary entry for 20 September 1997, where Kathleen wrote this - at this stage on 20 September 1997 Laura was six weeks old. She had been born in August '97. There is this little baby of six weeks of age. What she wrote is this:

45 "Sleep. Who needs it? Yes, I am getting a little irritable now. This is my punishment for the others, to be continually woken up, because this time we know that we have a child with a sleeping disorder, even though I'm sure they're all false alarms. The thought is still scary."

55 Now, ladies and gentlemen, I don't know what she meant by saying they had a child with a sleeping disorder, but one immediately asks the question: How did Kathy Folbigg know that these alarms were all false alarms? How was she sure they were all false alarms? The answer must be: Because she knew that none of her children that had previously

died had died from SIDS or any sleep abnormality. She knew that, because she had killed them. What she is a saying is, "I'm not getting much sleep I am getting a little irritable now this is my punishment for what I did to the others. To be continually woken up now because I have got a child that keeps waking up now even though I know that the alarms are all false, but it is still scary when the alarm sounds".

10 Imagine yourselves, ladies and gentlemen, if you had really lost three children to natural causes, and two of them had been put down to SIDS. You would be panic stricken at six weeks of age every time that alarm went off. Every time it went off you would think, "This is it. This is the real one. The other might have been false alarms" - there might have been a hundred false alarms, but "this one is it". You would never be sure, if you really lost three of your children, to natural causes, you would never be sure that the next alarm wasn't the real one. But Kathy Folbigg was sure. She knew. She was sure they were all false alarms. How? Because she had not lost any of her children to natural causes at all.

25 Although there were false alarms with this new type of monitor, there were not as many false alarms as there had been with the previous type of monitor, and the alarms were all false alarms. There was no instance of genuine respiratory distress or anything of that kind. That evidence comes from Margaret Tanner, who says that all of the downloads show that there was absolutely no abnormality of Laura's heart or breathing, and indeed it even comes from the accused's own interview at question 96 where she said they were all false alarms.

35 Then, ladies and gentlemen, whilst we are on the subject of the monitor and the alarm, we get this very strange evidence that came from Lee Bowen who said that when Laura was five months old she and her husband had gone over to Craig and Kathleen's, and I think she gave evidence they had a barbeque something like that. Everybody else was outside. She was inside, Laura was asleep. This was at five months of age; when you have heard from the evidence this is in the peak period of danger for SIDS, two months to six months is the peak period. This is right in that peak period. She hears the alarm going off twice. Kathleen comes inside, and tells Kathleen "this alarm has gone off". What does Kathleen do? "Oh, don't worry about it. It's just a false alarm". Laura is still asleep in the bedroom. The alarm has gone off, and Lee has told her that. What would you do if you genuinely lost three children already? You would be straight into that bedroom to check on your daughter, wouldn't you? Straight in. This if someone told you the alarm has gone off. No. Kathleen didn't even bother going in. Why? She knew her daughter was all right. Why should she go in? Why bother? There was a false alarm. They had numerous false alarms. She knew they were all false alarms, and there was never going to be the real thing.

Now, you should also compare that with the diary entry for 9 November 1997 where she wrote this - she is talking about Craig:

5

"There is a problem with his security level with me, and he has a morbid fear about Laura. He, well, I know there is nothing wrong with her, nothing out of the ordinary anyway, because it was me. Not them."

10

What does that mean? What could that possibly mean other than this: Craig has terrible fear about losing Laura like he's lost the others. I know there is nothing wrong with her, nothing out of the ordinary anyway, because I killed them. They didn't just die". That is what it means.

15

20

Now, ladies and gentlemen it was in March 1998 that Craig sent Margaret Tanner a letter, which is exhibit E. I'm not sure if that has a tick on it or not. But it was a letter from Craig to Margaret Tanner expressing his real concern that Kathleen was not using the monitor during the daytime sleeps. What he wrote in part was this on 18 March 1998:

25

"Strangely though, I feel that Kathleen finds it all tedious and frustrating, and would probably not rather lose it at all, merely entrusting Laura's survival to fight. You would think, after all she had been through, as a mother she, of all people, would be more diligent with the monitoring. Is it necessary that Laura be monitored through her daytime sleeping as I'm more than sure that Kathy does not do this."

30

35

Well, all I can say, ladies and gentlemen, is if she had genuinely lost the previous three children to death by natural causes, you would think after all she had been through as a mother she, of all people, would be more diligent with the monitoring, as Craig said. Why was she not more diligent? You know the reason why.

40

45

We then go back to her diary the entry of 20 September 1997 - sorry, I read that, put it to you. After Laura reached about eleven months of age, somewhere around there, the relationship between Laura and Kathleen started to deteriorate in one sense. It deteriorated in this way: That Kathleen would regularly get cranky and frustrated, according to Craig every day. Her relationship with Craig, that is Kathleen's relationship with Craig, also deteriorated. It was at that stage that Kathleen started to regularly go out to the gym during the day, and out with her girlfriends at night.

50

55

According to Craig, the accused growled every day. Lee Bowen saw Kathy completely go over the top with Laura one day about sleep, and also about food, and she saw Kathleen

pull Laura by one arm out of her high chair in frustration during a feeding session. So here, we submit, is a regular pattern or a pattern emerging, yet again, of the accused becoming frustrated that a child, by all accounts, who was
5 an extremely placid, easy-going happy child, that a child at that age, around eleven-twelve months to exhibit some of her own personality, to have some wishes of her own to be able to say "No, mummy. I don't want to, mummy". To be a bit naughty perhaps like children are.

10 What was the accused's reaction? The accused's reaction was, "You're going to do it my way if it's the last thing I do", and she started to growl and get angry and yank her out of the high chair".

15 We then go to February 1999, which was only about two weeks before Laura's death. The accused gave Craig a letter about their relationship, which has become exhibit 1. Their relationship by this stage was obviously
20 very, very poor. Kathleen wanted to move out, start-up on her own. She says in this letter, exhibit 1, that she wanted to move out with Laura, but in her record of interview she admitted to Detective Ryan that she had not really intended taking Laura with her. She said (795):

25 "I had a fleeting thought that it would be better and more stable for her if she just stayed where she was and stayed with her Dad."

30 Question 793:

"I started to think maybe the two of them the same as I did with path I suppose, the two of them would be better if I wasn't on the scene."

35 Here she was the third time thinking not only that Craig would be better off without her, but that her own child would be better off without her. All one can say, ladies and gentlemen, is that was very pathetic, because two
40 weeks later that little child that you saw on that video was dead. Craig said that he typed a letter back to her, which became exhibit 2, that he didn't feel able to bring himself to actually give it to her.

45 We then come to a couple of days before Laura's death. She died on Monday 29 February or 1 March, she died, which was - the 28th was Sunday; 1 March being the Monday. So going back to the Saturday, 27 February, Craig gave evidence that on that Saturday Craig went to work that morning.
50 When he got home after about 12 noon he asked Kathy to take Laura to a classic car display. She said "No. She will get all grumpy. You will bring her home and I will have to deal with her".

55 Craig went out to this classic car display on his own. Home about 2.30 and told "no". So he then went, and it was about 10 to 8 when he got home, about 40 minutes before Laura's normal bedtime. Surprisingly, Laura was already in

bed and Craig asked the accused why, and she said she was tired, so was Laura, so she went to bed or "I went to bed".

5 The following day, Sunday 28 February, the day before
Laura's death, the accused said to Craig she was sick of
being stuck in the house. So what they did is they - Craig
had already gone out the previous day and didn't want to
10 go out again, so instead, they arranged for their friends,
Dean and Tanya, to come over for a barbeque. That barbeque
happened to be a pool party, which is what you see in the
video that was taken the day before Laura's death. Laura
was full of beans, running around heaps and heaps,
15 swimming, laughing, screaming, playing, but Craig noticed
that from when the accused got up that Sunday, that he
noticed that Laura seemed to be avoiding contact with
Kathleen, and Craig raised it with Kathleen, and Kathleen
said, "Laura probably has the shits" over what the accused
did to her last night; "I lost it with her".

20 She said that what had happened on the Saturday was that
Laura was following her around whinging and moaning, and
she had spun and knocked Laura over, screamed at her, and
then saw Laura lying on the ground in an emotional wreck.
25 The accused then got upset, Laura got upset, and she then
settled Laura down and put her to bed.
I think Craig gave evidence that he said something to her
about what she had done to Laura.

30 So it is against the background, of those two days, that
we come to the day of Laura's death: The background of
the accused losing control with Laura; hitting her, be it
accidental or not; knocking her over; screaming at her, to
the extent that the following day this 19-month-old child
35 was apparently trying to avoid her mother. So we then get
to 1 March the Monday. Laura got up about 6.20. Sorry,
before we get to that, I have already read to you some
diary entries where the accused says she lost it. My
submission to you is that is a description of a very
40 similar incident, or very similar approach, very similar
loss of losing it with Laura.

On the Sunday, so far as what happened on the Sunday, what
I suggest to you is this: You will recall that during Mr
45 Zahra's cross-examination of Craig Folbigg (page 407), Mr
Zahra put this as a proposition to Craig:

"Q. I put it to you that she told you that she
had inadvertently knocked over the child and
50 that the child had become upset as a result of
that?

A. Yes, that's true.

Q. I put to you that she didn't say "I lost it
55 with her'."

What that amounts to is this: Mr Zahra, on behalf of his
client, the accused, was suggesting to Craig: Look, what

really happened was, yes, the child did get knocked over, but it was inadvertent and, yes, the child did become upset. So what can you assume from that? You can assume from that that there is no challenge to the fact that
5 Laura was knocked. There is no challenge to the fact that Laura did become upset. The only challenge is whether it was deliberate knocking or inadvertent knocking. You might think that is some acknowledgment by Mr Zahra that Craig's evidence was essentially the truth.

10 We then come to the day of Laura's death. Laura got up about 6.20. The accused got up 6.45. Laura was very clingy, subdued, and whingey, and she had got really agitated and upset when she realised that Craig was going
15 off to work. She was jumping up and down on her bed. Craig got her off. She went running up the hallway crying. The accused lost patience with Laura and growled at her. Later on Kathleen had Laura in her high chair and had both of the Laura's hands pinned down under her hand
20 on the deck of high chair and was trying to force-feed her cereal. When confronted by Craig, Kathleen said that Laura would have breakfast if she said she would, and accused Craig that Laura was only like this when Craig was around. She then grabbed Laura, pulled her out of the high
25 chair, and said "Go to your fucking father." Laura went towards Craig. Kathleen gave one of those guttural growls and screamed, "I can't handle her when she is like this". She had both her arms in the air. Laura fell to the ground crying hysterical, shaking, sobbing. Craig took Laura to
30 the bedroom. The accused came into the bedroom and said, "You give me that baby and get ready for work. Get out. You do this. This is your fault". Craig then backed right off, got ready for work, and then the accused said to him later, "Look, she's fine now", and Laura was watching TV.

35 Craig then left for his work at Teasdales. About 8.30 Kathleen phoned Craig at work. She was very chipper and loving. She said they needed to talking about their life when Craig got home. She said she wanted to apologise for
40 losing her temper that morning. She said that Laura was now fine. They were about to go to the gym, so Craig asked Kathleen to bring Laura to see him at work after the gym at morning tea time.

45 The accused agreed. The accused brought Laura to see Craig at about 10.30. They left at around 11.30. Laura seemed fine. She was happy, active and giggly. She didn't want to go with the accused.

50 Now, if I could suggest to you that there are, there is independent confirmation of the essential parts of that account of Craig's, I won't read it to you but I will tell you where it is. You might like to make a note of it. Questions 797 to 819 in her record of interview and
55 exhibit O, page one. Exhibit O is the document which she wrote out for her solicitors after she had done the police interview. So my submission is that those two sources independently confirm all of the essential parts of

Craig's account of what happened on the morning of Laura's death. We then come to the actual circumstances of death.

I will read one part to you question 813:

5

"He told me that Laura was visibly scared to go near you, what can you tell me about that?

10

A. Probably because I was a bit more vocal than usual. If I had screamed which I don't remember doing, if I'd screamed it would have been the first time she had ever heard me doing that so naturally she would have been standing there and thinking what the heck is going on? I'm not going anywhere near her while she's--"

15

The tape stopped.

20

So Kathleen and Laura leave Teasdales around 11.30. The only account, evidence of what happened after that, is from what the accused said to various people.

The first account that she gave was to the ambulance officers Mr Wadsworth. I will read to you what he said.

25

He said that the accused had told him that she had heard the baby coughing in the bedroom and checked her five minutes later and found her not breathing. She said that Laura had been suffering from a runny nose and coughing for a couple of days. That was her first account.

30

The second account was to Craig on the way home from the hospital. She said to Craig:

35

"On the way home she left work, she drove home...raced her to the kitchen the breakfast bar and started to perform CPR on her and ring me and the ambulance".

40

The next account was to Detective Sergeant Ryan on the very same day of Laura's death. It might have been at the hospital before she had spoken to Craig. The account she gave to Detective Ryan was this: This was an oral account that she gave to Detective Ryan:

45

"She woke up at 6.20 am this morning. She was.

50

Q. Can you tell me what happened with Laura today?

55

A. She woke up at 6.20 am this morning. She was in a bad mood. Craig went to work and we had breakfast. We went to the gym and then went to see Craig at work for morning tea. She went to sleep in the car on the way home, so I put her into bed when we got home. I heard her coughing and did not think much of it. I went to check on her about five minutes later and saw that she wasn't breathing. I took her to the

breakfast bar and did CPR and rang 000."

She was asked a few questions "what time did you leave the gym. 10.30...half and hour."

5

Ladies and gentlemen, I wanted you again to try and place yourself in a situation: You have had a child in bed coughing, you've ignored the coughing, you've gone about your other business, be it looking for the dog or putting out the washing, it doesn't really matter. But you have gone about your ordinary business. Five minutes later you come back inside, gone into the child's room to find the child dead. What would you be saying to yourself for the rest of your life? What would be the thing that you would be regretful of for the rest of your life? What would be the one thing in your life that you would have wanted to have changed in your whole life from that day? Surely, the one thing you would remember would be the coughing and you would be saying to yourself, if only, if only I had gone into to check on the child when I heard the coughing, that child would probably still be alive today.

If you were in that situation, that would probably be your thought to your dying day. But not Kathleen Folbigg. Why not? Kathleen Folbigg forgets all about the coughing. Because when she came to be interviewed by detective Ryan she completely, utterly forgets about the coughing. Why? Because the coughing never happened. Why did she say in the first place that Laura had coughed? Because she needed some excuse for having gone into Laura's room to check up on her. She needed to invent some story why she had gone into Laura's bedroom to check up on her. She needed to invent some story about how she had found Laura, deceased. So she invented the story about her coughing, if a person is coughing they're still breathing. So she invented this story going in five, ten, fifteen minutes later, depends which version you look at as to how long it was.

She invented this story about going in to check on her but then by the time she comes, I think five months later to be questioned by Detective Sergeant Ryan she gives an account in her recorded video interview, completely amiss to coughing and when asked about it she says, oh I forgot about that. Forgot about it?

Ladies and gentlemen, if that had really happened the way she said, there is no way she would have forgotten about that coughing. As I said that would be something that she would remember for the rest of her life and be regretful about; if only I had gone in to check on Laura when I heard her coughing.

Let us have a look at her record of interview on 23 July 1999 five months after Laura's death. It is a very long interview. I think it goes for something like eight hours and she gives an account in this interview of what happened with Laura. I would like to begin reading to you

from page 100 because there is a very, very long answer about Laura. It is one answer that goes for 13 pages about the circumstances of Laura's death the relevant part I will read to you now.

5

" I used to always check on her. I never went out checking on her, probably about every 20 minutes or so I used to 15 or 20 minutes I used to go in and see...pale but not a great deal."

10

Then at page 110. Which is she says, again about finding Laura deceased. " Then I have got back inside walked up the hallway, thought I will check on her as I have done a thousand times before...noticed she was on her back". That was in answer 365. Then at page 114. Part of question 376. "From when I put her into bed and she was asleep I sort of the potted around a bit...to when I checked on her."

15

What she is saying in the interview I use to do regularly check on her, this was just one of the regular checks that I did and I just happened to come across her when she was dead. Then Detective Sergeant Ryan puts to her the discrepancy between what she had said to him on the day of Laura's death and what she put in the interview. That is in questions 835 to 839:

20

25

"Q. When I spoke to you, you told me that you woke up at 6.20 in the morning or Laura woke up at 6.20. She was in a bad mood, she had a cold for a week or so. Craig went to work that morning, you had breakfast, you went to the gym and saw Craig at work and Laura fell asleep in the car; you put her into bed and you heard her coughing?"

30

35

A. I had forgotten about that.

Q. Sorry I didn't hear?

A. I forgot about her coughing and just forgot that she had a cold.

40

Q. Is it the fact that she was coughing or is it the fact that what you told me that day is not right?

A. No, it was the fact that I was standing on the back verandah with the door open and that, that she coughed. That is the reason why I went back in.

45

Q. You said that you had heard her coughing about half an hour after she went to bed?

50

A. I don't remember.

Q. That you went in about five minutes later and found her to be in the state that you told us before, is that right?

55

A. I don't know, I don't remember the conversation that I have had with you."

Well, that is what was in her videoed interview.

5 Then we come to a statement she did for her solicitor, very shortly after her videoed interview. It is a statement for her solicitor headed re; first of March. (Access sought to exhibit O: Granted.) 1999, first of March. "Didn't mention argument in interview."

10 She goes on and said in this, about the morning of Laura's death. "I had relented and let Laura out of her chair and Craig was carrying her. I remember raising my voice and seeing Laura's face. She was a little frightened...we calmed down".

15 Then on the second page she says this:

20 "Had monitor with me, had put it in on bench, something on verandah, went out back door to, something, dog. When she returned to verandah heard over monitor that Laura had coughed, didn't go in straight away...wish I had of straight away."

25 Here she is retrospectively saying, I wish I had gone into check on Laura when I heard her coughing.

30 Ladies and gentlemen, it is conceivable that she would forgot about the coughing, remember it when she is reminded of it by the police officer and why would she go to her solicitors and say, I wish I had of straight away gone in. We submit that all of that is just her, we submit that her regret at not having gone in is feigned, her forgetting about the cough was because it never happened and all of this is consistent only with her being
35 responsible for Laura's death. I would also remind you of this; she said in her versions she carried Laura out of the car into the house through the hallway to Laura's bedroom.

40 You can see from the two plans in evidence where Laura's bedroom was situated. It did not require her to go through the lounge room and yet the lounge room was where Laura's telly tubby shoes were found on the futon and also her bottle. They were both in that lounge room. How did the
45 shoes and the bottle come to be in the lounge room? Did she take Laura into the lounge room to feed Laura? Did Laura refuse to go to sleep, get cranky or cry? Was there another argument? Who knows? We don't know. But her account of what happened just doesn't add up.

50 We then come to the medical evidence in relation to Laura, and again I would direct your attention to the summary of the medical evidence that we have handed to you. I would like you to go over Laura's medical evidence a bit more
55 carefully because it is a bit more complicated. The reason is this: Laura was, as you know, found to have mild myocarditis. We would submit the most accurate expert evidence in relation to Laura was taken from Dr Cala who

5 did the post-mortem. He was of the view firstly, at point three; that the post-mortem findings of small areas of bleeding and collapse in the lungs was consistent with asphyxiation. He did see some inflammatory infiltrate in her heart caused by myocarditis, but it was consistent with the after effects of a cold or flu.

10 Now, ladies and gentlemen what has been explained to you is this: In medicine nothing is certain. Nobody can say you cannot die from mild myocarditis. You can die from a splinter in your finger. You can get septicemia. A finger might be infected and infection in the blood and systemic septicemia and you die. You cannot die from a splinter in your finger. You can't. Did Laura die from the myocarditis? Nobody could ever say to you she never died from the myocarditis. That is looking just at the medical evidence on its own. Dr Cala was of the view it was an incidental finding. That means she happened to have myocarditis, but that was not the cause of her death. That was because, not just a view he advanced out of thin air, but a view based on the fact that there was no evidence of heart failure, that her heart was normal, not to the naked eye, and that the inflammation was patchy, mild and of a low amount. He, therefore, was of the conclusion that it was very unlikely that Laura died as a result of this myocarditis.

30 In fact he does not believe that it is even a reasonable possibility that Laura died from myocarditis. Professor Herdson supports this view and believes that myocarditis was an incidental finding and not the cause of death. Professor Berry could not see any dead heart muscles on the slides he looked at. Professor Hilton was of the view that myocarditis could have led to Laura's death but he agreed that the finding of myocarditis did not exclude deliberate suffocation. Dr Bailey gave evidence in the Crown case, he is a paediatric cardiologist, he specialises in children's hearts. His view was that the agonal or dying heartbeat found in Laura by the paramedics, after Laura's breathing had stopped, made it most unlikely, sorry, made it most likely that Laura's breathing stopped before her heart stopped and that it was, therefore, unlikely that myocarditis caused Laura's death.

45 Because of that agonal rhythm it is more likely that the breathing stopped before the heart which is not what you would expect from myocarditis as a cause of death. It is more consistent with smothering than with myocarditis. That is point nine.

50 Dr Cala did not fall in the same trap as Professor Hilton had fallen into. He found the medical cause of Laura's death was undetermined.

55 Now, ladies and gentlemen, the very best evidence about Laura's myocarditis comes, not just from the Crown's experts but, indeed, from the defence expert, Professor

Byard. The defence expert, Jones, sorry; Owen Jones, Doctor Owen Jones. He is a cardiologist, not paediatric cardiology, general cardiology. Sorry, paediatric cardiologist. He gave evidence that in effect amounts to this: Most people who have myocarditis recover from it. In fact it is thought that something like five or ten percent of people who get viral illnesses may have myocarditis. Where, we don't know because we don't do post-mortems on them. But it is thought there are a significant percentage of people, something like a five or ten percent marking who get myocarditis from viral illnesses. Of those who present to doctors like himself, about a quarter of them die.

Of course it is only the ones, you might think, who have severe myocarditis with symptoms that present to doctors. Laura of course was not such a case. She had no symptoms. She's playing perfectly happy in that pool the day before and playing at the creche of the gym on day of her death, playing at her father's work place. Of those people who have symptoms severe enough to go to a cardiologist, a quarter of them die, three quarters of them live. Of those who die most of them don't die suddenly. Of those who die most of them have symptoms that are able to be ascertained by a doctor.

So if in fact Laura had died of myocarditis she is in a very small category of people who die unexpectedly without symptoms of myocarditis, not just myocarditis but of mild myocarditis.

Now, I know there have been varying opinions expressed, whether it was mild, moderate or more than moderate. In our submission you would accept Dr Cala's assessment it was mild myocarditis. We submit from all the evidence you will conclude that she just happened to have some inflammation around her heart, which is a not very uncommon consequence of a cold or a flu. She just happened to have that at the time she died. Were it not for the previous deaths in the family, any doctor would have looked at her on post-mortem and said she must have died from the myocarditis, because I can't find anything wrong.

But because Dr Cala knew about the previous history, you might think he did not find they died from myocarditis. He found death from undetermined causes. What we submit is that based upon all the evidence in relation to Laura, all the medical evidence, that this is the case: If you look only at the medical evidence alone in isolation, you cannot say it is impossible that she died from myocarditis. I'm sure my learned friend, Mr Zahra, will say to you; just look at the medical evidence on its own. Nobody's been able to come to court and say she did not die, a hundred percent, from myocarditis. But that is unrealistic. That is not the way that you, as jurors, should look at the evidence. You come into this courtroom as representatives of the community and you bring into this courtroom your commonsense and your knowledge of the

5 world. You don't look at the evidence in isolation. Just as if you had to decide something important in your every day lives outside this courtroom, you wouldn't just look at each individual fact on its own. You would consider everything that your presented with that is relevant to the decision that you have to make and then decide what your decision is.

10 Similarly, in this case it is true no medical expert can say absolutely certain she could not have died from myocarditis but there is strong medical evidence that the myocarditis is very likely to have been an incidental finding. Then you go and look at what happened on the morning of her death? What happened the day before her death? What happened two days before her death? The letter that was sent, given to Craig two weeks before her death? The diary entries that I have yet to come to, shows that her frustration level was building up and up and up. The fact she had already lost it a number of times with Laura, and the fact that she had previously killed three of her children. I will come to that in a little while.

25 So, ladies and gentlemen, what we submit is this: You would conclude in relation to Laura, looking at all the evidence, that she also was murdered by her mother by suffocation.

30 I have now come to the end of the consideration of each of the circumstances of the children's deaths and the medical evidence.

35 What I would like to submit that, even putting aside the diaries, that there is sufficient evidence in the circumstances of death, the medical evidence and the coincidence evidence, to justify the conclusion that even without the diaries, to justify the conclusion beyond reasonable doubt that Kathleen Folbigg murdered each of her children and caused her son, Patrick's, ALTE.

40 Let us come, firstly, to the coincidence evidence and consider that. Perhaps in might be a suitable time?

45 HIS HONOUR: We will take a very short adjournment, ladies and gentlemen. Go with the Sheriff's officer, please.

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: Mr Crown, a check has been made on the exhibit list, MFI 38. Some slight corrections are offered to the description of items. They may not be individually of any great consequence, I don't know, but I will hand you down a list and invite you to consider what is in there.

10 CROWN PROSECUTOR: Thank you, your Honour.

IN THE ABSENCE OF THE JURY

RESUMPTION

5 HIS HONOUR: Ready for the jury?

CROWN PROSECUTOR: Just one thing. Exhibit J, the 1997-1999
diary was originally marked as exhibit J. MFI 5 was the
copy of the 1996-1997 diary which had been edited. The
10 photocopy was included in the folder that was given to the
jury, together with the extracts. For abundant caution, we
would ask your Honour to include in exhibit J, not just
the 1997-98 diary, but the photocopy formerly MFI 5 of the
15 96-97 diary and the extracts document which were handed to
the jury at the same time.

HIS HONOUR: Well, the jury have these documents, Mr Zahra.
I think it is appropriate that I do that.

20 ZAHRA: Yes, your Honour.

HIS HONOUR: Very well. The items mentioned by the Crown
will be included in exhibit J. Do you have the documents
which were marked 5, Mr Crown?

25 CROWN PROSECUTOR: MFI 5 is the unedited diary.

HIS HONOUR: I see. Do we have - there should be available
to be marked exhibit J, an additional photocopy extract
30 from the diary MFI 5. That does not have to be done now.
As long as it is done before the end of the trial. Are
you likely to need to go beyond 4?

35 CROWN PROSECUTOR: Yes, I will finish by 4:30 though, your
Honour. Your Honour, I am going to tender the coincidence
document now: A copy for your Honour, a copy for the
court.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, I said to you rather
obliquely earlier in the day, that there was a reason why
it was desirable for the Crown Prosecutor to finish his
submissions to you today. There has been a death in the
Crown Prosecutor's family and the funeral is tomorrow. He
has asked me if he might attend the funeral and of course
10 I have said that he might do that. So he won't be with us
tomorrow. He will be with us for the rest of the trial.
That is why we want to finish his address this afternoon.

15 Now, the Crown has told me that he won't be able to be
finished by 4, but if you were prepared to sit on, he
would be able to finish by 4:30. Is there anybody who
would have an insuperable problem with that?

(No response from jury.)

20 HIS HONOUR: Thank you very much for your cooperation. Yes,
Mr Crown?

25 CROWN PROSECUTOR: Thank you, your Honour. Thank you,
ladies and gentlemen. We are now going to consider the
coincidence evidence, and might I give you a document
entitled "Crown coincidence evidence".

(Relevant copy document distributed amongst
jury.)

30 I think it needs to be marked. I do not know that it has
been.

35 HIS HONOUR: Yes. The coincidence document will be marked
41 for identification.

MFI #41 COINCIDENCE DOCUMENT

40 CROWN PROSECUTOR: Ladies and gentlemen, I have already
explained to you that the term 'coincidence' is really a
misdénommer. It is really similarity evidence to disprove
coincidence. What the Crown submits to you is that these
four deaths and the ALTE all have ten remarkable features
45 in common. I would like to go through those remarkable
features.

50 The first one is that all five of these events, that is
the four deaths and the ALTE, all occurred suddenly, that
is they all happened very, very quickly. They were all -
all these events were over in a matter of a few minutes.
There is no lingering illnesses. Not one of these children
had a medical problem that went on for any length of time,
more than a few minutes. Secondly, they all occurred
unexpectedly. Not one of these children had any health
55 problem that preceded the sudden death or ALTE: Not one
of them. Out of all of these five events, not one of them
had any sort of warning sign or previous symptom. Think of
all of the diseases that you have ever had, that your

friends have ever had, that your families have ever had, that anybody that you have ever known has ever had. Most illnesses don't happen suddenly. Most illnesses don't happen unexpectedly. You get symptoms that develop? No.
5 No. These children all died suddenly and unexpectedly.

Thirdly, these children all died at home. Now, they spent a proportion of their time away from the home - at the gym, relatives, at friends, out shopping, at Craig's
10 workplace, going out for a drive, doing the things that families usually do, and yet every single one of these five events was at home.

They all occurred during a sleep period. There is not one of these children that had something happen whilst they were out and about, whilst they were in the garden, whilst they were playing around at home, whilst they were watching television, whilst they were in the bath, whilst they were playing with mum or dad, yet every one of them
15 20 happened during a sleep period.

Number five, they all occurred when the child was in a bed, a cot or a bassinet. It didn't happen when they fell asleep on the floor. Didn't happen when they were sitting
25 somewhere; didn't happen when they were standing somewhere; didn't happen when they were running, jumping, skipping, eating or watching TV. It only happened in bed.

Sixthly, they - every one of these incidents occurred when the only person effectively at home or awake was the accused which gave her the opportunity to have done them harm. They were either alone at home with their mother or it was alone at home at night when Craig was asleep, and we know what a deep sleeper Craig was. Not one of these
30 35 unexpected deaths happened while Craig was awake, while somebody else was there, somewhere else, when anybody else was there. Every single one of them were discovered dead or moribund by their mother. What a coincidence, that Craig never discovered any of these children deceased. Not
40 one, or moribund. They were all discovered dead or moribund by their mother, during what she claimed was a normal check on the well-being of the children in the course of their sleep period. In fact three of them happened to be when she was on her way to the toilet. God,
45 her going to the toilet was very dangerous for these children. Three out of her five children had incidents when she happened to go to the toilet. God, you would be locking up the toilet, wouldn't you? Everyone of them was during a normal check of their well-being. Gosh, you would
50 be telling her not to check on them, wouldn't you? What an amazing coincidence, or is it?

Number nine: They were all discovered dead or moribund by their mother at, or shortly after death when they were
55 still warm to the touch, and two of them still had a heartbeat. So they were found by her very shortly, literally minutes, after the cessation of breathing. What an amazing coincidence, ladies and gentlemen, that each of

these five events was discovered by this woman so shortly after these babies had stopped breathing. Why was it that it never happened that one of these babies wasn't found cold in the morning when they got up? Why was it that some hours didn't follow, or even one hour didn't follow, after the cessation of breathing when these children are found deceased or moribund? Why was it that she discovered them all? So quickly after they had stopped breathing? In fact two of them so quickly that they were still, technically speaking, alive, and one of them was able to be revived. Two of them were found whilst their hearts were still beating, probably within six or eight minutes of the cessation of breathing. What an amazing coincidence, or is it?

Finally, in relation to four of the five events, that is in relation to Caleb, Patrick's ALTE, Patrick's death, Sarah's death, she failed to render any assistance at all to them after discovering them dead or moribund to the extent that she did not even lift them up out of their beds.

Now, ladies and gentlemen, those ten similarities on their own are incapable of being explained, except by the one common feature, that is this accused. This accused is common to all of these deaths and the ALTE, and that is because she was responsible for all of them. That is why she raised the alarm so soon after it had happened.

You have heard in evidence from a number of the doctors that there has never been recorded a family such as this one where four children have died of natural causes, either from the same natural cause or from different natural causes. There have never been three or more deaths in the one family recorded from SIDS.

Now, ladies and gentlemen, what that means, I am sure his Honour will tell you, what he will tell you is this: That the fact that there has never been an instance recorded does not mean that it has never ever happened. It does not mean that it could not happen. What it does mean is, it is an expression of how rare it must be that it has never been recorded. I mean it has never been recorded that the same person has been hit by lightning four times, I presume. That does not mean it has never happened. It does not mean that it could never happen. You might have some person living in the backwards of India who has been hit by lightning four times, but it is an expression of its rarity that there has never been - if this be the case that there had not been recorded that the same person has been hit by lightning four times. It is probably more common that a person has been hit by lightning four times than what has happened to this family, you might think.

Professor Berry described these four deceased children as being like four sudden lightning bolts, and that is really what it is. The only reasonable conclusion is that Kathleen Folbigg killed them.

Now, his Honour will also give you direction on the use of coincidence evidence and the use of tendency evidence. What I would like to do is to just briefly explain to you how we suggest you should view the coincidence evidence and the tendency evidence. Firstly, let me explain to you the difference.

Coincidence evidence is the kind of evidence that I have just been addressing you on. The similarities between a number of different events, with a view to assisting you to come to a conclusion as to what caused all of those events. That is coincidence evidence. It requires you to look at all of the cases at the one time.

Tendency evidence is different. Tendency evidence is where you have come to a conclusion, based on other evidence, that one fact has been proven. You can use that fact to assist you to come to a conclusion about other facts. Now in this case what it means is this: If you come to the conclusion that you were satisfied to the requisite degree, that is proof beyond a reasonable doubt, if you are satisfied that Kathleen Folbigg had killed one of her children you can use that fact to help you come to a conclusion, whether or not she killed other of her children. That is a tendency argument, because you have come to the conclusion that she killed, say, one, you can say she is a person that has a tendency to kill her children in this case, which is by smothering them. If we look at the circumstances of one of the other deaths, we can see that it has got similarities, and that helps us to conclude that she has killed the other child.

Now, what I suggest to you is this: That when you initially approach the evidence as a whole, that you use the coincidence approach, that is, you look at all of them to decide all of them and then hopefully come to a conclusion. The only time really that you might need to use the tendency approach is this - and I'm speaking hypothetically; this might represent the way you approach it, you might not - but let us say that you are satisfied that she has killed Caleb, Patrick, and Sarah, but you are a bit concerned about Laura's myocarditis. Then you can use the fact that you have already decided that she has killed three of her children to help you come to the conclusion that the myocarditis is an incidental finding, and that she has killed the fourth child. So it is just some evidence that you can use to assist you to come to the conclusion in relation to the fourth murder. I hope that I made that clear and not made it even more confusing. The coincidence evidence relies upon you looking at all of the evidence together. The tendency argument requires a conclusion first, and then you use that conclusion to view one or more of the other changes.

Now, there are some other factors that we would suggest to you are relevant to the coincidence argument. They are factors that are not in all five of the events but only in

some of them. I have already mentioned the fact that Patrick's ALTE was three days after Craig went back to work; Sarah's death was a day or two or three after the monitor was taken off. Again it is a similarity.

5

Another similarity, the accused had shown acute irritation at the child very shortly before death in relation to both Sarah and Laura. And finally, the accused had thought of leaving home in the period shortly before the death of Patrick, Sarah and Laura. So those are similarities that are not in all five events but just in several of them.

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We now go to the diaries.

15

Ladies and gentlemen, I often say to juries in cases where the Crown has to prove an intention on the part of the accused, that we don't have a machine to look into the minds of human beings, and thank goodness for that. But in this case we have something better than a machine to look into the mind of Kathleen Folbigg. We have her diaries which were a very intimate, personal and an exact analysis of what her thinking was during the time that she was trying to get pregnant with Laura, was pregnant with Laura, and in the early months of Laura's life. It is quite clear that this was a very serious journal of her thoughts. There is nothing humorous about what she was writing. There is nothing - it was not a story she was writing for a magazine. It was something that was very serious. It was something that was very precious to her. She got very upset when Craig read one of her earlier diaries, and it was quite clear from the entries on 16 January 1998 and 17 December 1997 that she never thought that anybody would ever read them. These were only for herself.

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Now, ladies and gentlemen, imagine if you had have lost three children and you were writing a diary. What would your diary be full of? What would be the thing that you were writing about again and again and again in your diary? A diary of your own personal thoughts. Just for yourself. Nobody else is going it read it, to try and deal with your own feelings and emotions. What would you be writing in your diary? You would be writing about how cruel fate had been to you, about how unfair it was that you had had three children snatched away from you. You would be probably doubting any religious beliefs that you may have had. You would be saying how unfair it was, how could one person have to deal with so much misfortune. How unfair is it? How unfair can fate be? There is not one entry in those two diaries of that nature. Yes, she mentions fate but she mentions fate in the context of that she's expecting to be punished by fate in the future for what she has done in the past. There is not one entry of the kind that you would expect from a person that had cruelly lost three children to natural causes.

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Now, ladies and gentlemen, I do not know to what extent you have actually gone over to these diaries and to what

extent you have perhaps read the extracts that have been given, but we say that the most important entries are in these extracts that we have given you, and I am going to, I will assume that you have very carefully read them. I am not going to go over them and read them to you. I read them to you in my opening address but what do these diaries contain in essence?

The diaries contain ramblings about her weight, about her desire to be watched by men at discos, about her desperate wish to exercise, so as to lose weight, about her personal life, Craig, about her tiredness. Again and again, about her tiredness. About her frustrations with the restrictions placed on her by having children. Then you have entries like the one that appears on 16 May 1997 - that is not correct - on 15 December 1997, Caz, her sister-in-law "Caz sent a beautiful angel and teddy for Laura."

Now Laura at this stage, ladies and gentlemen, was four months old:

"Both her and Craig are convinced that Laura's soul is not her own, by the looks of it. Me well I'm sure she met everyone and they've told her, don't be a bad or sickly kid. Mum may you know crack it. They've have warned her - good. But she's still her own little person and will always be - must stop calling her Sarah. She's most definitely not her."

Now, ladies and gentlemen, if you go - before we consider what that means, we should go to the entry for 31 December, which is 1997, which is just a fortnight later, where she writes:

"Getting Laura to be next year ought to be fun. She'll realise a party is going on. And that will be it. Wonder if the battle of the wills will start with her and I then. Will actually get to see. She's a fairly good natured baby - thank goodness, it has saved her from the fate of her siblings. I think she was warned."

Warned by whom? Let me go to 26 August 1996, and we see an entry -

"Went to clairvoyant last week. So did Craig. I always believed that there was more going on than just human nature. I seem content now because I now know that even though I'm responsible, it's all right. She accepts and is happy. I've always felt her strongly."

Now, let us start off with that one. Let us do it in reverse order. "Went to clairvoyant last week. So did Craig. I always believed there is more going on than just human nature." In other words, there might be

5 something to what these clairvoyants are saying. "I seem content now because I now know that even though I am responsible", responsible for what? "It is all right. She accepts and is happy there". Who? Well, in her record of interview at question 626-627 she admitted that this was a reference to Sarah. She accepts what? "I now know that even though I am responsible". Responsible for what?

10 Then we go to 28 - sorry, 31 December 1997. "Wonder if the battle of wills will start with her and I then", starting with Laura;

15 "We will actually get to see she is a fairly good natured baby. Thank goodness. It has saved her."

20 Not in the future. But it has already saved her from the fate of her siblings. So, the fact that Laura is a good natured baby and does not rub her up the wrong way has saved her from the same fate as her siblings suffered; in other words, her siblings died because they were not good natured babies, they did the wrong thing. That Laura has been warned. Warned by whom?

25 We then go to the first entry that I referred you to, which is the entry on 15 December 1997:

30 "Both Craig and I are convinced that Laura's sole is not her own. By the looks of it. Me, well I'm sure she met everyone and they've told her don't be a bad or sickly kid. Mum may, you know, crack it. They warned her good. She's still her own little person and always will be."

35 In other words, I think that Laura, before her birth, met the other three kids and they've told her "don't be a bad or sickly kid. Mum may, you know, crack it". They've warned her to be good. "That's good".

40 Now, if ever there was an admission, it is that combination of those three diary entries. Those children had been murdered by their mother in the other life, the other dimension. They have spoken to Laura before she was born, and they have warned her:

45 "Don't be like we were, don't be naughty, don't be bad, don't be sickly, you know what mum is like. You know what she did to us. You don't want her doing that to you, do you? So don't be a bad or sickly kid or the same fate will be befall you."

50 And:
55

"Thank goodness that she's a good natured baby because it has saved her from the fate that befell her siblings."

Now, ladies and gentlemen, there are a number of questions in which the accused was asked about these entries and she gave explanations to Detective
5 Sergeant Ryan. I referred you already to 626-227. I would also refer you to 610-611 and that is all in relation to those ones, in which she attempts to explain what this all means. In answer that can only be categorised as glib, trite, evasive. Her
10 explanations are just unbelievable for these entries.

Now, the explanations - well, she was only asked questions about the first diary because the police did not have the second diary. I don't know what Mr
15 Zahra is going to say to you about how you should interpret the second diary, but my submission to you is this: You would interpret the second diary, giving the words their ordinary English meanings. Would you interpret the diary as you interpret any document
20 that you read, a letter that you received, a newspaper article that you read.

If I could just refer to you a few other significant entries in the diaries.
25

On 4 December 1996, this is while she was still pregnant - this is when she found out she was pregnant with Laura:

30 "I know now that battling wills and battling sleep deprivation were the causes last time."

Causes of what? She attempts to give an explanation at 684-5 which we would submit just does not make any
35 sense at all.

1 January 1997:

40 "I have a baby on the way which means major personal sacrifice for both of us, but I feel confident about it all going well this time. I'm going to call for help this time and not attempt to do everything myself anymore. I know that
45 that was the main reason for all my stress before and stress made me do terrible things."

What terrible things? She gives some lame excuse in her interview at question 701-708 about what she meant by "terrible things" and it is just totally unbelievable. Bad
50 thoughts, she said. It meant she had bad things. Terrible things, it says. Not bad thoughts, terrible things. What terrible things did stress make her do?

17 February, 1997, referring to Craig:
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"He should be for me forever. Just because a baby is entering our life makes no difference really. One day it will leave. The others did

but this one is not going in the same fashion.
This time I'm prepared and know what signals to
watch out for in myself. Changes in mood
et cetera. Help I will get if need be."

5

What signals to watch out for in herself? What is she
talking about? How did the others leave that this one is
not going to leave in the same fashion? What does she mean
by changes in mood? What help does she need? Again, at
10 question 742-744, she attempts to provide an explanation
for this entry but it is a facile, evasive, unsatisfactory
response.

15

6 July 1997, she is talking about her life with Craig:

20

"Maybe then he will see when stress of it all is
getting to be too much and save me from ever
feeling like I did before during my dark moods.
Hopefully preparing myself will mean the end of
my dark moods, or at least the ability to see it
coming and to say to him or someone 'Hey, help,
I'm getting overwhelmed here. Help me out'. That
will be the key to this baby's survival."

25

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What will be the key to the baby's survival? The help
during her dark moods? What does she think or do during
these dark moods. What is it that: She can see it
coming? What does she do when she is overwhelmed? Why is
the stress of it getting to be too much? What were the
feelings that she wants to be saved from?

35

26 June 1977, second last line: "If God or that elusive
higher power doesn't take them away from me once they are
older to punish me". Punish her for what?

40

Then after Laura was born, I have already referred you to
the one about the monitor, at six weeks of age I have
referred you to the one about, that the alarms are all
false alarms and that that is punishment for the others.
Why does she need to be punished for the others?

45

25 October 1997: "Just watched a video of Sarah". A little
later on, "I cherish Laura more, I miss her, yes, but I'm
not sad that Laura is here and she isn't". What a strange
thing to say about your deceased child. "Is that a bad way
to think? Don't know". I do. Do you?

50

55

"I think I am more patient with Laura. I take
the time to figure what is wrong now instead of
just snapping my cog. Also she is a far more
agreeable child and is easily...most of the
time. Not sure how Craig feels about Sarah now.
Know that even though he tried, he loves Laura
just as hard and wasn't prepared for that.
Thought he could remain standoffish, but
couldn't. I think Laura is beautiful compared to
Sarah. She was cute, but Laura has a special
look about her. Her slight difference in looks

5 gives her a beautiful face, not just pretty, cute and cuddly, gorgeous and beautiful. Well, so far anyway. Looking at the video, Sarah was boyish looking. Laura has definite feminine features, they are chalk and cheese. And, truthfully, just as well. Wouldn't of handled another one like Sarah. She saved her life by being different."

10 Laura, in other words, saved her life by being different. This accused would not have handled another one like Sarah. What a thing to say about your dead child. "Just as well she's different". Why? Just as well that Laura is different, because that way she might survive. That's what
15 this means.

20 29 October 1997: "Laura is different. Totally. She doesn't push my button anywhere near the extent she did." In other words, Sarah "which is good for her is all I can say."

3 November 1997 "Laura by this stage is three months old. Second line:

25 "Feeling deprived of my freedom. I know that's the price that you pay for having a baby but I would not be human if it didn't get me down a little every now and again. It is because my
30 release and enjoyment of the gym is taken away. I have to take her with me most times now which means I can't enjoy myself and turn off like I usually do because she's there and I worry about her. Someone is awake. Got to go. Lost it with
35 her earlier."

Three months of age and she has already lost it with her: "Left her crying in our bedroom and had to walk out - that feeling was happening."

40 What feeling? "And I think it was because I had to clear my head and prioritise. As I have done in here now. I love her. I really do. I don't want anything to happen". What, what might happen?

45 I have already read to you the one from 9 November 1997. Now, the one that is dated 8 November 1997 is probably, it should be 8 December because it is out of date order. "Had a bad today day. Lost it with Laura a couple of times. She cried most of the day."

50 Now Laura is four months old at this stage:

55 "She cried most of the day. Why do I do that? I must learn to read her better. She's pretty straight-forward. She either wants to sleep or doesn't. Got to stop placing so much importance on myself. Must try to release my stress somehow. I am starting to take it out on her.

Bad move. Bad things and thoughts happen when that happens. It will never happen again."

5 Why is she starting to take it out on Laura? Why is that a bad move. What are the bad things that? What are the bad thoughts that? What is it that will never happen again?

10 Then if you go to 28 January 1998. Laura is nearly six months old:

"Very depressed with myself, angry and upset. I've done it. I lost it with her" -

15 and I interpose "yet again" -

"I yelled at her so angrily that it scared her, she hasn't stopped crying. Got so bad I nearly purposely dropped her on to the floor and left her. I restrained enough to put her on the floor and walk away. Went to my room and left her to cry. Was gone probably only five minutes but it seemed like a lifetime. I feel like the worst mother on this earth. Scared that she will leave me now. Like Sarah did. I knew I was short-tempered and cruel sometimes to her and she left. With a bit of help. I don't want that to ever happen again. I actually seem to have a bond with Laura. It can't happen again. I'm ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me. It only seems to happen if I'm too tired her a moaning, board, whingey sound, drives me up the wall. I truly can't wait until she's old enough to tell me what she wants."

35 Why did she lose it with Laura? Why did she yell at her so angrily? Why did she leave her? Why did she feel like the worst mother on this earth? Why was she scared that Laura would leave her now like Sarah did? How was she cruel and short tempered with Sarah and then she left with a bit of help? What sort of help? What is it that she doesn't want to ever happen again? What can't happen again with Laura? Why is she ashamed of herself? And, finally, 6 March 1998: "Laura not well. Really got on my nerves today. Snapped and got really angry but not nearly as bad as I used to get."

50 Now ladies and gentlemen all of those questions that I have asked can be answered by one single solitary statement; the only answer that you can give to all of those questions is this accused murdered her previous three children and was desperately anguished that she may murder her fourth child and did in due course do exactly that. These diaries are the strongest evidence that you could possibly have for this accused having murdered her 55 four children.

As I said, it would not be as strong evidence if you had a machine to look into her mind, to read her mind as these diaries are. There is only one explanation for them. It is the only explanation that makes any sense at all. And when
5 my learned friend, Mr Zahra, makes submissions to you about this diary, I don't know what he is going to say and I do not get another opportunity to speak to you, but I anticipate that what he will say is that these were - he
10 might say to you these were the ramblings of a grief stricken parent who had lost three of her children. If that's the case, why isn't there one entry about how cruel fate had been to her taking these children away without any blame on her part? It just does not make sense.

15 Now, ladies and gentlemen, there is just a couple of general submissions that I would like to make to you and I am coming towards the end of my address.

20 Firstly, some evidence was led in the Crown case about the absence of a normal grief reaction to the deaths of the children. What is the significance of that? If that was viewed on its own, it would have no significance at all. You can't attribute much weight to that because some
25 people show more grief than others. Some people show less.

30 However, what we do submit is that the unusual grief reaction that she showed, particularly after Laura's funeral and wake, is consistent with an ambivalence on her part. We don't suggest that she planned and carried out a cold, calculated murder of her children and then afterwards was pleased they were gone. We do not suggest
35 that. What we suggest is that she became enraged, she became consumed with stress, hatred, resentment, anger and suddenly smothered her children to death. Most probably she regretted what she had done very shortly afterwards. Maybe that's why she so suddenly raised the alarm after
40 the children had died.

45 We don't say that she rejoiced in the deaths of these children. Quite the contrary. Of course she grieved for them but her grief was compounded by guilt at being responsible for their deaths, so it was not an unambiguous grief reaction. It was a reaction of grief, coupled with
50 guilt for their deaths. What was the battle of wills that is spoken about in her diaries. The battle of wills was that these children developed personalities. Caleb must have developed a personality and a sense of will at a very young age, and babies do have a will, "Yes, I do want a feed. No, I don't want a feed. Yes, I want to cry. No, I
55 don't want to cry. Yes, I want to go to sleep. No, I don't want to go to sleep". This accused had an overriding need to control - particularly the sleeping and eating patterns of the children - and when she could not do that she imposed her will upon them, to the extent of murdering
60 them. She was going to win that battle of wills, and when they wouldn't comply with her she murdered them. With each child, she was able to cope just a little better. That is why each child lasted a little longer than the previous

one: Caleb was dead after 19 days. Patrick lasted four months, before he suffered his ALTE and then another four months before he died. Sarah lasted ten months. Laura went for comparatively longer, 19 months. Laura of course was a very placid baby. The description of her in the diaries is of a very placid, easy-going compliant child. Quite the contrary to Sarah. And the sense in the diaries about Sarah is that it was Sarah's fault that she died. Sarah was the bad one. Sarah was trying to win that battle of wills. It was her fault that she died. If she hadn't have battled so hard against the accused then the accused wouldn't have had to kill her.

The blood on Laura's pillow. Now, ladies and gentlemen, you have heard the evidence about that, that there was a presumptive test which was positive for blood but that the presumptive test is no more than a first guess. It goes positive for a lot more things than just blood, and that when it was analysed for DNA analysis, it was not Laura's blood because it was the blood of a male. We don't know whose it is. There is no evidence as to whose it might be. There was - it was unlikely to be Craig's. All I can say about that is that it is a mystery. It remains a mystery. And you might remember that at the very beginning of this trial I told you that the pieces of evidence in this trial were a bit like a jigsaw puzzle, and at the end of the trial it might be that there are a few pieces missing the in the jigsaw puzzle. That does not mean that you cannot make out what the picture is. You might make out a jigsaw puzzle of the Sydney Harbour Bridge and the Opera House. There might be a piece of the sky missing, but you can still say it is a picture of the Sydney Harbour Bridge and the Opera House, and this is one of the very small pieces of the jigsaw puzzle that is missing.

Exhibit AM, which is the letter that was tendered very late in the Crown case. It was written after Sarah's death and expressing Kathleen's disgruntled feelings that she had towards Craig, expressing sorrow at their lives and what has become of them as a couple. She is telling Craig that she can't serve him as a wife should, that she can't make him happy. She is sorry, but that he'll be okay. That should be compared with an entry in the diary for 21 July 1996. That entry reads in paragraph 2: "I'm going to try my hardest this time. If anything does happen I'll just leave and try to let Craig go in peace and start again". So what she is saying there, when she is trying to get pregnant with Laura, is that, "I'm going to try my hardest with Laura but if anything does happen to Laura, ie, if I do kill her, I'll just leave Craig and try and let him go in peace and start again"? And here she is, after Sarah's death - and you might think fairly soon after Sarah's death - saying in a letter to him that she is sorry; she can't serve him as a wife should; she can't make him happy; she knows that he will be okay, and that they should have a parting of the ways. This was her way of letting Craig go in peace and starting again. But of course as we know Craig wouldn't let her go. He loved her.

He wanted her. And he was determined that they were not to fail in their marriage.

5 I would like you to briefly consider what I anticipate will be submissions made by my learned friend, Mr Zahra. As I said, I don't know exactly what he is going to say, but I anticipate it a little bit, and I have to anticipate.

10 I think that essentially he will say that the Crown must prove that these children did not die from natural causes; the Crown can't prove, in relation to each individual child, that they didn't die from four incidental findings, therefore the Crown had failed to prove its case beyond
15 the reasonable doubt.

Caleb may have died from a floppy larynx or SIDS. Patrick may have had an ALTE, which was a first epileptic attack or encephalitis. His death may have been caused by an
20 epileptic attack, an epileptic seizure. Sarah may have had a displaced uvula or SIDS. Laura may have died of myocarditis. Well, yes, ladies and gentlemen, I can't disprove any of that, but one day some piglets might be
25 born from a sow, and the piglets might come out of the sow with wings on their back, and the next morning Farmer Joe might look out the kitchen window and see these piglets flying out of his farm. I can't disprove that either. I
30 can't disprove that one day some piglets might be born with wings and that they might fly. Is that a reasonable doubt? No. Is the hypothesis that the defence advances a reasonable doubt? No. Why not? Because if you look at what they are suggesting, not in isolation, but in totality: There has never ever been before in the history of
35 medicine that our experts have been able to find any case like this. It is preposterous. It is not a reasonable doubt. It is a fantasy, and of course the Crown does not have to disprove a fanciful idea. As I said, you can die from a splinter in your finger. If one of these children were to have been found to have a splinter in their
40 finger: Yes - my friend would say - the Crown can't prove that they didn't have septicaemia and die from that. Yes, that's true. But that is not a reasonable doubt. You don't just look at the medical evidence in isolation. You look at all of the evidence.

45 My learned friend, Mr Zahra, will probably also say that there was no signs of any physical abuse to these children during their lifetimes. Well, that's true. That is quite true. But you have heard evidence that suffocation is very
50 easy to do on a young child, on a baby, without leaving any signs. This accused snapped when she wanted sleep and couldn't cope with their crying or whinging. My friend will also make submissions to you, I anticipate, that there are no definitive signs of smothering on these
55 children. It is true. There is none of them that has bruising around the face, or tooth marks on their lips or on their tongue, that are consistent only with smothering. If they did have those marks my friend will probably say

it is consistent with a fit anyway.

5 No doubt he will point to some evidence that was called in
the defence case from the girls at the gym, that the
accused was a good mother. Well, ladies and gentlemen, the
10 girls from the gym, you might think, would have no real
idea what sort of a mother Kathleen Folbigg was. You would
give their evidence, in our submission, very little
weight. None of them had any idea that she harboured the
15 thoughts that are expressed in her diaries, and those
aren't the kind of thoughts that you would confide in
casual acquaintances that you meet at the gym, or even
better friends than that.

15 I anticipate that he will read to you selections from the
diaries where she expresses joy at having her children,
particularly Laura; and, indeed, there were times that she
was thrilled with Laura as a child. She was delighted by
20 Laura. She enjoyed Laura. She loved Laura. We don't say
that she always hated Laura. What we say is that when she
became frustrated and stressed she got flashes of anger,
resentment, bitterness, hatred. That wasn't something that
she thought all of the time.

25 I expect that my friend might say to you that there is no
logical reason that has been advanced why she would kill
her children, and I would have to say, yes, there has
indeed been no logical reason, but you do not need a
30 logical - who would have a logical reason to kill their
children? Many people do the most amazing crimes for
totally illogical, irrational reasons that have a lot more
to do with their emotions than they do with any logical
thinking. Of course it didn't make sense for her to kill
35 her children, and the vast majority of people would not
contemplate it, wouldn't do it, but that does not mean
that the fact that she didn't have a logical reason for it
- it does not mean that she did not do it.

40 I anticipate that he will say to you that the diaries are
ramblings of a grief stricken parent who had lost her
three children, and indeed that you should not read them
literally. I have already made submissions to you on that.

45 I anticipate that he will extensively make submissions to
you about the fact that the Crown has to prove its case
beyond a reasonable doubt. Yes, indeed, that has been the
case from the very beginning. That is why we have a jury
of ordinary people who come into the courtroom to decide
50 factual issues of this kind. Beyond a reasonable doubt
means just that: Beyond a reasonable doubt. What is a
reasonable doubt? It is for you, as representatives of the
community, to say whether a doubt is a reasonable doubt or
not. That is your test to determine. Nobody can tell you
55 what that means. Have you to decide it.

Now, ladies and gentlemen, when I opened the trial to you,
I gave you three alternative intentions that the Crown
alleged in relation to the deaths of these four children.

Those three intentions were: Either an intention to kill, or an intention to do grievous bodily harm, which is really serious bodily injury; or that she smothered them with reckless indifference to human life.

5

Now intention to kill is clear. Intention to do grievous bodily harm, you will remember I said to you that a deliberate intention to render a child unconscious would amount to grievous bodily harm, and reckless indifference to human life merely means that she knew well, when she suffocated them, that it might well cause them to die, but she went on regardless in that knowledge.

10

Now, any of those three intentions are sufficient to establish the crime of murder, and we would say that you would have no hesitation in coming to the conclusion that she had one of those three. It is not necessary for you all to decide on the same category. Some of you might think she has an intention to kill, some an intention to commit grievous bodily harm, some to kill them with reckless indifference. It does not matter. But if you accept that the Crown has proved beyond reasonable doubt that she had one of those three states of mind, then the Crown has proved the requisite element to establish her guilt of the charge of murder.

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If you come to the conclusion that she in fact smothered her children, we submit to you it is inevitable that she had one of those three states of mind. If so, then she must be found guilty of those murders. As to which of those three different intentions or three different states of minds she had, it is not really of any great significance. The tenor of her diaries, you might think, is more consistent with a deliberate killing in a fit of anger and resentment rather than an accidental killing in the course of trying to render them unconscious, but it does not really matter which.

30

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Now his Honour will give you some directions on an alternative verdict to the murder charges, a verdict of manslaughter. His Honour will give you the directions on manslaughter, not because his Honour has taken any view of the facts of this case, but because his Honour is obliged, in a murder case like this, to give any jury directions on manslaughter. What he will say to you is that you only come to manslaughter if you are not satisfied of any of those three states of mind, and he will explain to you what manslaughter is. I am not going to explain to you what it is. But what we say to you, ladies and gentlemen, is this: Either she smothered them, in which case she had one of the three states of mind for murder, or she did not smother them, in which case she is entitled to an outright acquittal. We do not submit to you that there is some halfway point of manslaughter: Either she smothered them and she either intended to kill or to render them unconscious or did it with reckless indifference to human life, in which case she is guilty of murder or, she didn't smother them, in which case she is not guilty.

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5 In relation to Patrick's ALTE. You only have to decide
whether she had an intention to cause grievous bodily
harm. I don't think anybody would doubt that the brain
10 damage that he suffered was grievous bodily harm. So the
only issue is: Did she attempt to smother him? If so,
then that crime is established. If not, she is entitled to
be found not guilty. So, our submission to you is that
15 although his Honour is obliged to direct you on
manslaughter, that it is not something that will really
concern you at all in the context of this trial.

15 Ladies and gentlemen, the Crown says that looking at all
of the evidence in this case, that you will be satisfied
beyond reasonable doubt that the elements of each of the
five charges, that this accused faces in this trial, has
been established to that requisite degree, that is beyond
a reasonable doubt. If you come to that conclusion your
20 duty is to find her guilty. It might be very difficult for
you to emotionally get around the idea that a woman would
murder her own children. It goes against every ounce of
humanity that any of us have, but this case is not about
emotion. This case is about facts. Evidence. Logic.
Rationality. And it requires you, as judges in this case,
25 to do what any judge, any professional judge, such as his
Honour, has to do day in and day out, and that is to put
aside any feelings of sympathy or prejudice for anybody
associated with the case. The accused, the families of the
victims. This is not a case for sympathy, prejudice, or
30 emotion. It is a case for a cold hard look at facts,
evidence, rationality; and with those words I thank you
very much for your very patient consideration of this
address.

35 HIS HONOUR: Thank you Mr Crown. Ladies and gentlemen,
thank you for your cooperation this afternoon. We shall
adjourn now and resume at 10 o'clock tomorrow. Will you
please go with the sheriff's officer.

40 JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Yes, Mr Crown?

5 CROWN PROSECUTOR: Your Honour, I just raise the issue of bail, as to whether your Honour feels that it is an appropriate point for bail to be revoked. It is a matter for your Honour.

10 HIS HONOUR: What do you say about this, Mr Zahra?

ZAHRA: Well, your Honour is well aware of the arrangements that have been made in relation to bail. They are really quite secure. They have been complied with. She is staying
15 with the officers of the Salvation Army. She is escorted there and away from the court. There is no risk that she would fail to appear. She has continued to turn up at court. She has complied with the conditions, so we can very much guarantee that there won't be any problems with
20 her interfering with the jury. She does not go out at night. She stays at the place. There has been no suggestion that she has not been compliant with that. Your Honour, those particular concerns about failing to appear, or concerns that the jury may be interfered with, are
25 non-existent, and there is no reason why bail cannot be continued at the present time.

HIS HONOUR: Mr Zahra, I will accept that for the moment, but I want you to understand that this is a matter that I
30 shall review day by day from now on, so that appropriate tentative arrangements should be made.

ZAHRA: Yes. I understand what your Honour is saying.

35 ADJOURNED PART-HEARD TO WEDNESDAY 14 MAY 2003 AT 10AM

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 BARR J
AND A JURY OF TWELVE

TWENTY-FIFTH DAY: WEDNESDAY 14 MAY 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

IN THE PRESENCE OF THE JURY

15 HIS HONOUR: Good morning, ladies and gentlemen. Yes, Mr Zahra?

ZAHRA: Thank you, your Honour. It has now been some time since my opening address to you. It was about a month and a half. Might I at the outset take you to some of the submissions I made at that point in time?

It is recognised no doubt that an opening address is quite helpful to you, helpful to you so that you might understand what the defence case is at the outset. It is also recognised that as jurors who have gone through the process of jury selection, and then immediately taken from their day to day existence and then asked to sit on a jury, that then becomes very quickly, apparently a very serious case, that much of what I said to you at the outset may not be something that you recall with a degree of precision. So if you could bear with me at the outset. Some of you will remember some of the matters that I did raise with you. It is helpful, because ultimately what I am about to say to you and what I am about to take you to in the course of my submissions is very much what I opened to you on.

When I go over these remarks to you, in fact I will take you to the transcript of the words that I used, it will become apparent to you that the case that I will be putting to you in my closing address is in fact the same as what I have put to you at the outset.

45 You may recall in fact that I reflected about how difficult it would be for you to understand the complexity of what I was about to say, but it was put to you in the hope that it would offer some guidance.

50 The Crown ended his address yesterday by saying that he anticipated that I would be saying certain things in my address to you. I might take you to that in a little while.

55 It may not have needed a great deal of anticipation, because the matters he raised at the end of the day were matters that I raised to you at the outset. There are matters that are our case now.

5 You may recall at the outset that I had taken you to some fairly basic directions that were given to you at the outset, and these included, amongst other things, that no doubt there would be expected to be quite a deal of publicity about this matter; and that it was important for you to attempt to disregard what that media reporting was.

10 You may recall that I had taken you to a direction which, on the face of it, was fairly obvious, that it is best not to really talk to anyone else about this case because, really, what is important here is in fact the evidence before this court, that you don't need to get the opinion of someone who might have read or heard a little grab of a
15 media report.

20 You may recall that I had reflected on the fact that soon after the opening, that there was likely to be quite some publicity; that there would be many people in this State in this city, who would be talking about this case; that in the workplaces, that there would be many people, in social settings in this city, that there would be many people saying that the accused is guilty merely on the basis of those media reports.

25 You may recall that I put to you, well, there are probably many people in the workplace who would be discussing this case as a result of the media reporting and saying look, you can't have that many deaths in the one family. It is suspicious. You can't have that many children dying in the
30 one family of natural causes. She must be guilty. She killed those children, she murdered those children.

35 You may recall that in fact I said to you that it might be really quite important to reflect on that, to reflect on the fact that the sheer number of charges are a very powerful starting point for the Crown.

40 You may recall that I said to you, you would need to reflect on that; you would need to reflect on the power of the mere fact of the number of charges which in fact enables people, on the face of it, to reach a conclusion that she must have murdered the children because you can't
45 have that many children die of natural causes in the one family.

50 You may recall that I put to you that no doubt that that was a significant platform of the Crown case, that the Crown case, quite properly, will say to you at one point in time, to look at this case globally.

55 It was submitted to you that whilst that was an appropriate process of reasoning, that you must move from that. That the mere number of counts, the mere number of deaths, was not in itself determinative that the accused was guilty of murder.

There has been much evidence from experts who have

indicated to you that nowhere in medical reported research or inquiry has there ever been this many deaths in the one family. No doubt that is a platform of the Crown case.

5 It was submitted to you at the outset that that is in fact
not determinative, in other words, we need to understand,
firstly, the fact that there is this tendency to look at
the number of charges on its own as being determinative.
10 What was submitted to you was that in fact you have a
heavy burden in this case. You are not in the same
situation as someone who can, offhand, make a comment
about this case on reading newspaper articles or watching
snippets on the television or hearing things on the radio.
You have a much heavier burden.

15 It was submitted to you that you would need, ultimately,
to go to the precision of the evidence of each individual
case. The Crown said to you at the end of his address to
you that he would anticipate, he would anticipate that we
20 would be saying to you that really this case needs to be
decided on the individual case; that we need to go to the
individual medical evidence in particular in order to
determine whether the accused is guilty of murder. Well,
the Crown did not need to anticipate, because this was in
25 fact the submission that was made to you at the outset. It
was made very clear that the case for the accused was very
much the necessity to, firstly, understand, understand the
powerful driving force behind the sheer number of charges,
that same driving force that permits persons to say well,
30 she must be guilty, you can't have that many unnatural
deaths in the one family, to recognise that but to decide
this case on the detail of the evidence.

35 You may recall I had remarked that if it was merely a
matter of deciding this case on the number of counts, that
because it is unknown that there has been this number of
natural deaths in the one family, in medical research,
that she is guilty of these counts of murder and the count
of inflicting grievous bodily harm.

40 You may recall that what I had submitted to you, that
during the course of this trial, that there would be a
tension between the Crown saying to you "look at this case
in overview. Look at the four deaths and the ALTE" and the
45 tension on behalf of the accused to look at the detail, to
look at the precision of the evidence. Now that is in fact
the submission I made to you at the outset - recognising
that there would be such a tension and you, no doubt,
would come now to recognise that that is in fact the way
50 this case has unfolded and it would become clear to you,
when in fact I take you again to what I said at the
outset, that this is in fact the accused's case.

55 If it were merely appropriate to say, look, this has not
been recorded before, she must be guilty, well you may
recall that I had said to you really well, if that were
the process, why didn't we just really decide the case
then and there? Why did we need now to have to go through

quite an amount of evidence over a month, a month and a half? We must recognise that the power of the number of charges. We must recognise that obviously as the Crown has put to you that there will come a time when you look at this case in overview.

It is submitted to you that this case cannot be determined on the mere fact that it has not yet been recorded in medical history or is not known to medical practitioners, or that we get to a stage where, because of the number, she must be guilty of all of the charges.

Now, it is submitted to you that that really is a flawed process, if ultimately that is what we are doing.

If we go to the precision and we have disquiet about the evidence but then come back to the fact well, it has never been reported before, she must be guilty, then that is a, I submit to you, a flawed process because the mere fact of the number is not determinative.

Now this tension was recognised at the outset. This tension will exist throughout the rest of the trial, and will exist during the course of your deliberations. It is not to suggest that, looking globally is the proper process. What is submitted to you is that if you go through the global view and then look at the precision, otherwise we have wasted a month and a half. We need to go to the precision and that is the tension that was recognised at the outset, the tension between what the Crown says to look at this in overview and what we submit to you, the need to look at the precision.

You see, it is submitted to you that this case is not assisted by statements that pigs might fly or lightning doesn't strike four times in the one place. This case, as submitted to you, is a heavy burden. The accused is charged with a number of gravely serious matters. It is a heavy burden upon you, and it is a matter that obviously that you need to go to the precision. You need to go to the detail of the evidence and understand and recognise that obviously whilst the overview, looking at the counts in combination, is part of the process, but if in fact that is all that is left and that there is disquiet about the evidence in the individual cases, then it is submitted to you that you could not be satisfied beyond reasonable doubt that she in fact murdered these children. So that tension was recognised at the outset.

It was indicated to you that there might be some fundamentals that might assist you through the course of the trial.

It was said to you, obviously, that you must always keep in mind in the resolution of the tensions in the evidence that when you go about resolving those tensions, that you use what is a very valuable tool to you, and that is an understanding that it is the Crown who bears the onus of

proof. So in resolving the tensions, really, this is the foundation. This is the touchstone for resolving the tensions in the case. It is not a question, as you may recall I said at the outset, of weighing up both cases and see in fact what you would prefer. This case does not lend itself to a broad brush approach or just looking at the big picture. It is a matter where the detail must be looked at and it is submitted to you that when you look at the detail that in fact that there will be this, this disquiet.

You may recall that at the outset I said to you that so far as an example of the danger in really looking at the global view and using that in order to convict the accused in the individual case, is that when we go to the detail of the individual case, a lot of what the Crown has put to you just does not fit in the individual case.

You may recall at the outset that I had indicated to you that it may be a helpful process of reasoning to, when you test what the Crown has said to you about why it is that the accused murdered these children, that you would look, for example, at the evidence in relation to the child Caleb, and that when you look at that case, that you could in fact see that there does not appear to be the pattern that the Crown had suggested to you, so far as a suggested motive, a suggested state of mind in the accused that you might comfortably find in that particular case.

You may recall that when I said to you, look, we may need to go to the detail of Caleb but in a sense that we said, look, this is a matter where this child lived for about 19 days; that during that period of time, that there was no suggestion that this child was subjected to any abuse.

You may recall at the outset that the Crown had indicated to you a possible motive for the commission of these offences. The Crown quite properly said that the Crown does not have to prove a motive but the Crown did make some comments about a possible motive for these particular killings, and it was suggested to you that when you look at the evidence in relation to Caleb, that you may not find these particular motives to exist; that when you go to the precision and the detail, that you cannot substantiate this particular motive again, accepting that the Crown does not have to prove the motive but I might remind you what the Crown had said to you at the outset about motive and take you briefly to how he ended his case yesterday.

This is what the Crown said (page 26 line 35):

"The Crown case is that this accused had the following possible motives. The accused had a very low threshold for stress and she was also deeply resentful at the intrusions that her children made on her own life and, in particular, on her sleep. Her ability to go to

5 the gym, and her ability to socialise, including
going out dancing. She was constantly tired,
resentful against her husband, Craig, for not
providing her with what she considered to be
adequate help and she was constantly, we say,
10 constantly preoccupied to an exaggerated degree
with her weight gain due in part to the fact
that she couldn't get to the gym as much as she
liked because of her children."

10 That is what the Crown was saying to you at the outset, in
part, to the fact that she could not get to the gym as
much as she liked because of "her children", plural. The
Crown case is that:

15 "She either intended to kill them during a flash
of anger, resentment and hatred against her
children, or alternatively, that she
20 deliberately sought to render them unconscious
in an attempt to put them to sleep, either so
that she could get to sleep herself or that she
could have some time to herself."

25 The Crown again made some submissions to you in the
opening in this regard again. This is at page 67 at around
line 27:

30 "The Crown says that Kathleen Folbigg in anger
and/or resentment and/or stress, either intended
to kill her children or intended to render them
unconscious thereby causing them grievous bodily
harm or thereby intending to cause them grievous
35 bodily harm. Alternatively, the Crown alleges
that she was recklessly indifferent and she
realised that her actions in restricting their
air intake may well cause them to die. The Crown
says that she was well aware that by doing this
she was placing her children at critical risk of
40 death."

40 Then at line 50:

45 "Whilst all parents sometimes feel frustration,
exasperation and anger with their children, her
feelings ran deeper to intense anger, hatred and
resentment to the extent of prompting her to
kill her children. She saw her children, the
Crown says, particularly Sarah, as being engaged
in a fierce battle of wills with her which she
50 desperately had to win. When she could get away
from her kids, such as to the gym, she was on
top of the world and she was very eager at all
stages of all the babies lives to resume her
social life, her sporting life, her working
55 life, her sexual life that she had had when she
didn't have children."

Some of the time she coped well with the demands of

parenting. With Laura, particularly, who was a very docile child she coped a lot of the time but inevitably the Crown says there were times when she could not abide or cope with the demands of parenthood. She eventually resolved her frustrations, her resentment and her flashes of anger by killing her children. The Crown case is that "she was totally obsessed by her own needs, wants and desires".

So you may recall this, because this was no doubt a very graphic way of putting the Crown case to you that, when she could get away from her kids, such as to the gym, she was on top of the world and she was very eager at all stages of all the babies lives, to resume her social life, her sporting life, her working life and so on.

Again, this wasn't a matter yesterday afternoon of anticipating what our submissions are going to be today. We in fact flagged this at the outset. We had indicated to you that it would be necessary to go to the detail, particularly in relation to the child Caleb, to see whether this particular motive could be borne out. It was in fact, as was indicated to you that you would need to look at this critically. This is at page 85 at line 12, the submissions that I made to you in relation to what the Crown said to you about motive:

"What we submit to you at this stage is that you would be critical of that motive and you would need to look at the detail. You would need to look at the lifestyles. You would need to look at obviously the circumstances and it is quite highlighted in relation to the child Caleb, for example, that no doubt you would use that also as a means of looking at the lifestyle in relation to the other children."

Now the Crown has properly said that they do not have to prove a motive in a sense. The way the Crown has put their case is that this is a motive: If you don't accept it, we don't have to prove the motive. That is quite true. However, that doesn't mean that a question of motive or trying to determine motive is not an important consideration. "In this particular case", I said to you, "it is important because, in the absence of any physical symptoms or medical signs which conclusively can indicate suffocation, and if there is in fact no motive or no apparent motive or one that can't be excluded, and there is in fact no pattern of physical abuse, then the Crown's case becomes immeasurably weaker. So it is true that the Crown has said to you that they do not have to prove motive but the Crown has proffered a motive and you would need to look at that critically and, as I have indicated to you, it will become apparent to you, even today, that the motive is very, very shaky. It is submitted to you also that obviously if there is in fact no motive that can be excluded then in the absence of any history of any other abuse, then the Crown case becomes immeasurably weaker. It is, therefore, important to very critically

look at what the Crown tells you about the motive and obviously from the Crown's opening, we can see that he relies very heavily on the diaries to support that motive."

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Now, it was really not necessary for the Crown to anticipate what we were going to say to you because we said this to you at the outset.

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Now, in a sense what we flagged at that point in time was to, really, look critically at the motive when the evidence is called, test it. Now, I will take you to the evidence with an amount of detail and precision and I would ask that you bear with me during that process, because when we look at the detail we can now conclude that that motive, as I said to you at the outset, is very, very shaky.

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Now, as I have indicated to you from the Crown's opening remarks, that in a sense what the Crown was saying to you, that in a sense these motives about socialising and going to the gym were not just in relation to one of the children, but used the plural.

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Now, it is submitted to you and it is really quite apparent if we reflect on the Crown's address to you yesterday that in fact it was not put in the way totally as he did in the opening. It is accepted that certainly he looked at situations of anger and resentment, but so far as this particular picture of the accused - and you may recall what impression that you might have had at that point in time about the accused, the mental picture that was created by the Crown in its opening to say to you this is the motive. This accused murdered her children to go to the gym, to go socialising, to go dancing, amongst other things. We can in fact see that from the Crown's address yesterday that that emphasis did not continue over to the Crown's closing address.

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Ultimately, the Crown put to you yesterday that (page 1376 line 35) this is again in saying look, I can anticipate what the accused's case is going to be. Clearly it did not need anticipating because this is what we were saying at the outset:

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"I expect that my friend might say to you that there is no logical reason that has been advanced why she would kill her children, and I would have to say, yes, there has indeed been no logical reason, but you do not need a logical - who would have a logical reason to kill their children? Many people do the most amazing crimes for totally illogical, irrational reasons that have a lot more to do with their emotions than they do with any logical thinking. Of course it didn't make sense for her to kill her children, and the vast majority of people would not contemplate it, wouldn't do it, but that does

not mean that the fact that she didn't have a logical reason for it - it does not mean that she did not do it."

5 Now you can in fact see that there is really a different
emphasis. In fact I will actually take you to the detail
of the evidence because, in particular to Craig Folbigg,
because he at times tried to, again it is submitted to
10 you, paint this picture of the accused because it is
submitted to you that that was the picture that he wanted
to present of the accused. This was the mental picture.

15 What is submitted to you again, look at that mental
picture that was attempted to be created, but then look at
the detail of the evidence. I will commence doing that in
a short time.

20 You may recall in my opening address to you that it was
not a matter for the accused to prove that the children
died of natural causes. Again, this was an important
submission that was made to you and it was said, well
look, really, this is an important tool. You must use this
as a touchstone.

25 It is for the Crown to prove the case beyond reasonable
doubt. It is not a matter for the accused to prove that
Caleb died of a floppy larynx. It is for the Crown to
prove that the accused murdered these children: In the
30 case of Patrick, that she in fact intended to inflict
grievous bodily harm on that child, and so did. So when it
is put to you that these are conditions that you would
need to take into account, you must always take into
account that really this is not a matter where it is for
the accused to prove that Caleb died of a floppy larynx,
35 that Patrick's ALTE was the result of epilepsy or
encephalitis and his death also was the result of a
condition that might have arisen in a background of
seizures or epilepsy or encephalitis. It was not for the
accused to prove that the uvula of Sarah caused her death.
40 It was not for the accused to prove that Laura died of
myocarditis. Again, it is for the Crown to prove that the
accused murdered these children.

45 The process that has been gone through, particularly with
the experts, was to look at other hypotheses, other
possibilities. The question will be that if you conclude
that they are reasonable hypotheses, can you exclude them.
Now it is important to consider that when you are
50 resolving these tensions, when you are working through
this, that this is in fact the touchstone, these are the
yardsticks. It is not for the accused to prove floppy
larynx or myocarditis. It is for the Crown to exclude
these hypotheses.

55 Again, this was a matter that was in fact put to you in my
opening address, and it was submitted to you - and again
reading from page 81 line 26, I will repeat that:

"None of the experts and particularly the pathologists that carried out the post-mortems, could find any evidence to support positively that this was suffocation.

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As the Crown has indicated to you that there are some symptoms that may be consistent with suffocation, but it is important to understand that when that evidence is called, those witnesses will also say that it is consistent with some other natural process; that those symptoms are consistent with some other natural process."

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It was put to you in this in this way, as the Crown said there is no, in fact - it is the accused's case that despite the extensive post-mortems, particularly the extensive post-mortems in relation to Sarah and Laura, that there is in fact no positive evidence. As the Crown had indicated there may be some aspects which could be consistent with suffocation but those conditions may also be consistent with natural process. So the question arises here in relation to the Crown case whether the deaths can be attributed to suffocation in the absence of the typical signs of suffocation at autopsy.

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Now, again, this is accused's case in my final address to you. It was the accused's case at the outset that this was flagged, that really none of the experts will say that there is positive proof of suffocation, and it is submitted to you that what I said at the outset has been borne out by the evidence. The witnesses have at times used the expression "consistent with suffocation", and in summary of the medical evidence, the Crown uses this phrase in reference to the number of witnesses who expressed it in this way a number of times. It is always important when that phrase is used, to say, hang on a moment, consistent with suffocation means that because a person or a child could be suffocated without there being any symptoms that consequently if there are no symptoms that that would be consistent with suffocation.

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Now whilst that is a valid process of reasoning it has got to be recognised that when the experts say it is 'consistent with suffocation', they are not saying that there is positive proof of suffocation. They are not saying there is positive proof of suffocation. They are saying because there is an absence of conditions, that that would be consistent with suffocation because you can have suffocation where there are no symptoms.

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It was then said to you that we need to consider that this was a case where no doubt that there are four children would have died and two of them, as was indicated in the opening, there were extensive post-mortems, and I will take you to the detail of those, and in fact there are no none - none of the positive signs of suffocation in those autopsies. I will take you to the detail of those. So

these are preliminary remarks that were made to you at the outset in my opening address to you, and whilst I have been repeating what I in fact have said, that in a sense really we do better than go back to the start and say well, really, look, this is what was flagged, this is what was flagged at the outset, this is the way that the evidence is expected to unfold. This is the process by which it was submitted to you that you would reason through these cases. That you would obviously take into account that if a witness says it is consistent with suffocation, that you would understand that really what they are talking about is an absence of condition that would you need obviously to consider these particular conditions in relation to each of the children in order to be satisfied as to whether the Crown has proved murder.

Now these were the submissions that were made to you at the outset, and in a sense it really, my submissions during the course of this address, will be the same as what in fact was said to you at the outset.

You may recall that in relation to the diaries that I had said to you that you would need, again, to consider the detail of the diaries and to consider the diaries in the context.

I had said to you that no doubt, as the Crown has said to you, that you start off giving the literal meaning to those particular words.

The question remains what do you ultimately give to those remarks as being a literal description of what her thoughts were at the time?

You may recall that it was suggested to you that when you look at those excerpts from the diary that you would need to look at the context in which those diaries were written. It was submitted to you in the opening address to you that there may be some grief reactions; that in the context of experiencing the deaths of the children, as going through some fairly normal human reactions, not only of grief, maybe feelings of shame, feelings of guilt, feelings of responsibility, asking the "what if" questions. That is a submission that I made to you at the outset (page 86 around line 35) they were submissions that I made to you at the outset that you would need to look at those diary entries, taking into account the wide range of human responses. No doubt on the one hand looking at the literal meaning of those words but then going on, going on in fact to see what evidence there is that might suggest that this was in fact her true state of mind.

I will take you, in a little while, to some parts of the record of interview where the accused was taken to some of the excerpts from the diary. It is submitted to you that in those answers we may get some insight into her state of mind in relation to those excerpts from the diary that she was referred to; that you in fact may be able to glean

that there are some of those processes, some of those mental processes, feelings of shame, feelings of guilt, feelings of responsibility and asking "what if" questions and I will take you to those in a moment.

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What is submitted to you powerfully is this: In relation to the diaries ask yourself this question: Where is the pattern of behaviour that these diaries, looking at the literal interpretation of the words, where is the pattern of behaviour?

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Now, the Crown's closing address to you talk in terms of this diary showing that she was prone to totally losing her cool; losing her control; venting a high level of anger, frustration and stress, and the Crown as you can see, gets to the detail of the diaries and says: This is what she said. This is what she had done. These indicate an undercurrent. These indicate, not only a state of mind, but a real propensity on the part of the accused to lose it, to lose her cool, to lose her control, to vent a high level of anger, frustration and stress.

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The Crown says that this is how these states of mind and the diary manifest themselves and it says that it manifested themselves in the murder of these children.

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What is submitted to you is that if this was the state of mind, if this was indicative of an accused who was prone to lose her cool, prone to lose control, prone to vent a high level of anger, frustration and stress, and the Crown says you can look at the diaries, you can look at the detail of the diary entries, and you can conclude that that is the sort of person the accused is; that is the mechanism; that is the state of mind that led to her murdering her children.

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What I submitted to you: Why, why hasn't it manifested itself in a recognisable pattern of behaviour? Now, again, I will take you to the detail of the evidence about the way others saw her; the way others saw her in relation to her care of the children; the evidence in relation to the fact that there is no history of abuse; there is no suggestion that these children were physically abused by the mother. The Crown case is that this was her propensity, it manifested itself on five occasions and it manifested itself on those five occasions where she - on one occasion had an intention to cause grievous bodily harm and on the other four occasions that she intended to murder, intended to kill or was in fact recklessly indifferent to that.

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What is submitted to you is that if these diaries are indicative of an underlying propensity, pattern of behaviour, that that pattern is not there. I will take you to the detail of that. But there is one key to understanding the diaries and that is asking that question: Why hasn't it manifested itself in a course of conduct, if obviously the mechanism is totally losing her

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cool, losing her control, venting a high level of anger, frustration and stress, why hasn't it manifested itself at other times? Why hasn't it manifested itself in any suggestion - you may recall in the opening address it was suggested to you that, really, that there was just no pattern, there was just no pattern of abuse, that there was no pattern of her losing her cool to the degree that the Crown suggests was part of her state of mind, part of her propensity.

We know that the accused and Craig Folbigg were married in 1985. We know that at times the marriage was strained, but it was on foot. It was on foot ultimately for about 16 years. Sixteen years. Now, in re-examination, Craig Folbigg was asked this - and this is at page 524 at the top of the page - he was asked about how, in a sense, he reacted to reading the diaries:

"Q. Did those entries relate to all of your wife's attitude to the children?"

And he acknowledged 'yes.'

"Q. To those things that you read about her attitude to the children, were those things that she had ever expressed to you before then?"

A. No, never.

Q. Were those attitudes that you read in the diary anything that you had seen before or experienced before or witnessed before in Kathleen prior to reading those diary entries?"

A. No."

Now, this was a man who was living with his wife for about 16 years. Now, if these diaries indicate this state of mind, as the Crown suggest to you, why didn't it manifest itself in this marriage?

"Q. Were those attitudes that you read in the diary anything that you had seen before or experienced before or witnessed before in Kathleen prior to reading those diary entries?"

A. No."

If we are talking about an underlying predisposition, an underlying part of the accused's character that the Crown says to you is represented by those thoughts, is represented in those diaries, then in fact why hasn't it manifested itself in a continuing course of conduct or a pattern of behaviour where these children were abused? It is submitted to you, that when we go to the detail of the evidence in a moment, that it is quite the opposite, that when we look at - no doubt there is some parts of Craig Folbigg's evidence I want to take you to in a moment and the assessment of what the weight you give to what he said, but if we pass to the detail of his evidence that we will be asking ourselves this question - if those diaries

indicate an underlying state of mind, where is the corresponding behaviour? Where is the pattern of behaviour that might be represented by these underlying conditions?

5 "Q. Were those attitudes that you read in the diary anything that you would had ever seen before, experienced before, witnessed before of Kathleen prior to reading those diary entries?

A. No."

10

Now, these were matters that were in fact flagged to you at the outset. So when the Crown says to you yesterday afternoon, that he was trying to anticipate what our case was. Well, it didn't need a great deal of anticipating because in a sense this is what we were saying to you at the outset.

15

20 Now, what I intend to do really now, moving on from what my opening remarks were to you, and in a sense that hopefully you may remember some of those things that I mentioned to you, but in a sense we have not wasted time by me referring to my opening remarks because in a sense they are also my closing remarks to you so we have not wasted time with me going backwards. So it is not the situation where now we are starting from the starting point. My submissions to you at the start are the ones I make to you now: There is no change in what the accused's case is now than what it was at the outset.

25

30 Now, I indicated to you that, therefore, there was going to be this tension. Look at the global view, the Crown says. Our case, look at the detail because when you look at the detail there is disquiet. There is disquiet.

35

40 Now, much of my submissions to you now, taking you to the detail of the evidence, will refer to some things that in a sense, if we can glean properly from what the Crown is now saying in their closing address, is probably an irrelevancy, the question of whether she socialised or whether she went to the gym in relation to the child Caleb, for example, may not be relevant because it does not appear that the Crown is in fact emphasising those things in their closing address, as they might have, in the opening. But if you could bear with me because it really is quite important, because what this does - very much as I indicated to you at the outset - the absence of motive raises disquiet. The absence of motive raises disquiet. The absence of behaviour also raises disquiet. So in a sense actually one needs to put to rest, if there is still a continuing suggestion that part of the motive was the need to rid one's self of the burden of the children to go to the gym or go disco dancing, that in fact really it needs to be put to one side because what is submitted to you is that really this was a picture that was attempted to be placed before you by Craig Folbigg, but when we go to the detail it is quite clear that the picture was never there; the picture was never there. This

55

is in fact something I foreshadowed at the outset, as I have read to you a moment ago.

5 Let me go through this evidence in relation to the child
Caleb, firstly. Again, it is important to look at Caleb
because at the end of the day if you look at the global
picture, using the mechanisms the Crown impresses on you
using, coincidence, using in fact the tendency rule that,
10 in fact you would need to take into account the detail of
the evidence and, again, this was something I submitted to
you at the outset, that in relation to the coincidence
evidence, that you would need to look at some of the
evidence, some of the factors when you weigh up the
15 factors that the Crown has in their schedule of
coincidence evidence. It is submitted to you that when you
look through the detail that you in fact understand why
those coincidences occur, particularly when we take into
account such things as she was the primary care giver,
20 that she was with these children pretty well all of the
time, that we would need to factor those matters into
account. These were matters I flagged at the outset. Let
us just, in relation to the child Caleb firstly, just look
at the detail of the evidence.

25 Craig Folbigg was asked this at page 218:

"Q. During the marriage before Caleb was born,
essentially, and your life was your work, your
wife and your extended family?

30 A. Yes.

...

Q. In a sense your life gravitated towards your
own family

35 A. Yes."

40 And then in relation to socialising in clubs he indicated
that that had stopped when Kathy was pregnant with Caleb,
that that going out to the clubs had stopped. Socialising
out to the clubs stopped. And in a sense, during the
marriage, that they went out together. There was no
suggestion that she was in fact, during the course of the
45 marriage, going out with friends or others; that in a
sense the socialising and the clubs was together with his
wife; and question:

"Q. It is then that you essentially mix within
your family?

50 A. Essentially."

Then at 218:

"Q. That there was no socialising after the
death of Caleb?

55 A. No. No. It was well after Caleb died that we
really hunkered down, friendless and family
alone."

5 So when you go to the detail and, again, look at part
of the motive that was suggested by the Crown, that
in fact it just does not fit that picture. We know
from the evidence which I will just take you to in a
moment, that in fact really the gym wasn't around
then. She wasn't going to the gym with Caleb, that in
a sense it was not until they were at Singleton that
in fact that she went to the gym. So we can in fact
10 see the danger of just really looking at some picture
to see whether in fact they would apply to all of the
cases, because the detail suggests that in fact it
wasn't.

15 What about her attitude towards Caleb? What about her
attitude towards the impending birth? Is it
consistent with the type of person that the Crown
impresses upon you that is represented in the diary?
Craig Folbigg was asked this at page 219, about the
20 impending birth, she went to pre-natal care, she went
to see doctors. She went to see doctors during the
course of the pregnancy.

25 "Q. She was happy to be pregnant?
A. Yes, she was.

Q. She was in fact ecstatic that you were going
to have a child?
A. She was in that regard.

30 ...

Q. In 1998 Kathy fell pregnant. Everything
seemed fine and we were happily anticipating the
35 births?
A. We were."

Question 219:

40 "Q. Nothing out of the ordinary, was there?
A. Nothing horrendous, no."

He went on to say, "pretty much seemed standard to me."

45 Then he was indicating that - he was taken to the fact:
"Well, look, you have made many, many statements since the
first time that you went to the police", and he said "I've
made many, true". Continuing:

50 "Q. Is it true that in none of those statements
do you ever say any word at all about any
attitude, problem or difficulty in the time
firstly, before the child was born?
A. Yes, none of those statements at all."

55 In fact he was particularly taken to a statement that he
had made only some months ago (11 December '02), so he was
taken to a paragraph - we started the trial in April -

5 this is when he was giving his evidence and he was taken
back to a statement that he made on 11 December, only a
number of short months before that. He agreed there was
nothing up until then that indicated that there was any
problem about an attitude, some problem or difficulty in
relation to the attitude of the accused to that child,
Caleb. In fact he was taken to a paragraph in that
statement that he had made only a matter of, a number of
10 short months before that statement on 1 February 1989:

15 "My estranged wife Kathleen Folbigg gave birth
to our first child Caleb Gibson at the Western
Suburbs Hospital at Newcastle. Prior to the
birth Kathy and I were happy setting up the
bedroom before the birth. We had fun together,
fun getting together the things we needed when
our child was born."

20 This was the statement that he made only a few short
months before he was giving evidence. Again, there was
nothing that was proffered to suggest that there was
anything about her behaviour, consistent with what the
Crown says is this high level of anger and resentment,
25 this capacity and propensity to lose her cool, lose her
control and venting high levels of anger; because in a
sense that is what the Crown is saying, that that is the
mechanism by which that she killed Caleb.

30 You may recall that the Crown was saying yesterday that
even though the child was only 19 days of age it developed
its own personality at 19 days of age and it was such that
we could also, we could look at those expressions, battle
of wills, that we can in fact say that this must also have
35 happened in relation to the child Caleb and, that there
was a battle of wills because he had developed a
personality in 19 days. You can in fact see how dangerous
it becomes when we start extrapolating or extending these
sentiments in the diary, because in fact they don't
40 manifest themselves. They don't appear to the person who
was living with her, day in and day out, around this time.
Nothing manifests itself, this loss of control, this
capacity to vent her anger. It just does not appear.

45 When Mr Folbigg had reflected on this a few short months
before giving his evidence, that he could not refer to any
problem or any difficulty. In fact the picture that is
painted on the evidence is that she was happy, she was
happy to be pregnant. She cared for herself and the child
50 during the course of the pregnancy by going to the
doctors, and in fact she was happy to be a mother. In fact
he goes on: "Everything appeared to be normal and she was
happy."

55 At page 102:

"Q. Can you tell us how did Kathy seem in the 19
days that Caleb lived?"

...

5 A. I wasn't really there much but...Okay."

Again, he was taken to parts of his statement on 11 December (page 224):

10 "I was of the opinion that Kathy appeared happy and...yes.

...

15 Q. That is the case, is it...having a child."

He agreed, and this is at page 229:

20 "See, because quite clearly up until this morning, taking you through the detail of the statements there is nothing, nothing that you have ever said before that her relationship was other than quite normal?"

25 And he said: "According to the statements" - and this was in cross-examination. You see, was Mr Folbigg at that time trying to, again, paint a picture, being a bit equivocal, but when he says, when he is taken to the statement, that there is nothing about the behaviour that he can point to.

30 Again, he gave evidence about his wife's diligence in the care for Caleb. It is page 229:

35 "Q. Did it appear to you that your wife was being quite diligent in her care for Caleb?
A. Yes, it did.

...

40 Q. She seemed to fuss over Caleb in that regard?
A. She seemed diligent with it."

45 So really this is the evidence - again, going back to what I said at the outset - look at Caleb. Take into account what the Crown says about how you use the diaries, but then stress test it. Test it in relation to Caleb. Stress test the conclusion that the Crown asks you to draw that this was in fact a person who was prone to totally losing her cool, lose her control, vents a high level of anger, frustration and stress. Because in fact when we see the detail, that in fact it does not manifest itself, it does not manifest itself in any pattern of behaviour.

55 Now, you have with you parts of a diary that in fact she had filled out during the course of exhibit L. This is in fact a photocopy of the whole of the month of February that you have. Keeping in mind this picture, it is exhibit

L. It has on the first page "February", it is out of, I think it is a page to a day diary. If you don't have it - I will just take to you some parts and you may be able to see these things at a later stage. Again, the question that is posed to you at this stage is again, keep in mind what the Crown's case is, totally lost her cool, lost her control, venting a high level of anger and frustration. This you can extrapolate that what she was going through was a battle of wills. Look at the detail of this diary. She notes things, for example, of the fourth baby, Caleb. You can see on Sunday the 5th that she has such things as "changed nappy," "fed Caleb", "slight spew" and then you could see in fact "brought Caleb home!!", and so on.

In fact you can see that this is really quite far removed from a person who has this low level of tolerance, of frustration and this was a battle of wills. But what we can see in fact is what the accused did was really embrace the life of this child during this 17 days, and in fact recorded many, many things in the diary, the various times when, the times when the child was restless, the times when the child had wind, feeding, changing nappies.

Now, you might think that really what this does is paints a picture of a person who is really quite diligent and quite embracing the birth of their child. When Craig Folbigg was taken to the detail of this and in a sense it was put to him at 231 that this was indicative of the accused's diligence, he indicated he really did not see that that way. He was taken to the detail and it is at 233 he said, he was asked:

"Q. You say your wife was happy to be a mother?"

And he ultimately said:

"A. Yes.

Q. She embraced it?

A. Yes."

We can in fact see from this that she certainly was looking forward to the future with this particular child. You can in fact see at the top of the page sometimes, firstly indicates two weeks old, that if you go obviously to the diary after the child had died, that she indicates, for example, on Wednesday, 22nd, you can see up the top "three weeks". You can in fact see that she has obviously prepared the diary well in advance, well in advance through February by writing the time, 6.30, 7.30 and so on. So you can in fact see that really, far from having the intention to really cease the life of this child within a short time, that you can in fact see that she was really planning herself the March, four weeks one month. So you can in fact see that she was really quite diligent. She in fact has various appointments in that diary also.

The Crown makes some issue on the day of the death of

5 Caleb, that there is a note there at 2am: "Finally
asleep!!" And if it is to be understood correctly, then
the Crown might be suggesting that in a sense what she has
done here is either indicated that this was a time when
she had killed the child and made a note or whether this
indicated a high degree of frustration at that point in
time. But we can in fact see that really the "Finally
asleep!!" appears on a number of occasions throughout the
diary.

10 You may recall when Detective Ryan was taken to some of
those, for example, one of those appears on Tuesday the
14th, there is a couple that appear on Sunday the 12th,
Saturday the 11th. So we can in fact see quite a pattern
15 of making those particular statements that the child was
finally asleep, and we obviously need to look at that
entry in the context of those others. But again, really
the message to be got from this is, really, looking at the
diary and looking at the way the Crown wants to paint the
20 accused and see in fact whether it is congruous or not.

As was indicated to you at the outset, particularly in
relation to looking at the coincidence evidence,
particularly when we look at the list of those about
25 obviously they occurring at home, child in bed, occurred
when the mother was the only adult home or awake; she had
discovered the children either dead or moribund, that she
discovered the children dead or moribund, when she claimed
there was a normal check on their well-being, and three of
30 them on her way to the toilet, finding the children, as
the Crown puts, but I will take you to the detail of this,
the question of obviously finding them soon after
cessation of breathing and obviously the question of
failing to render CPR.

35 Clearly, it is accepted that the deaths all occurred
suddenly and unexpectedly and that is one factor that
would you take into account, but looking at these elements
of coincidence we would obviously need to look at her
40 role, her role as the primary care giver and see in fact
when we look at these in total that we need to factor that
into account. When we factor those types of situations we
can in fact obviously see that they don't appear, the
coincidences or the lack of coincidences that the Crown
45 has suggested.

We know that in a sense that the accused was the primary
care-giver of Caleb and the other children. We know that
Craig Folbigg was a heavy sleeper. He was described, that
50 if a truck came through a wall or a bomb fell, that he
would sleep pretty much through it. At page 233 he was
asked this in cross-examination:

55 "Q. It was your wife who was the primary
care-giver of the child?

A. Correct

...

A. ... I pretty much don't see anything until the next morning."

5 It was put to him that at night he was of the view that it was his wife's function to wake up, that he would remain asleep because he was the provider and he said this:

10 "My wife was well aware that I was willing to get up and look after this little fellow if she needed me to, or wanted me to, and my wife never attempted to wake me or asked me to see when I went to bed, I really didn't see much until the next morning."

15 Then he was taken to a statement that he made in relation to Laura which would indicate obviously how he saw the relationship and in fact how he saw, how the relationship was. He was asked this at 233:

20 "I now realise this was wrong and Kathy was doing everything at home."

25 Then he went on at 234 to explain this:

30 "Kathy and I made a deal. She wanted to be a mum. She wanted to leave her job so we made a deal. I put 150 percent into what I could do in my life to provide for her and this baby, and me to provide a tidy life, and she would put 150 percent into her life as a mother. I did help out at home but not very much."

35 The next aspect of Caleb's life, again seeing whether it fits in with the picture that the Crown intends to, or has posed, and that is obviously that she had this propensity, even during Caleb's life, to have a low level of frustration, that it manifested itself in a high degree of anger; but at the same time Caleb was a very good baby, he appeared to be a happy baby, and as was put to him, that he was not irritable:

45 "A. If he was hungry, had a wet bum, that would be about it."

Q. Nothing out of the ordinary. He was a good baby?

A. For a 19-day old.

50 Q. He slept well?

A. He did actually.

Q. See, wasn't he a very quiet baby?"

55 And he answered: "He was a quiet baby".

Now these answers are really quite telling because what was put to him was that the child was a very quiet baby

5 but he made a point, it is submitted to you, in removing the "very" out there - "he was a quiet baby". He was in fact taken - "Well, he was a quiet baby, was he?" Answer - and we need the word "very", for what he put to him in cross-examination question - "You have some hesitation in using the word 'very', do you?" Answer: "Well, he was a very quiet baby, yeah".

10 He was then taken to a previous statement that he made:

"Caleb slept...He was a very quiet baby and to my knowledge he slept fairly well.

15 Q. Do you recall saying that?
A. I do.

Q. They are your words, not mine, 'very quiet baby'?
20 A. Good."

You may recall that interchange. You may think really this is being very pedantic. He was pressed about the word "very", but it indicates a flavour in evidence, that will become very evident, that will be in other passages that I take you to in the way that he answered questions.

25 In relation to Caleb, so far as the night, the night of his death, again let us look for a pattern, let us look for a manifestation of this lack of control, this anger, the losing her cool, the venting of a high level of anger, frustration and stress. Let us see in fact whether we can see any lead up to that, any pattern of behaviour, that might suggest that.

30 Well, it is submitted to you that the evidence in relation to Caleb suggests that there was in fact nothing. Quite normal. There was in fact nothing out of the ordinary on that particular night. This is in cross-examination. This is at page 237:

40 "Q. Can I just take you to the night that Caleb died...

45 ...

A. ... pretty much seemed normal."

50 So we don't have anything about this particular night that had indicated that there was any build up, that there was any suggestion, any sign, any manifestation of the type of phrases and statements that are made in the diary. There is just no manifestation of it.

55 When the child is found it is quite clear also that the accused is quite upset. She in fact is in a high degree of upset at that point in time.

The Crown says to you - and this is one of the important

parts, the Crown argues, in the coincidence evidence - that why wouldn't you, as a first step, go and attempt to resuscitate that child? That is a quite powerful submission that the Crown makes. This is where obviously your experience in life - not applying the what "What would I do?" test, but understanding human nature. There is a danger, no doubt, in applying the "What would I do?" test because maybe, if you apply the "What would I do?" test, that maybe what the Crown says is quite true - you would just jump in there, take the child and attempt to resuscitate them. But it is submitted to you that you could fall into error in applying the test of "What would I do?", or what the average person would do.

What we are really looking at is a range of human emotions. People react differently in different situations, and is it so unremarkable, or is it so remarkable in this case, that met with the observation and the finding that she made that, she would panic, that she would in fact not know how to react. Not be able, at that time, once there was a realisation that there was a problem, react to, in a sense, go to attempt to resuscitate the child.

See, when we look at, firstly, in relation to her coming upon the child, and the Crown says: Well, look, really she is the one who finds the child, and this is more than a coincidence - because in a sense what the Crown is saying is that really she has gone there to kill the children - and it is not a coincidence in the fact that she was the person who found the children, but is it so unusual that she would be the person who finds the children when we look at the diary and see the frequency with which she had gotten up to attend to the child; is it so remarkable that she was the person who would find the child because, in a sense this is what she said in her record of interview at question 131:

"Do you remember why it came to your mind to check Caleb...

...

...trying to adjust to interrupted sleep and you are trying to, you know, you worry that everything is all right and, and all that sort of thing."

Now is that an expression that is so out of the ordinary? Is what she said there so unusual to suggest that, as the Crown put to you: Well, would you ever let her near the toilet? Is it remarkable that a mother who is tending to a child, a matter of days old, understanding the frequency that she has to get up "because you are trying to adjust to interrupted sleep. You are trying, you are trying - you are worried, and that sort of thing", was it normal habit to put your hand on their chest as well, or was it normal habit just to sort of poke your head in the room;

she had indicated that this is what she had done, that she had gone in there to put her hand on the chest: "Normally I would...flip their legs and whatever else."

5 So you can in fact see that the sequence she indicates in a sense that, well, really she was up, she was up frequently, trying to adjust to her sleep, would pop her head in the door - and this is at question 104:

10 "I sort of walked in there...so it was a case of both of us pretty much panicking on what we were supposed to be doing, and we just rang the ambulance."

15 Now again we look at the coincidence evidence, but again, go to the detail. This is in fact what was suggested to you at the outset: Go to the detail. Go to the precision. When we go to those questions and answers, does it then seem so unusual? This is a first child. She is adjusting to sleep. She checks on the child; puts her head in the door. She puts her hands on their chest, realises there is a problem and then panics. It is reasonable, as the Crown put to you, that you might think: Well, you might have gone in there and attempted to resuscitate the child. But 20 is this scenario, is the way that she in fact has set out the sequence of events so unusual? Not applying the "What would I do?" test, or what the average person does, but what she said herself is dismissed out of hand? It is submitted to you: Far from it. Far from it, that she obviously went to the child, as she said, had gone to put her hand on the chest. She then panicked. They didn't know about CPR. She went in screaming. Craig Folbigg, no doubt attempted CPR. She was ringing the ambulance. Now this is where it is important. Obviously when you look at this coincidence evidence, on the face of it it seems quite powerful, but this is the tension, this is the tension that was recognised at the start. Don't just look at the global view. Look at the precision. Go to the detail, because when you go to the detail it does not come into this category where it is so remarkable, so unusual to not be a coincidence and be evidence in fact supporting that she murdered Caleb.

45 I will stop there. There is some further matters that I want to raise actually about Caleb, but in a sense what I have attempted to do there was really to look at the detail of the evidence, again going back and saying: Well, really does this fit? Does this fit in with the picture that the Crown has wanted to paint of a person who, in a sense, Caleb had developed a personality; there was already a battle of wills; she totally lost her cool, lost her control, venting a high level of anger, frustration and stress. I submit to you that when you go down to the detail, look at the evidence, it doesn't fit. Thank you.

55

SHORT ADJOURNMENT

RESUMPTION

HIS HONOUR: Yes Mr Zahra?

5 ZAHRA: Thank, you your Honour.

10 Just before the adjournment, I was taking you to the accused's demeanour on the night, and addressing the issue the Crown put to you: Well, why didn't she go and attempt to resuscitate the child, and what is submitted to you was that taking into account the way she in fact had explained the sequence: Is it that unusual that she might have panicked in a situation like that? And her first response might have been to call for her husband. What happened from then on obviously in a state of panic, she being indicated in her record of interview "not experienced in CPR" at that point of time. So obviously these are questions of weight that you would attach to these matters of coincidence that the Crown has indicated to you.

20 We obviously need to take into account her demeanour at the time before we suggest some golden rule as to how a person would react in a situation like that: Whether every person would go and resuscitate their child first up, or if they place their hand on a child's chest and panic, what the reaction would have been. So it is submitted to you, far from it being a golden rule, it is something that you would rely on your own experience, and again not applying "What would I do?" tests, but in a sense trying to understand the range of human emotions; the way the ambulance officers in particular described the accused when they attended a short time later. For example, Mr Hopkins at 4.38 described "plainly upset" and agreeing she was plainly upset, that she was crying, that she said something to the effect "My baby's having trouble breathing and won't wake up properly".

40 The Ambulance Officer Coyle described her as having her hand up to her face and she was crying out and sobbing (page 445):

"Q. The woman you took to be the child's mother was hysterical; is that right?

...

45

A. Yes...and we had no time."

He putting his hand up to his face.

50 "Q. Apparently overcome with grief?

A. Yes."

55 So obviously we have some picture of her soon after, and obviously we need to take that into account, because obviously the Crown has a mental picture to portray of the accused a short time earlier: Totally lost her cool; lost her control; venting a high level of anger, frustration and stress. The question is obviously whether

that demeanour - and this is obviously the beauty of the jury system, in the sense it is not a question of what anyone can tell you of the. This is a matter for you, using your experience in life; whether, obviously, you would look at that type of behaviour and find that it is consistent or not consistent with a person, obviously, who, prior to that time, had come upon the child in fact who had died or else realised there was a problem, and in fact gone into a panic. Not a matter of anybody telling you how to apply these facts. It is flagged. You obviously take into account your experience, and knowing from these independent witnesses, the ambulance officers, as to state of mind at that point in time. But it is submitted to you that this is really quite consistent with that panic with the realisation that the child had stopped breathing or the baby was having trouble breathing and wouldn't wake up properly. The demeanour that is described by the ambulance officers is really quite consistent with that being the sequence of events.

To some extent that is in fact the demeanour that Craig Folbigg has also described of his wife. He in fact also talks about statements about there being "something wrong with my baby", and her screaming at the end of the basinet.

He was asked this at 246:

"Q. She was very upset...
...

A. ...got on with life."

Might I make some submissions to you about the weight you would attach to Craig Folbigg's evidence. This is a matter for you. You saw him in the witness box. You saw his demeanour at various times. You no doubted listened to what he said. You, using your experience in life, it is hardly a mystery in a sense that you come to court well suited and well equipped and well armed with being able to assess people's demeanour. You come across people sometimes for the first time, and obviously make assessments about what they say. There is lots of matters, no doubt, that you take into account. Demeanour: What they say, how they say it. Clearly this is a skill that you have. It is for you ultimately to make assessments of Craig Folbigg's evidence. There are some matters that I wish to raise to you about it and make a submission that you would give little weight to his evidence. The reason this is in issue is because, particularly in relation to the sequences before Sarah was found dead and also in relation to the days before Laura's death, particularly the morning of Laura's death, the Crown relies heavily obviously on Craig Folbigg giving a sequence of events.

So ultimately it is really quite important that you make an assessment of his evidence, because obviously you need,

particularly in relation to Sarah, to know whether she was out of the room with the child at about 1 o'clock in the morning. So these are highly relevant and highly significant facts that the Crown relies on. There was no one else, apart from Craig Folbigg, giving evidence about that particular sequence. So you ultimately have to make assessments about Craig Folbigg's evidence and what weight you would give to his evidence, and whether you accept the sequence of events that he in fact has related to you.

Can I just give you some snippets here, and in fact I will refer to a number of them during the course of my submissions to you, and submit ultimately that the overall picture is such that you would attach very little weight to in fact what he says or be really quite concerned, particularly in relation to the death of Sarah and Laura, that you would have quite some disquiet about relying on what he says to support a conviction of murder of the accused. Again, at least at times, it may seem a little bit pedantic, but they give a flavour and some insight into the way Craig Folbigg has approached the evidence. Say, for example, that phrase I just read to you: "You said in evidence after the death, so far as your wife is concerned, that they pretty much got on with life."

You might think that what Craig Folbigg was trying to do here was paint a picture of his wife as being rather cold and callous. No doubt more in keeping with the person who had a low level of frustration, totally losing her cool, a person prone to lose her control, high levels of anger and frustration. So he described this as "pretty much got on with life". Then he was cross-examined about the detail of what he had said previously. Again, this in isolation, might sound pedantic, but from the over all picture we can glean a certain attitude to his giving evidence.

"Q. Did she cry when she grieved Caleb...?"

...

A. Couple of days after that."

That is very much the same as the type of evidence that he had given in relation to death of Laura, painting this picture obviously of the - back in the motor car, trying to suggest in a sense that if there was grief, it was an absolute pretense. In a sense you might get a flavour in the sense of what he was doing at that point in time pretty much up until the funeral in relation to the child Caleb, maybe a couple of days after that.

"Q. So a matter of days?"

A. Maybe about a matter of week or so.

...

A. Over the loss of our baby."

5 Again there may not be a lot of real distinction there, but it is significant at the same time, what he said in evidence, "She pretty much got on with life", to what he said in the statement over the following weeks, "Kathy and I cried a lot over the loss of our baby". They're the indicators of the flavour of the approach, of his giving evidence.

10 Again, on its own it might seem quite pedantic, but in relation to the sequence of events that are related in court to what happened on the night that Caleb had died, the fact that really there was nothing unusual, nothing out of the ordinary, nothing to suggest that she had lost her cool or resorted to anger or frustration. He was referred to his statement and he was asked in cross-examination:

20 "Q. Can I read this to you of...?
A. Is that the 19th of May 1999.

...

25 A. Because she asked me to."

30 You might think that really this interchange is really quite extraordinary. He in fact says that his wife told him to. We know that there were listening devices at various times in the house. There is nothing in the listening devices to suggest at any time the accused was heard to be suggesting to Craig Folbigg that he was attempting to manipulate or fabricate the evidence. We have his word for that. You can see in fact how the accused would be. Where do we take it from? "She asked me to". What he is saying is that he in fact put that in, put that in because "Oh, she told him to", to presumably create this picture. So then the questions were then asked in cross-examination, further to that:

40 "Q. When did you tell the lie?

...

45 A. ...at my request."

50 This is really crucial, because this is in fact what he describes, the process of going back to the two page statement. We have two sittings. What he is describing here is a process where, in a sense, presumably what he is attempting to portray, is that something had happened after the first sitting of the statement and that, in a sense, because he was besotted, as the Crown put to you, that in a sense he went back to change his statement to fit in to accord with the way either, as he is saying, "because she asked me to" or, in a sense, because that is the way he perceived it. But it is important to see that in effect what he says had happened was that, at his request, he dialled back through police computer and we

changed certain aspects what he told him on 19 May.

"Q. You're lying about that, aren't you?

5 ...

A. ... because I swore on the bible."

10 Later in the transcript he said, indicated, "because I swore on the bible here to tell the truth".

15 What we do know, know very clearly from Detective Ryan's evidence, is that that is not what happened. Detective Ryan said, "No, we did not go back, scroll through the computer. We did not change anything". So I think Detective Ryan said "absolutely".

20 So how do we resolve this? We have this picture, and again, it presents a flavour, it presents an understanding of Craig Folbigg's approach to the evidence. Because we can almost glean a mindset, even by referring to these two little excerpts about seeking to minimise the grief after the death of Caleb; removing the kiss of the night before. Now, again these are very small things, maybe in
25 isolation, but you can get a very clear flavour, because what he is basically saying, "I went back in the second sitting. We scrolled back through the word processor and we changed things", the Detective said that is in fact not what happened.

30 Another aspect of Craig Folbigg's evidence that you need to take into account, it begins - these are matters, not only of your observation of him in the witness box and how he gave evidence, but some of the other material we can
35 look to. We may in fact get this underlying flavour of what he is trying to do, which is to colour the evidence; to paint this picture of the accused, a picture which is consistent with, in a sense, of a woman who has this anger this frustration, goes in and murders her children and
40 expresses no grief. We need to take into account some of the other material, for example, some of the excerpts from the listening devices that he was taken to in cross-examination.

45 It is submitted to you that really these are clear statements by Craig Folbigg, that he was motivated by revenge at certain times when he was making police statements. This is in fact an extract of 23 July 1999, an
50 extract at page 243 of the transcript. This is what the police listening device picked up of Craig Folbigg talking with the accused:

55 "I said I went there because I was so full of hate and spite and anxiety and grief and anguish over the fact that not only had I lost my daughter, I'd lost my wife, you know...I was so frustrated, I was hurting, so I thought I'll fucking fix this."

This is what Craig Folbigg is recorded to have been saying at this time:

5 "I'll fuck your life. You fucked mine. I'll fuck yours. I will go and tell some fucking horrible thing about you that the police think you did it anyway.

10 Q. Do you recall saying that answer?

A. I don't recall actually saying those things, no.

15 Q. You see that was your state of mind at the time when you went to the police?

A. No, it wasn't."

It was put to him:

20 "Q. And that you were personally lying to suit your objective?

A. To suit my objective life with Kathy, Kathy, yes."

25 Again, there was another excerpt from the listen device:

"Well, I don't want him going after you for something you didn't do" -

30 This is Craig Folbigg talking to his wife -

"that you...whether it is my children's lives or my children's deaths."

35 As I said to you, this is Craig Folbigg's words on a listening device planted by the police, and these are statements that he is making to his wife of the question:
40 "Well, how can you dismiss that as an element or factor in weighing up his credibility? You can put it to one side because he is besotted with her". Why has he said that?
"I use whatever I can to... my children's lives or my children's deaths".

45 One interesting fact about that last sentence is that he was asked some questions in reexamination in an attempt to further understand that or explain that. This is what he said. This also is important because, as the Crown said, you don't leave your common sense at the door if you're making assessments about credibility. This is what he said
50 in reexamination by the Crown. This is page 528 at line 47:

"Q. What do you mean by that?

55 ...

A. ...that is what I meant by that."

How does that phrase "or my children's deaths" fit into that? How does "I use whatever I can... To sell sell a motor car. Whether it is my children's lives".

5 Stopping there. That might be an explanation "or my
children's deaths". This is something he is saying, that
he, at times, used his children deaths to sell a motor
car. He is saying this is a normal thing. It doesn't fit
10 in. It raises real concerns, because we get an insight not
only of Craig Folbigg in the witness box, but at home in
his communication with his wife.

The Crown said to you yesterday, in relation to the
15 differences in the grieving, that it was one factor; but
the Crown put to you quite properly, that "we can
understand difference in grieving with difference in
personality", and Craig Folbigg very much accepted that in
cross-examination. This is page 247. In evidence-in-chief
20 he had previously indicated that he had fallen to pieces,
and that she didn't fall to pieces, and that she appeared
to be coping much better than he coped. However, when he
was cross-examined at page 247, that question:

25 "Q. You said, isn't it the case, you were
expecting your wife to have some reaction to you
falling to pieces?

...

30 A. ...Yes, I guess so".

We get further insight in relation to the
accused's grief in an answer he gave in the
35 record of interview at question 402. This is a
question directed at this difference:

40 "Q. Now Craig tells us that after Caleb died
you appeared to get over it easier than he did.
What can you tell me about that?

...

45 A. ...So, yeah, if I appeared to be handling it
better it was probably more a case I just
blocked and blocked rather than actually dealing
with the situation."

50 She goes on. So, as the Crown quite properly accepted, you
obviously need to take that into account.

Craig Folbigg was then cross-examined in relation to his
statement earlier, that in evidence-in-chief, again it is
submitted to you that he was trying to paint this picture
55 of the wife being really able to recover from the death
and just going out dancing or discoing, clubbing, soon
after. Again, when he was cross-examined, the detail
doesn't bear that picture out.

In evidence-in-chief he said "she went out a bit" and again, pretty much as soon as she started back at work, in cross-examination about this, (page 250) he answered - the question:

5

"Q. You said in evidence that after Caleb's death...

...

10

A. ...it may not be. I can't recall."

You can see from that, when he was cross-examined about the detail, it just doesn't seem to fit into that picture that she has this position - may be two or three times that she has gone, after in fact that she had worked; this is in fact after Caleb died - "It would have been some, a few months, but the frequency is no more than two or three occasions. I can't exactly recall the number".

20

You can see how obviously oval the detail doesn't fit into scenario that is attempted to be painted at this point in time. Similarly, this statement that she wanted to return to work. It was put to him that really that she needed to go back to work for financial reasons and in particular in relation to the child Sarah, about the decision to work at Retravision, after Sarah was two and a half months old. He in fact was taken to his statement again which did when Sarah the third child was about two and a half months...for financial reasons."

30

Then he was asked page 251:

"Q. Then you go on, I look after Sarah on these days...

35

A. No."

He said no that was not the case. What he said in the statement was not truth.

40

"Q. When your wife went back to work among others reasons, from time to time it was for financial reasons?

45

A. That is what I said there, but that wasn't the case.

Q. So you lied there?

A. That was another one of her lies that day.

50

Q. Did you lie when you made it or did you go back and correct it?

A. I added that in on the 23rd."

So we can in fact see from that, that again we have this snippet again which is really quite incongruous. I will read this question and answer, when Ryan was asked about the -- 109, line nine:

55

"Q. When you recommenced the process on the 23rd you didn't change anything that had been previously typed on the computer on the 19th?
A. I am absolutely sure of that."

5

So we can in fact obviously make assessments of Craig Folbigg's credibility taking that into account.

10 Can I now go to the medical evidence in relation to Caleb? Again, putting to you that really as was put to you in the opening address, there is a need to go to the detail firstly, to see whether there was in fact any positive evidence of suffocation, whether the Crown can in fact exclude certain conditions. At the end of the day is there evidence on which a conviction can be supported
15 beyond reasonable doubt that she murdered Caleb? Can I just quickly refer to Professor Herdson, in a sense his diagnosis in looking at the material, he said this, 1034. "Slightly worrying me to come to otherwise quite
20 reasonable conclusion of SIDS, I don't think I can take it much further than that."

25 Again, he said it was consistent with deliberate suffocation. Again, as I said to you before, when that phrase is used, consistently used, suffocation comes up, yes, doesn't that mean there is no symptom of suffocation because you can have suffocation where there is no symptom, therefore it is consistent with suffocation. Again answers in that same way.

30

Again so far as any reservation that he may have had that that reservation related to the question of the age of the child at 19 days. But in cross-examination at 1042: "I didn't say that it prevented me making a diagnosis of SIDS
35 but I would have any antennae up a little bit at such a young death." That was his diagnosis.

40 Professor Berry in relation to the question of the floppy larynx clearly Professor Herdson excluding the question of floppy larynx as having any relevancy to death. He indicated in his experience that he had not come across a child dying of floppy larynx. Certainly in his experience, speaking to his colleagues, that was not the case.

45

Professor Berry very much said the same thing. He indicated, however, that he has a principle of never saying never, but he thinks it is extremely unlikely in relation to the floppy larynx. "Although I never say
50 never, it is not my opinion that Caleb died of floppy larynx."

55 An issue raised about haemosiderin. It is an important aspect because again it highlights what I was saying earlier on when we go to the detail, there are troubling aspects. You may recall that the finding of haemosiderin was on the basis, primarily upon which Professor Berry excluded SIDS. The finding of haemosiderin which suggested

obviously that there had been previous bleeding to the lungs. We were given a little bit of insight how bleeding in the lungs may occur and what is haemosiderin. Haemosiderin is, in a sense, at times been described simply as scavenger cells, in a sense, when there is blood in the lungs that these cells in a sense are scavenger cells turn the substance the blood into haemosiderin and there is a switch which can reveal that.

10 Professor Berry said the blood is converted over a period of 36 to 48 hours into haemosiderin. So it is interesting to take into account that mechanism because if in fact the haemosiderin is found in Caleb at the time of death, that in a sense what we are talking is because the process that the process takes a period of 36 to 48 hours to turn it into haemosiderin. When we must look for an explanation of haemosiderin, not at the time of death but as to whether there was something that occurred some time previously. At least 36 to 48 hours. Because that is in fact the when blood is converted to haemosiderin. So this is an interesting aspect where again the attention to detail is quite important because well, if that is the case, if the Crown relies on haemosiderin here, and the weight of the expert evidence, this is not a specific finding of suffocation. But if it is to be used in the way the Crown suggested, that this is in fact some support for suffocation, the first thing we must take into account is that haemosiderin is the result of a process when the blood is converted over a period of 36 to 48 hours. So in a sense Professor Berry was cross-examined about, really, where does that leave us with the haemosiderin? What he said is this, and more than this: That it should lead to an investigation to see whether there might be an episode of smothering or asphyxiation. But no doubt not at the time but at a time for haemosiderin to exist.

So this is an important part of the detail of haemosiderin because it is submitted that to say a non specific finding - Professor Berry, 1078:

40 " Q. So far as the presence of haemosiderin is concerned, it makes you want to inquire further?
A. ...oh, absolutely, I wanted to make it quite clear. I think it is quite clear in my report.
45 The significance of the haemosiderin is that it takes Caleb out the SIDS group... Episode I can point to as being a possible asphyxial episode before death."

50 This is extremely important.

The Crown didn't address this in his closing address yesterday because if the haemosiderin is the result of a prior episode more than 36 to 48 hours before, then what was the prior episode? Professor Berry says well, look he can't reach the conclusion that it is diagnostic of suffocation because there is no proof he was. There is an absence of an episode that he can point to, to put a great

deal of weight on. Let us think about that for a moment because one thing we do know, that two days before the accused has taken the child to see doctor Springthorpe. So if we are trying to understand whether haemosiderin
5 assists us, whether it is consistent with prior episode. 36 to 48 hours, we don't really know how much more than that. But two days before she has taken the child to see Dr Springthorpe, at the end of the day we could probably
10 only take that up to that point. But it seems it is submitted to you, incongruous, unusual, that if this haemosiderin that started at least 36 to 48 hours before, is pretty much at the same time where we have a picture of the accused being concerned about the child having
15 stridor. At the same time if this haemosiderin is to be used in a way that is probably founded on medical research or opinion, then in a sense is it suggestive of some prior act?

20 Look at the diaries. Where is it? Where is it in anyone's observation, that this child was smothered a couple of days before or attempted to be smothered a couple of days before. So much so there was bleeding in the lungs. Again, it is very easy to look at the global picture and use the diaries and just take it word by word. But when
25 you go to the detail, this is the tension: When you go to the detail, where does this work out? How does this fit in? Well it raises quite some disquiet about the use of medical evidence here, the use of haemosiderin.

30 "Q. In the sense of finding of haemosiderin is a matter that warrant...?
A. In my report."

35 Again there is some evidence, obviously all children struggle. Where is the evidence that this child was injured during any struggle. It obviously a case, it doesn't necessarily follow. But why is there an absence? Why is there an absence indicated? Why is there an absence in Patrick of the ALTE. Why the absence of Patrick
40 at the time of death, why is there absent of Laura at the time of death, of any, any of the signs, any of the signs of suffocation or manual asphyxiation?

45 I will take you to some of the detail of this but you have the post-mortem report of Doctor Cummings? Where is the evidence of petechiae? Again these things are not determinative but if we are looking at coincidences, if we are looking at the pattern, why isn't this an important pattern? We know that there can be. We know the children
50 can struggle. We know as their older, they're likely to be struggling more. I will take you to the detail of Dr Cala when I come to Laura. But there is nothing in relation to Caleb's death, nothing, nothing to Patrick's ALTE and doctors examining the child, again I will take
55 you to the detail of Dr Dezordi. No evidence of other injury. No evidence at the time of death, when we look at the evidence of Dr Singh-Khaira that indicated in the post-mortem of Patrick. No evidence of any injury of Sarah

in relation to Doctor Hilton, obviously there is an issue about the punctuated abrasions. But there is in fact statements made by Professor Berry who agreed these may be consequent upon resuscitation and we know Craig Folbigg attended to resuscitation.

Where is the pattern of injury and why is it not even in one of them, one of the five incidents? Because in a sense what we have are five instances where we know that it is possible to have symptoms but there are none.

Dr Beal in relation to Caleb, again excluded floppy larynx, said you have to take into account what Dr Springthorpe had done, take into account the people post-mortem and she had excluded floppy larynx. In isolation, she indicated that, 1138: "I would have put sudden infant death syndrome with the proviso the child was under three weeks of age."

Again, when asked 1146, indicated, however, that age was not determinative and that second, not exclude sudden infant death by the mere fact of the age and similarly with the child being on its back. Again not conclusive.

"Q. Not conclusive?
A. ...with these provisos...no, no."

In relation to the child Caleb, we know obviously that there was some breathing difficulties at the time of feeding. Dr Springthorpe's evidence really is quite clear that he made certain observations about it. This is what he said. This is in relation to seeing the child two days before:

"Q. What did you about stridor on that occasion?
A. No change of colour... made a note that the father expressed that he wanted to take the child Caleb into bed with him on the night that Caleb died.

Q. Did Craig Folbigg tell you that was because of particular concerns he had on the night about Caleb?
A. Yes, I note there that Craig was concerned that stridor... around the 1 o'clock mark."

So, we have these indications at that point in time of this particular condition. Professor Byard in looking at the Caleb's condition in isolation. He said this, 1202:

"With Caleb I would say the cause of death was undetermined. The reason for that... which is a wheeze when they inhale."

Then he was taken to Dr Springthorpe's observations about

the stridor's very, very mild. And there was some recession, sinking in of the chest cage. He was asked about the evidence of Dr Springthorpe, that he had asked Doctor Cummings to see if there was any cysts, we can see
5 that sometimes occur and cause noisey breathing. And he was told that there was not.

Professor Byard was taken to those observations of Dr Springthorpe. However, ultimately went on to say:
10

"Yes I would be concerned...nothing was found at autopsy or 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
15 was no cartilage in the - we would need a microscope examination to tell that. The other important thing I would think with this type floppy voice box, if there have been cases that have been written, newspaper, literature where
20 children have had, well, they have just stopped breathing because of it. But there are actually no, and there has actually been no structural abnormality."

He went on to refer to the study of six babies who presented with respiratory arrest that were diagnosed as having been caused by floppy larynx. He indicated one needs to take into account the children's airway are very narrow and particularly vulnerable, lying on their back.
30 He was cross-examined at length about this. It was put to him that floppy larynx are simple. He said no floppy larynx is not simple. "It could be a structural problem with the larynx...to cause upper airway obstruction." This is taken back to say Dr Springthorpe was saying it is very mild. 1254: "It seems he has a very
35 definite...really exclude it as a factor."

When pressed that Dr Springthorpe saw the live child, took into account the examination by Dr Cummings, would you agree it is highly unlikely that the floppy larynx had any significance at all in the death of this child? "No, I couldn't, I couldn't exclude the floppy larynx." He said in relation to the haemosiderin, again very much the same. It is clearly submitted to you that the haemosiderin, not
45 determinative, ultimately, Professor Byard went on to agree that there was no medical condition or symptom that he observed that would amount to proof of suffocation.

1209:
50

"Q. Looking at the post-mortem of all the pathologists in isolation in relation to Caleb, did you find any new post-mortem or symptoms which would amount to proof of suffocation?
55 A. No, there is not."

Really, this is the case ultimately with the expert evidence, whilst it may be consistent with suffocation,

consistent because there are no symptoms of suffocation. When we look at the medical evidence, it really doesn't take us further. It is not a question, as I say, that it is for the accused to prove that the child died of floppy larynx. It is a question of whether the Crown can exclude that as a reasonable possibility. But more than that, you must pose the question, what is the proof that this was suffocation? Where is the medical evidence that might support suffocation? Again, the medical evidence does not permit that finding, looking at it in isolation. This is in fact where the detail needs to be considered.

So just looking at Caleb, in fact I have gone into Caleb's evidence into quite amount of detail, again to indicate this should be the touch stone at the end of the day, before you return a verdict of murder in relation to Caleb. Look at it in isolation. Can you conclude that this child was murdered by the accused, when you go to the detail? It doesn't fit into scenario that the Crown attempts to paint. When we look at the coincidence evidence, we take into account what her role was. That she was the primary caregiver, she was in fact the one who was with the child. Go through the list and putting aside the question of sudden unexpected death occurring at home is not unusual? Occurring in the child's sleep in bed in a bassinet; occurred when the mother was awake, discovered by the mother. Soon after the cessation of breathing, failed to render assistance.

When we go through the detail of that, for example in relation to warm to touch, even if the evidence of Caleb's is that he was warm to touch, what does that mean? No expert has been asked to give a precise opinion of what that means. Is one warm for five minutes, ten minutes, hours? If this was to be relied on with some degree of precision, then you would have expected there to be some expert evidence about that, but there is none. Warm to touch, it is submitted to you really lacks precision. The fact they found the child in these circumstances and didn't resuscitate the child, you would no doubt recall what I said to you about those things. When we look at Caleb's case and we go to the detail, we can see no manifestations of the thoughts in the diary, if they're to be used as the Crown says.

There is no injury. There is no pattern of injury. In fact the evidence is completely the opposite; that she was embracing motherhood. There is no gym or no socialising. She was happy to have the child. Can the Crown exclude floppy larynx? If they can, can they conclude that this was murder? Is there medical evidence of suffocation? Is this, as the Crown said, that Caleb developed a personality in 19 days, that there was, as with Sarah, a battle of wills, the case of developing a high level of anger, frustration and stress.

When you start looking at this globally and understand if what the Crown is saying is true, that this domino effect,

5 this tendency evidence can be used, envelope this case to swallow it up, the momentum again is indicated to you the momentum of, just the number, we can in fact see when you seeks to envelope the individual case, stop it there. Stop it there; consider the individual evidence and see whether ultimately you can be satisfied beyond reasonable doubt that she had murdered Caleb. Stopped it and look to the detail.

10 This is the tension that was identified. This is the tension that was identified. We've got to go through the detail of Caleb, bear that out. That is the process that is it is submitted to you that you need to go through, not just use the diaries and start to extrapolate the meaning
15 of this into Caleb's life. The diaries no doubt are for you ultimately to consider. I will say more about the diaries after lunch. But again, I keep coming back to Caleb, keep looking at coincidence evidence in relation to Caleb and see whether these matters of coincidence are so
20 remarkable as to suggest that they would not have occurred in the way that the accused has in fact said. What I propose to do after lunch is go through Patrick's ALTE but not in the detail of Caleb, but I will flag the detail and we will tend to move a little bit quicker with the detail
25 but again, keeping in mind the attention to the detail. Is that a convenient time, your Honour?

HIS HONOUR: Yes. We will take the lunch adjournment.

30 LUNCHEON ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

5 ZAHRA: If it assists, I am on track with my estimation of
a day, a day and a half.

10 HIS HONOUR: Thank you, Mr Zahra, for letting me know, but
it is really not of any concern. You take the time you
need.

ZAHRA: I just indicate that for your assistance, your
Honour.

15

IN THE PRESENCE OF THE JURY

5 ZAHRA: Before lunch I had referred to part of the transcript of Dr Byard's evidence where he indicated that he could not exclude floppy larynx. I should indicate that that was in answer to a question of the Crown Prosecutor in cross-examination. Could I read to you the first questions and answers to put obviously what the doctor said in some perspective. This is 1234 at line 4:

10 "Q. Doctor, based upon the diagnosis of Dr Springthorpe who saw the live child...

15 ...

Q. Do you agree it is highly unlikely that the floppy larynx had anything to do with the death of the child at all?

20 A. Yes.",

and went on to say that he had never had an autopsy where he found the floppy larynx to be the cause of death. It was then I referred you to some re-examination, to put the sequence properly, and more fully the questions that I referred you to before, when we were in fact in my reexamination, where he was asked:

30 "Q. What do you mean floppy larynx not simple?"

That is where he said it could be a structural problem with the larynx.

35 "Q. But those conditions can be quite significant ones?

A. Yes.

Q. And significant enough to possibly cause an upper airway obstruction?

40 A. That's correct."

So, he went on the to say at 1254:

45 "Well, I was concerned about the retraction of the muscles, and I think there had been other statements that indicated the classic stridor."

It seems his definite clinical finding with the upper airway problem, "and I can't exclude it as a factor."

50 Can I say something about those phrases? "Highly unlikely" or the word "unusual". No doubt it is an important qualification. It is an important qualification in trying to way up, as a piece of circumstantial evidence, whether the child died of a floppy larynx, so obviously referring to the likelihood is a relevant part of the process. But it is submitted to you that those phrase "highly unlikely" or the word "unusual" can be of

only limited assistance. It may be a simple analogy. For example, we may be driving to court or work this morning and stopped at a set of lights and a car runs into the back of your car. It may be that you're driving to work every day for five years, ten years, maybe more. You are probably not comforted by the fact that someone tells you it is unusual or highly unlikely that you have an accident on the way to work. So we need to obviously keep those words in perspective. It is not a question of possibility. It is a question, obviously, of whether these conditions can be excluded, that phrase "highly unlikely" or the word "unusual" can be of only limited significance, but a piece of evidence that needs to be weighed up.

Just finishing in relation to Caleb, in relation to the time. We don't know within the time period, between 2 o'clock, when the entry in the diary was made "Finally asleep" to 2.50, when the ambulance was summoned, as to when the child died in that process, or in a that period of time.

It is submitted to you it seems highly unusual that as of 2 o'clock that she enters into the diary about sleep, and that if what the Crown says is that she murdered the child soon after that, it seems incongruous at one stage entering the matters into the diary, and obviously within this period of time, had in fact murdered the child; it seems to be incongruous with the pattern of entering matter into the diary. That is the timeframe that, obviously, the evidence reveals.

One other aspect, again relating to the coincidence evidence about the question of whether she was resuscitating the child or in fact offered to involve herself in the child's care. There was a passage I read to you in the ambulance officer Hopkins where he was asked this question at 438:

"Q. Mr Hopkins, when you got there you first saw the child being held by a woman you took to be the child's mother; is that right?

A. That's correct."

I should have emphasised the significance of that. This is not a case where the mother had really abandoned the child at this time. The officer made this observation when he arrived that the child was being held by the mother.

Can I go on to the child Patrick. Again, in the same way as I made submissions in relation to Caleb, it is important to look with some precision the evidence as to Patrick's. We see many manifestations of thoughts that are in the diary. Whether we can see any manifestations of state of mind that the Crown says to you that led to the accused attempting to suffocate the child in relation to the ALTE, and that state of mind being consistent with totally losing her cool, lost her control, venting a high

level of anger, frustration and stress; much in the same way I made a submission to you in relation to Caleb.

5 We can go through in fact the same procedure in relation to the evidence of Patrick because, when we look at the evidence of Craig Folbigg, we can in fact see that when the accused fell pregnant with Patrick, this in fact was described by Craig Folbigg as really being quite a happy time. You may recall he gave evidence that the SIDS
10 organisation was contacted. They effected renovations to the house, based on that information. He agreed (page 248) that the accused had quite a bit of input. In fact she helped paint:

15 "Q. In other words, discussion about what should be done as a result of what SIDS people had told you?

A. Pretty much so.

20 Q. So it was a joint effort, the information you got from SIDS, to try and design the house or make sure the child would be safe?

A. Yes.

25 Q. And the wife was quite happy at that time?

A. She appeared to be.

Q. And she was looking forward the arrival of the new baby?

30 A. She never actually told me whether she was or not."

This again is similar to the way that Craig Folbigg had given evidence about Caleb, and missing out the kiss and variations. We have the same pattern here, because then he
35 is taken back to what he said in the statement.

Go to paragraph 20 the first sentence there. "Kathy and I were happy again", not put to him as he said in evidence
40 "appeared to be happy" and, going on, "happy again and looking forward to the imminent arrival of our new baby". That is the description that he gave in his statement. He was asked did he agree with that, and he said "apparently".

45 "Q. You see, you want to qualify observations at every opportunity, don't you, Mr Folbigg?

A. Sorry?

50 Q. You put it this way...?

A. Yep...write or type this".

Again, we get a flavour of his evidence where, in the statements he says one thing, but we can
55 obviously see with this pattern, that his approach to the evidence is attempting to minimise any positive indications in relation to accused. It is submitted that this is a

mechanism here seeking to minimise what he had previously said.

5 He again confirmed that she went to see Dr Marley, and she appeared to be excited about the birth of the child, and he then said "she appeared to be". In relation to the birth of the child, this is 252:

10 "Q. When Patrick was born again your wife was euphoric...

A. Please explain 'euphoric'.

15 Q. Was she overcome with happiness?

A. No."

That is his evidence in the trial. Again he is taken back to the statement:

20 "Q. Go back to paragraph 20. Can you read the last sentence. Read it out loudly: 'Patrick appeared to be healthy, and Kathy and I were overwhelmed with happiness'. You can see obviously - just a moment. Before that he was

25 asked why she was overcome with happiness?

A. No."

He is then taken back to the statement where his words appear in the statement "overcome with happiness".

30

"Q. You were saying today that she wasn't?

A. I am saying she wasn't euphoric... meaning euphoric."

35 Without laboring the point. Again he was asked some questions, and at some later stage he was referred to the fact that in relation to that statement, "please explain euphoric". He was in fact taken to evidence in answer to the Crown's questions the previous week. The question was

40

asked at 207:

"Q. What was your attitude and Kathy's attitude to the birth of the Patrick...?"

A. Oh, euphoric."

45

Then there was interchange where he said "I wasn't going to in a sense, tell you or use the word euphoric because I wanted to know what you meant by euphoric" but you can see, in a sense, this pattern of behaviour where he is attempting to minimise anything positive in relation to the accused, basically saying that, in a sense, things were not as they might otherwise have seemed. Again, in relation to Patrick, we have this pattern that it was the accused who was the primary carer, particularly at night.

55

This is at 108 in examination in chief:

"Q. At nighttime, even though...?"

...

5 A. I'd say through the early hours of morning
at night it would have been Kathy...that's
correct."

10 Again we have his evidence in relation to the accused's
demeanour, whether she was in fact happy to be a mum. This
is 253:

"Q. Was she happy being a mum...?
A. ...most of time she did."

15 Then if I can take you back to a prior statement, not of
1999, but a prior to statement of 11 December 2002 which
was then very - this was early April, only a few months
before. The question was asked:

20 "Q. You see one of those statements you made in
December last year, again only three months ago
you say this: `Again Kathy seemed happy about
the birth and interacted with Patrick well,
after they arrived home from the hospital I
25 didn't notice Kathy having any serious problems
coping with motherhood...?
A. Stressed out being a mum."

This is in examination in chief at 108.:

30 "Q. During those first three months you were at
home...?
A. ...didn't really, to me, appear to be having
any dramas with it."

35 Then he was cross-examined about the time after he left to
go to work. This is after the three months. (254):

40 "Q. Everything was normal...?
A. ...seemed to be."

This is the same pattern of questions I referred you to
about Caleb.:

45 "Q. Despite you making many, many statements
there is nothing...?
A. ...that's correct."

50 Again we focused on prior to birth, happy to be a mother,
primary caregiver, times that he went back to work
everything was normal. He doesn't fit into this scenario
of using the diaries to show that this time she was a
person who had this frustration, low tolerance frustration
and totally losing her cool and control and venting high
55 levels of anger. It doesn't fit in.

It goes on, if you look at the night of the ALTE
everything is normal. 245:

Q. Now on the night of the ambulance taking the child...?

A. ...that seemed like a normal night...I certainly didn't see any...not that I recall...seemed so."

5

That is the evidence. It is the evidence that no doubt is to be acted upon, again going to the detail, we don't see any pattern of behaviour during these months of Patrick's life that fits in to the state of mind that is reflected in the diary. But those statements of mind if they're to be given their literal meaning as indicating her state of mind, it does not manifest itself in any behaviour. It doesn't raise itself anywhere in the sequences of the evidence that I've put to you. We can take that sequence right up until the time, right up until the time when the ambulance was in fact summoned. We know that Craig Folbigg made a number of statements and there is nothing in any of those statements that would suggest that there was anything that he had observed. This is a person, again who - in relation to Caleb was there with her as husband and wife.

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There is nothing about his evidence, about what she was like at that time which fits into the state of mind that the Crown suggest is an apparent in the diaries. This is in fact where the concern comes into how far the diaries could be used, because in fact they don't manifest themselves. You may recall when in fact I referred to the key to this being that re-examination of Craig Folbigg. Were those attitudes that you read in the diary, anything that you had seen before or experienced before or witnessed before in Kathleen prior to reading those diary entries? No.

35

This is a man who was with her about 16 years. We really need to look at those diaries in that context.

40

45

We can say, okay, well let us look at Sarah. There is the battle of wills. We can extend that, extrapolate that, work backwards, use that for Caleb and use that for Patrick. Let us look at the detail of evidence and it doesn't bear out any manifestation of those sentiments that are expressed in the diary and ones that the Crown relies hell on to paint this picture of a person who has a low frustration level and lose control and venting high levels of anger and frustration. Again, it doesn't fit in.

50

55

We have some evidence in relation to what happened at the ALTE. Again, this comes back to the issue of the coincidence evidence. Again, okay, we have some understanding of the background. We have some understanding that she was the primary caregiver, even though he was not going to work she was the one getting up at night for the feeds. After he went back to work she was the primary caregiver with the child, basically day and night and particularly at night.

So in those circumstances again we run through that the

coincidence list that the Crown has in fact provided, again obviously that this incident occurred suddenly and unexpectedly. When we go through the rest of them we can see, when you take into account what he know about the background and what her role was that in fact we can discount them, discount them or suggest they might have very little weight.

Can I particularly turn to one of them and that is firstly, not only the question of being found but that she had found the children well, obviously the primary caregiver the one waking up at night. It wasn't Craig Folbigg who was doing that. We can obviously take that into account if we're looking at likelihood that she was the one who was going to find the child.

In number eight in this coincidence list, they were all discovered dead or moribund by the mother during what she claimed the normal check of well-being of children in the course of their sleep. Three of them, on her way from the toilet. Then joined with this number nine: They were all discovered dead or moribund by their mother at or around or shortly after their death when they were still warm to touch. The question of warm to touch, I submitted prior to lunch that really if that was to be given the precision of significance then this could have easily been a matter of expert evidence but the question of warm to touch is not precise as submitted to you. The note here goes on to say literally minutes after the cessation of breathing.

The Crown has made some feature of this in relation to the ALTE and said we can look at this and conclude that it just so happens you may recall he was saying well at nighttime we are talking about 300 minutes, and obviously if the child was found in the crucial two minutes, then it is just beyond belief that she would be the person who would find the child at that point in time. Again, an important submission because the Crown relies on that finding of fact to support these coincidences or this particular list.

The Crown says that in the ALTE what the process was, was that the child had stopped breathing, become unconscious and within a couple of minutes, maybe two minutes between the time of being unconscious and the time of being resuscitated, it just so happened that the accused came upon her. He makes the submission well, that is you would think it unlikely in the circumstance of there being 300 minutes and she just so happened to find the child in that two minute period.

We again really need to look at the detail of the evidence to see in fact whether that could be borne out. You may recall that the foundation of the Crown making that submission to you is evidence that was not specifically read in relation to Patrick's ALTE but just generally about the sequences of events, that if a person were to stop breathing, how long does it take for them to become

unconscious and how long for them to die? In a sense the foundation for the Crown saying that is what must have occurred in relation to the ALTE.

5 What you need to take into account that that whole
sequence presupposes that Patrick stopped breathing. In
other words, for him to lapse into unconsciousness and
die, that and for him to be found in that two minutes,
10 then the Crown is inviting you to conclude that the
sequence was that this child stopped breathing, had gone
into unconsciousness and within the two minutes prior to
death, was resuscitated. When you look at the detail of
the evidence that finding of fact does not necessarily
15 follow because there is no evidence that Patrick stopped
breathing.

Now, that is a crucial part in this logic. For the Crown
to be right that she has found the child within this two
20 minutes, the child would have had to have stopped
breathing, gone into unconsciousness or within that couple
of minutes was in fact found by her and then resuscitated.
When we go to the detail of the evidence there is no
indication at all that this child stopped breathing. Now,
can I firstly take you to what the accused said about the
25 this sequence of ALTE. And this is from question 190.

"Q. Can you describe that to me, that you
didn't hear him breathing properly?

30 A. Well baby sort of well going on mine, there
are definite in through the nose and out through
the mouth and it's a regular or in through the
nose and out through the nose sort of thing,
unless they have got their mouth open... It was
35 a gasp, I suppose you could probably describe it
as, yeah. A very scary sound, you don't sort of
like to, I don't like thinking about it all that
much sort of."

40 Question 191:

"Q. What was the first thing you did when you
heard that?

45 A. Put the light on so that I could see, you
know, if there was anything that could have been
obstructing as to why he would be breathing like
that. He was flat on his back when I come in. He
was paler than usual. He obviously, I don't
know if it was obvious or not but he might have
50 been having trouble... Craig was trying to get
him to open his eyes, trying to get him to
respond to him... he just wouldn't."

55 You can read that that particular passage. You can see in
fact it is important again to look at the detail because
number eight, nine, ten in the coincidence list. The
question of why didn't she perform CPR or why didn't she
attempt to resuscitate the child? Firstly, the sequence
and as I submit in relation to Caleb, does that sound so

unusual in a situation that presented itself?

5 The other aspect from this is that clearly from what the accused has said that this was not a case where the child had stopped breathing, was unconscious and required resuscitation, that there was nothing to suggest that this child at any time had in fact stopped breathing.

10 It was in a sense the child was in respiratory distress whilst it is what the accused said in the record of interview, is supported by what Craig Folbigg had also said. This is taken from the evidence at 110:

15 " Q. Where was Patrick?
A. Laying on his back in the cot.

Q. The covers?
A. Didn't have them on him.

20 Q. Where were the covers?
A. Down towards the end of the bed.

25 Q. Did you notice that his eyes were closed?
A. He had his eyes closed, looked like he was asleep.

30 Q. Do you remember what it was that Kathy was screaming?
A. She wasn't actually screaming any words she was just screaming.

Q. Did you pick up Patrick?
A. I grabbed him out of his bed.

35 Q. What did you notice about him?
A. When I picked him up I scream to Kathy to ring the ambulance a heard...little noise."

40 This is something the Crown referred to yesterday: "I thought, oh God, he's breathing."

45 This is the evidence where can you comfortably glean from that, what the process was, was that Patrick had stopped breathing, becomes unconscious and it was just in that window of two minutes that the accused came upon him. Because if in fact we look at the evidence that there was nothing to suggest that that was the process. So it then comes back that really we then need to look at the chronology, we can see there is really quite a wide margin there. It doesn't necessarily follow what the Crown says is true, based on the evidence that in a sense that she found him within that short window of two minutes.

55 This is in fact where the detail needs to be gone through. The chronology note says 430, the ambulance was called. 441, ambulance arrived, Patrick was in respiratory distress, the ambulance doesn't say that the child had stopped breathing and required resuscitation.

The whole premises of the Crown's argument, that two
minute window is based on the sequence of stopping
breathing. There is no evidence that is submitted to you
5 was in fact the process.

Now, despite Patrick's condition, again was this the case;
where her demeanour was such consistent with her totally
losing control or cool, venting high levels of anger and
10 frustration. Because Craig Folbigg talked about how the
accused in fact puts diligently attended to Patrick's
needs after the ALTE with the disabilities that the child
had. 112 in evidence in chief:

15 "Q. After Patrick had been diagnosed as
epileptic...?
A. ...not very well."

Then in cross-examination at 257. Again we have this
20 pattern, he seeks to minimise any positive things about
the accused. Because he was then taken in
cross-examination to that, it was a difficult time and:

25 "And you said in evidence (page 1112 line four)
she had this little fellow that she had to work
out, do his medication."

Again the passage I read to you a moment ago, 258 asked:

30 "Q. You say she did the normal things with a
baby and feeding...?
A. ...who gave the boy medication... She was
doing the best she could."

35 This is at around the time when he saw the diary. It is
quite clear this diary was in plain view on the bedside
table and he read it. In fact it was at that point in time
that he was quite concerned that she may not be coping
with the particular difficulties. It was at that point in
40 time that his sister, Carol, became involved in the day to
day care of Patrick and Craig Folbigg indicated that it
had some positive effect on his wife. That appeared to
have some effect on his emotional well-being and he
answered that she seemed to settle down a bit with that.

45 At this point of the time Craig Folbigg attempts to paint
a picture of the accused leaving Patrick with others,
leaving the child with Carol. He then indicates that she
was growling every time she got angry:

50 "Q. How often was that daily weekly?
A. She was in fact daily growling."

He was then asked again in cross-examination, again
55 looking for the patterns of behaviour. Patterns of
behaviour taking to one side that obviously Craig Folbigg
says that about growling, growling every day. The question
then remains can you rely on that observation in the light

of the matters that I have raised with you about how you might consider the question of weight of his evidence?

5 Let us look at hard facts. He was questioned about whether the accused was abusive to Patrick in spite of the overall disabilities. This is 261.:

10 "Q. Despite these particular disabilities as I have taken you through your statement...
A. ...not that I recall... As in what was she physically violent.

15 Q. Do you remember a moment ago I took you through your statement?
A. Yep.

20 Q. You were asked whether there was any incident, anything that you could recall that impacted negatively on her treatment of Patrick?
A. No.

Q. There was nothing, was there?
A. No."

25 Again, looking in relation to demeanour on the morning of the death of the Patrick. There is nothing about her demeanour that might fit in that particular pattern, the Crown says to you, you can glean from the diaries, 114:

30 "Q. Did you sit with Patrick and have your breakfast...
A. ...that's right."

35 He was cross-examined at some length about that and I will refer to some of questions and answers from 273. He was referred back to what he said in examination if chief and:

40 "Q. He appeared to be quite okay?
A. He seemed fine.

Q. He seemed content and happy?
A. He did."

45 This is in relation to when he kissed Patrick, the observation he made about the child on the morning of the death:

50 "Q. What about your wife, what do you recall about her?
A. I don't recall very much about her."

Again we went through the process of reminding him what he said in his statement back to paragraph 28:

55 "Q. Can you see the last sentence there. "I kissed him goodbye and left for work about 7.30 am. When I left Kathy appeared her normal self nothing out of the ordinary occurred this

morning or the previous days."

That is something he said in his statement in 1999 in paragraph 28. He was asked this:

5

"Yes, I can see that.

Q. Well, were you lying then or were you telling the truth?

10

A. No, that is the truth.

Q. You had quite a memory of this in May 1999 sufficiently to make a positive note in that statement to that effect?

15

A. That I didn't take any notice.

Q. Well it doesn't say that, does it, that you didn't take any notice?

20

A. Well, when someone appears to be their normal self, it is because you've not really taken any much really notice."

Later on also that nothing occurred this morning or the previous days:

25

"That is how I remember it.

Q. That is your memory here today?

30

A. That is how I remember it."

Again adopting the same approach to the precision of the evidence. He was taken to the statement he made on eleven December last year. Again, this is a statement only a matter of short months. He was told really in relation these sequences there is nothing that you put that was negative in these statements. He was taken to the one he had only then made a few months before. 275:

35

"Q. Before lunch I took you to the statement of eleven December, do you recall me doing that?

40

A. I do.

Q. Do you remember me taking to the passage...four months ago?

45

A. Four months ago."

The next recollection 276 at 10.00 am, his wife telephoned him and she in fact screamed, and 10 o'clock or some two and a half hours before, sorry two and a half hours after, he was left with that picture; two and a half hours later. You see there is nothing we can obviously take it to two and a half hours, but there is nothing there, nothing to suggest during the course of the pregnancy there, helping to renovate the house. Nothing when the child was born, nothing in relation to approach to motherhood. Nothing that might suggest there was anything happening around the time of the ALTE that night. Nothing to suggest that even

55

when he made the statement on eleventh December that there was anything about that particular morning of the death that might have suggested in any way any manifestation of her losing her cool or control or venting a high level of anger and frustration. There is nothing about that evidence when he made his last statement only a few months before he is giving evidence.

Again he was taken through the question of the grief reaction of his wife, 276:

10 "Q. You were asked questions about yours and your wife's reaction to the death...

A. ...and devastated Kath.

15 Q. That is your recollection here today?

A. Yes.

Q. You are overcome with grief?

A. I was.

20 Q. Was your wife also overcome with grief?

A. It appeared to be the case."

Again, he spoke about his wife getting on with things. He was then asked in relation to her demeanour. Quite clearly he was describing her being devastated after the death of Patrick. He was asked if there was a difference in his approach, could it be attributed to the difference in personalities. You may recall I took you to some of the those aspects in relation to Caleb in parts of his evidence. He said very much the same thing. He said that well, that is the difference expressing grief:

35 "It is a different in personality, it is the way different people react to grief in different ways?

A. Obviously."

He went on to say he was referred to the fact "I wouldn't say she just forget the little fellow."

There was a source of tension, obviously, between the different grief reactions. It was a source of tension.

45 "Q. I think you used this expression...

A. ...dig a big black hole."

Clearly there was a difference in the grief reaction. The Crown said yesterday people react quite differently. We need to take into account these particular differences and understand them as Craig Folbigg understood them as being obviously a difference in personality.

Again, in re-examination we went through the fact that the question of whether the scenario was painted by the Crown of the need to go to dancing or go to the gym again. We have no evidence that, as I said to you before in relation to Caleb at the gym, didn't really come in until the time

of Laura. Again, going to the detail in relation to her socialising after the death of Patrick, did she socialise? "We socialised with friends. We went out to nightclubs together. Together went dancing, we bought another house."

5

"Q. You mentioned nothing about any social event that she went to on her own after the death of the Patrick and before Sarah was born?

A. That's correct.

10

Q. I put it to you, apart from going to a staff Christmas party she didn't go anywhere on her own, socialised on her own, between the time of Patrick's death and Sarah's birth?

15

A. Fair enough.

Q. There wasn't any gym or any dancing at that time?

20

A. There wasn't in gym, no.

Q. Or dancing?

A. Not that I can recall."

It was put to him:

25

"Q. Was there any conversation that you had with your wife about whether you were concerned about her growling or her inability to cope (283) you never raised anything with her in these conversations regarding having another child?

30

A. I am sorry, Mr Zahra, but I would never have been game to."

35

Now, again the Crown says to you that you might conclude that the accused was a domineering woman. You might need to reflect on that. Where is the evidence of that, apart from what Craig Folbigg says. And when you're going to what Craig Folbigg says you need to make an assessment about the weight you might attach to his evidence.

40

Even putting Craig Folbigg's evidence to one side, let us see if in fact there is another touch stone to the type of mother that she was in relation to Patrick.

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Now, we do have that here. So we can move outside the evidence of Craig Folbigg and we can look for other touch stones because as the Crown puts to you, take the literal view of the diaries, that these are better than a machine looking inside her head, these are admissions of guilt, that these are admissions of guilt that she murdered these children. It has been submitted to you that you would exercise a degree of caution before you use the diaries in the way the Crown has suggested to you, in a sense that the Crown says you use the diary to paint this picture about a person who has a low threshold of frustration, losing control, loses her cool and venting a high level of anger and frustration.

55

Let's see, doing our best, what we can to look from other sources. We know there is a little bit of overlap in relation to Patrick and Sarah here. I might refer to all the evidence at this stage, not only in relation to Patrick but Sarah, because we know from the evidence from Dr Marley, he attended upon both Patrick and Sarah. We know he was in fact the family doctor. But he was not only the family doctor but he had a position in relation to the treatment of the children, particularly in conjunction with attending specialist and he was given updates and reports, particularly in relation to Patrick. So we know what role Dr Marley had. He would see the accused with the children, Patrick and Sarah, not only in relation to normal visits but also he was in fact given updates and reports in relation to, particularly to the accused looking after Patrick with his disabilities.

He was asked this, 452:

20 "Q. In relation to Patrick there were many attendances at pediatricians because of his particular needs after the seizure disorders developed?
25 A. Yes and probably attendance at hospitals, I would expect.

30 Q. Mrs Folbigg was very diligent in attending, not only upon you but also those other specialists?
A. Yes.

35 Q. She appeared to be a very caring mother?
A. There was nothing that made me anxious about her care of her children."

He was asked whether he saw any sign of neglect. He said he never saw any sign of neglect and he agreed Mrs Folbigg impressed as a caring and concerned parent.

40 You may recall he was asked whether he had particular training in relation to being aware of child abuse. He indicated obviously that this was a matter that was becoming of a particular special interest in a sense that it is an important part of the role of a doctor when a child comes to the doctor, to be aware and alert for evidence of child abuse. You may recall he was asked about that. It was more than merely when you're examining the child and obviously at times the child's clothing is removed, but it is not only looking for physical findings, but as he indicated yes, you look out for inconsistency, like, if a child had a fall and parent come tells you the child fell yesterday, obviously a bruise may be four, five days old, you prick the ears up, or child failing to gain weight or parent make be anxious or worried or not taken for routine checkups and vaccinations. These are the sorts of things that doctors are aware of in relation to when they're seeing children. When you see, take a child to a

doctor, they are also looking to see whether in fact there might be some patterns of abuse and obviously their to be alert for these things. He indicated that he saw nothing:

5 "Q. Based on your knowledge of these signs, you saw nothing?
A. I saw nothing.

10 Q. You would no doubt from time to time have carried out physical examinations of these children?
A. Yes, I did.

15 Q. There was nothing that you saw, no bruises, no injuries?
A. No injuries. When we do a vaccination we routinely will check the child hips and pelvis and strip the child down basically to nappy. It is a bit cold for the child but, yes.

20 Q. That occurred in relation to both children?
A. Yes.

25 Q. And you saw no sign of physical injury?
A. No, I didn't.

30 Q. The children appeared to get on well with their mother, in other words, there didn't appear to be any distress, the children were under the presence of their mother?
A. There is no record and none of my memory that the mother was finding things difficult with the children or that the children weren't bonding appropriately."

35
40 Now, let us put to one side Craig Folbigg's qualifications of "appeared to be normal". Nothing that seemed out of the extraordinary, or ordinary. Let us put that to one side. We have a doctor here who had interacted and examined the children who is in fact skilled in determining whether there is any history of abuse, in a sense are there manifestations, are there manifestations of what the Crown says to you about the diary, meaning that she is a person who has this low threshold person who would lose her cool, this battle of wills, if you take into account what she said about Sarah, work backwards to Patrick and work backwards to the 19 days where he developed this, the Crown submission of personality: Venting high levels of anger and frustration.

50
55 Well, where is it? Where is it? We have the opposite; there is nothing. There is no history of abuse. I repeat that question and answer because it really places the situation very succinctly. The children appeared to get on well with their mother. In other words, did it appear to be any stress the children were under in the presence of their mother? There is no, none of my memory that the mother was finding things difficult with the children or

that the children weren't bonding appropriately.

He was then taken to some documents which are exhibits, this is correspondence he received from doctor Hardachre. I refer to some of the experts there. There is a letter of the matter and the last paragraph reads: "Mother also requested a repeat sleep study to be performed by Dr Gus Cooper at the John Hunter Hospital." This is in relation to an attendance upon Sarah. So that is hard evidence, hard evidence that this is a note that she in the background of Sarah being unwell, apparently flu like symptoms, that she was concerned enough to suggest that there be a further sleep study performed. And it is submitted to you that this is really very significant evidence about an underlying state of mind. It really is quite inconsistent with the demeanour and the state of mind the Crown invites you to conclude from the diaries. That particular paragraph was read from a statement that contained this history that the mother brought Sarah to see the paediatrician, because Sarah had been lethargic and sleeping poorly for the last couple of days. That she had not been drinking particularly well that day and had little vomiting and diarrhoea. It was in that background and history that she requested a repeat sleep study referral.

So, again, this is quite hard evidence that is quite to the contrary and it is an exhibit, a letter, it is a correspondence, it is exhibit three.

There is also another letter of Dr Hardacre in relation to Sarah which is 21 January 1993, which is also part of the exhibit three. At 548, it was described this way:

"Q. That report notes the fourth paragraph that the mother and father are understandably anxious and especially as she has reached the age where trouble occurred with the two boys."

You can read that letter. One of the other matters that Dr Marley was taken to was in relation to his observation of how the accused was reacting to the child, Patrick's, disabilities. This is 448:

"So far as Patrick was concerned you had an opportunity to see Mrs Folbigg interact with Patrick...because of the those disabilities?
A... Yes."

There is also a letter of 24 September that he was referred to. This is at 448:

"Amongst your treatment you say that on 24 September 1993 the note is "counselling about Sarah Folbigg's death."
A. Yes.

Q. In that note it appears that you treated

her, or she came to see you in relation to counselling."

5 This is in relation to clinical notes he said from his surgery:

10 " She attended practice. I haven't got Kathleen Folbigg's notes in front of me but she would attend the practice for counselling. I'm not sure if she saw me or one of the other doctors."

15 There was also evidence from Dr Cash and Dr Innes about the frequency with which she was going to see them in relation to the children, which in itself indicates a caring role of the accused over the children. Dr Cash in relation to Laura and Dr Innes in relation to Laura. I think doctor Innes saw Laura on approximately 13 occasions. They didn't have any particular recollection of the accused but Dr Marley did and it is submitted to
20 you that these are really very strong pieces of evidence which really don't stand with the sentiments that are expressed in the diary. They don't stand with the state of mind that the Crown asks you to glean or to conclude from the diaries.

25 ZAHRA: Is that a convenient time, your Honour?

HIS HONOUR: Yes, we will take a short adjournment ladies
30 and gentlemen:

SHORT ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF JURY

5 HIS HONOUR: There has been an inquiry about sitting times
on Friday. I have not said anything about it. It is not
something that has slipped my mind, but I have just been
concerned to see how the trial is running and where we are
likely to be by the middle of Friday. I think I cannot on
10 present indications complete my summing up by earlier than
Friday afternoon and I would be reluctant to send the jury
out on Friday afternoon in a case of this magnitude. The
case is therefore bound, whatever happens, to go into next
week, and in the circumstances I think that I should
15 indicate that we should finish at 1 o'clock on Friday,
unless anyone wants to put anything against that. Madam
Crown? Mr Zahra?

20 CULVER: No, your Honour.

ZAHRA: That is suitable.

HIS HONOUR: I will tell the jury when they return.

25

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, I have been observing
the progress of the trial this week. I have made no
announcement about sitting times on Friday. I was
concerned to know precisely where we would be on Friday.
10 It is quite obvious that whenever counsel's address finish
my summing up cannot begin at a time that will enable me
to send you out to consider your verdict this week. The
trial is bound, therefore, to run into next week and it
seems, in the circumstances, appropriate not to sit on
15 Friday afternoon. If my summing up happens to be finished
by Friday lunch time, I would not in any event, in a case
of this magnitude, invite you to retire to consider your
verdict on a Friday afternoon. So I will say it now, we
will bite the bullet. We will not sit after 1 o'clock on
Friday. Yes, Mr Zahra?

20 ZAHRA: Thank you, your Honour.

Before moving on to the medical evidence, can I just
briefly refer to what the accused said about her state of
mind at the time of Patrick, between the time of the ALTE
and the time of death and what her state of mind was about
25 Patrick and his disability and how in fact she was coping
with those disabilities.

We can see from question 205 of the record of interview,
she was asked how she was feeling. And she said that she -

30 "I think - I was on auto pilot. I was sort of
still trying to handle the fact that we were so
pleased that he survived that it wasn't really
an issue to either one of us if we had to go
35 through this so that he survived and had the
next birthday or whatever that was fine."

It goes on a bit. You could read that to get some
idea of what she says was her state of mind at the
40 time.

We know, however, that the marriage appeared to be
strained at that point in time. Clearly, the accused
at one time had considered leaving both Patrick and
45 the father, her husband, at the time.

The Crown relies on it in saying well in that
situation, why would she want to leave the child?
Again, they are obviously of importance and these are
quite powerful submissions and obviously part of the
50 understanding of the Crown's case. But again, this is
a matter which is no doubt a very important jury
question. Again, this is not a matter of applying
what would I do in a situation test or what does the
average or the normal person do in a situation like
55 this? Because obviously what is even average is quite
within a wide parameter. So this really is a question
obviously for you as to what significance that you

place upon that fact at that point in time. But there are some pieces of evidence that might give some insight to a state of mind when one obviously considers the position she was in. One can have some understanding of the pressures that she was under, and no doubt decisions made in that pressure sometimes are not the most rational, are not the most appropriate decisions, but again this is not a matter of applying a test of what would I have done in a situation, but maybe to try and get a bit of insight and try to determine the circumstances and the background in which those thoughts came about.

Can I take you to 454 of the record of interview? I can read that part of it to you, but you can read the whole lot, and the questions and answers after that. But at 454 she was taken to the fact that the marriage was somewhat strained and she was asked:

"Q. What can you tell me about that?"

And she said:

"That will be a correct statement. One hundred percent of my time was probably 99 percent was caring and looking after Patrick. There was, sort of, unfortunately Craig came, you know, third or fourth down the wrung, ladder of who I was caring for and who I was thinking of...during that time."

Then she goes on. I read part of 455: "Again you need... himself", she goes on "...person in mind."

At 466, the entry about considering both Patrick and Craig and she answered:

"Yeah, I was sort of suffering a bit...spend any time looking after Craig or myself. I just started to think I wanted to do the run a bit, the flight bit."

And she goes on. Then she says:

"But I worked through that...I have got to stay and look after him and I truly didn't think that Craig would actually cope looking after Patrick on his own."

You could read 467 and then 468. She answers:

"I can't really tell you. I recall getting in a down sort of mood but I don't know if I would class that as depression...depression."

She goes on: "To me they strike me as two totally different sort of moods". This was in relation to an entry in - I am sorry, this is in relation to a question of

whether Craig told the police officer that he was, when he was caring for Patrick, that Craig had thought that the accused was suffering from depression.

5 Then she goes on:

10 "If it was her depression, looking back now you will probably understand it, you wouldn't be able to be happy and chirpy 100 percent of the time...might have been in a bit of trouble. It was...and help him develop, keep him strong so he would stay with us and then I would worry about the marriage and then would I worry about Craig and then would I worry about me. That was 15 just, yeah, so if you class that as depression, I've only got to frown and Craig classes that as depression."

20 You could read that and you could get some insight into her state of mind at the time.

25 Can I just briefly refer to Carol Newitt's evidence, that is the sister of Craig Folbigg? In cross-examination at page 900 at about line 9 she was asked this question: - I am sorry, let me just in context - at 893 she indicated that the accused had an intention to leave, and she says this:

30 "She said that she didn't think that she could stay with Craig and look after Pat and she thought at the time that they might be better off. If she did leave and we advised her that she would always be his mum and that we...surely miss him if she left.

35 Q. Had you seen any signs before that that...?

...

40 A. ...easier for her and for Craig, the stress would be a little easier if it was divided."

45 So we get some observations of Carol Newitt. There again, putting the whole state of mind in the context of her position at the time.

In that cross-examination at page 900, she was asked this:

50 "Q. Did she say to you that sometimes she wasn't sure whether she was good enough for it?"

55 And Carol Newitt replied "yeah". So we have, interestingly, that particular observation, that Carol Newitt recalls the accused saying that sometimes she wasn't sure whether she was good enough, and that appeared to pass and that appeared to pass with her assistance.

5 So we no doubt need to take into account the context. We
may understand - again, not applying the test of what I
would do in a situation - but could we understand a parent
looking after a child with a particular, with the
particular difficulties that Patrick had at the time,
doing what she was doing; maybe feelings of inadequacy,
maybe feelings that she was not good enough, that the
child was better off without her, better off with Craig
and Carol. We might understand those emotions.

10 Now, again, it is not to dismiss it. It is an important
part of the Crown case, but ultimately these are questions
of weight, the weight that you would attach to the fact
that she wanted to leave. You obviously need to look at it
15 in the context and look at her state of mind at the time
and the situation she was in. As I have submitted to you,
this is an appropriate jury question. It is not a matter
for me to say well look this is what you should think of
her of it. This is a matter for you, this is a matter for
20 you understanding bringing in those skills that you have
to take that into account and what I am submitting to you
is a way that you can interpret that. It would be wrong
for me to do that. In a sense this is your domain. It is
flagged. When you take into account what the Crown says,
25 just look at this picture. Try and have some understanding
for the situation, that the accused was in at the time and
then see whether at the end of the day you can use this as
a piece of evidence, the fact that she wanted to leave
Patrick, as a piece of evidence in a sense of part of the
30 Crown case that she murdered Patrick. So that is what the
Crown is doing. The Crown is saying well, look, this is a
piece of evidence, a piece of circumstantial evidence in
the sense of trying to determine her state of mind. The
question is obviously looking at that piece of evidence,
35 you obviously need to take into account the context in
which she had these thoughts.

40 Can I also indicate, in relation to Carol Newitt's
evidence, this is in relation to, again, part of the
aspect of coincidence evidence, part of the list that the
Crown has given you, particularly in relation to the
aspect of whether she should have attempted to resuscitate
the child Patrick at the time of the death of Patrick, and
there was the evidence that the Crown had impressed upon
45 you yesterday, that Carol Newitt was, in a sense that you
could glean from what she is saying, that the accused
essentially prevented her from picking up the child. So
the Crown says to you: Look, wouldn't you expect that she
would be tending to the child? Why is it that she
50 appeared not to allow Carol Newitt to pick up the child?
And the Crown's submissions are based on the evidence that
she had given, particularly in the course of her
evidence-in-chief, where she said that the accused said
"don't pick him up."

55 In cross-examination, this is page 902, these questions
appear:

"Q. You have set out there going to Kathleen and Craig's house...

...

5

Q. In fact the only reference you have got at that point..."

And she said "Mmm".

10

Before you take into account what the Crown's submissions are, you have got to make a finding of fact, whether she did, whether this evidence amounts to a restriction, in other words, not only that she had not attempted to care for the child or to resuscitate the child, because after all when you go to the record of interview, we know that she made a number of calls, it may be that she was really quite frantic at that point of time. We really don't know at the end of the day what happened so far as her and the child is concerned. There is nothing she can recall in the record of interview at that point of time, it may well be that in the position she was in we would expect there to be an amount of stress. It may be that some aspects of obviously the sequence of events are not matters that she was able to recall at the time of the record of interview; but in order to accept what the Crown is saying to you, you must ultimately find as a question of fact, that there was no attempt to resuscitate and in fact what the Crown says to you, that the accused attempted to restrict her - that Carol Newitt says that the accused attempted to restrict her from picking up the child. Then we go back to the statement that she made, that it does not appear that those particular statements were there. In fact very much quite different.

35

She was in fact - this appears in the cross-examination at about 900 around line 29:

40 " Q. When you saw Kathleen Folbigg after the death of Patrick you made some observation about her demeanour... that's all he said?
A. Yes."

45 Ultimately, that is how the evidence finished up, that in a sense that she had qualified that statement. She had said "no, don't pick him up", in her evidence-in-chief. She was taken to her statement in cross-examination where there was no reference to that, and then when she was taken back to this in cross-examination, she said "no, the word was just no, that there wasn't "don't pick him up".
50 So, again, as a foundation for relying on those matters of coincidence, the whole foundation of that is really making the finding of fact that there was no attempt to resuscitate or to care for the child or that she attempted to restrict Carol Newitt from the child.
55

Can I now go to the medical evidence in relation to Patrick, firstly in relation to the ALTE?

5 Now, ultimately there is some division in relation to the experts, Professor Herdson and Professor Berry were clearly cross-examined about the possibility that what in fact occurred at the ALTE was the first manifestation of seizure disorder or the first manifestation of epilepsy.

10 This appears where the experts are somewhat divided. Quite clearly, Professor Herdson, Professor Berry and others say - and this is something obviously that Dr Wilkinson also talks about - that in a sense with the glucose and the urine that they say that in those circumstances it would be essentially unusual for a child to have that degree of brain damage or a first manifestation of epilepsy or of a seizure disorder.

15 Professor Berry says that they do not suffer that type of damage for two reasons. 'I think it is very unlikely that first fit would lead to such a brain damage.' Professor Berry went on to say in his experience it would be extraordinary, to be a manifestation of the first epileptic seizure. He goes on, however, to say:

20 "In my experience it would be extraordinary but my experience of, as a pathologist, is that I do not see children of a first presentation at epilepsy... but in my view it would be an extraordinary presentation of epilepsy."

25 He was asked whether he would defer to the neuropathologist, Dr Kan's findings. He said obviously that he did not know Dr Kan, but on the question of interpreting the slides, he had a summary of the neuropathology report in his notes and he was ultimately asked this in cross-examination:

30 "Q. You can't exclude the possibility that there was in fact a first epileptic seizure at the home that might have been caused by a structural abnormality of the brain?"

35 A. I listened to your questioning of the previous witnesses. If there was a structural abnormality of the brain then I would expect that the neuropathologist would find it. What I would accept is that in many individuals however, epilepsy, there is no structural abnormality of the brain that we can find.

40 Q. The neuropathologist in the present case has not excluded the possibility of there being structural abnormalities in existence that were not apparent in the examination of the slides?

45 A. I would be very surprised if a neuropathologist missed a structural abnormality of the brain because that is their forte.

50 Q. You would have to defer to his experience in that regard?

5 A. I will repeat my answer. I think what a
neuropathologist is looking for is to find
structural abnormality in the brain. I don't
understand his answer if that is what it was,
unless it is implying that it was so small he
missed it, or he was referring to the situation
where people who have seizures have no
abnormality in order to be found with an
electrical abnormality."

10 Professor Beal said very much the same, that in a sense
that she was relying on the clinicians and the neurologist
and then in relation to the questions of whether
encephalitis could be excluded, that she would defer to
15 the clinicians, but indicated that in her view it would be
unlikely to be a first manifestation of epilepsy; but at
1146 she deferred to others to exclude epilepsy:

20 "Q. In relation to the child Patrick and the
ALTE you are relying on other experts to exclude
ALTE...

...

25 ...on their observations?
A. Absolutely."

30 Professor Beal indicated at page 1139 that she believed
that the possible investigations were thorough, and ruled
out any natural disease process in relation to the ALTE.
So we have this division. We have this question that in
fact was raised about the ALTE, whether in fact it might
have been the result of encephalitis, whether it might
have been the result of epilepsy or an ALTE. Clearly there
35 is a divergence of opinion, and at the centre of this, as
the Crown forcefully argues, is that you would need to
take on board the evidence of the clinicians and, in
particular, the evidence of Dr Dezordi and Dr Wilkinson in
order to exclude the fact that this was not epilepsy, this
40 was not a prolonged seizure at the ALTE, it was not
encephalitis.

45 You might think that Dr Dezordi and Dr Wilkinson impressed
in the same way that they went through a process. Dr
Wilkinson referred to seven features which assisted him in
coming to the conclusion that in particular that he could
rule out encephalitis. It is quite clear, as the Crown
indicated to you, that ultimately there was - their
position in evidence in this court - was in fact quite
50 firm. It is clearly the case that there was nothing in the
cross-examination that might have suggested that they in
fact had mistaken their particular diagnosis, and they
appeared to continue to be strong in relation to the
features that they say that ultimately now leads them to
55 the conclusion that they could rule out these other
processes.

However, there are matters in relation to the evidence of

Dr Dezordi and Dr Wilkinson that might suggest that whilst their evidence was clear, that they say that you could rule out these processes, that there were times when clearly these alternatives were very seriously considered.

5

In relation to Dr Dezordi. He was in fact cross-examined about the discharge summaries that he had prepared in relation to Patrick's ALTE. He was cross-examined basically in relation to that discharge summary. He prepared that discharge summary on 29 October 1990: .

10

"Q. And then you put in what you then your then final diagnosis was?

15

A. Not at all, because it is tentative. The word 'probably', we don't use that word very frequently in discharge summaries. That is quite an unprecedented phrase in there and it would suggest that I was, that the whole thing was in question. So it is more of a working possibility rather than a diagnosis.

20

...

Q. So a working possibility?

25

A. ...There was doubt."

He was asked to read parts of his ultimate summaries. He said the following:

30

"Diagnosis lines says intractable seizures, probably viral encephalitis and two other diagnoses, bronchiolitis. Brother died age 19 days in sleep.

35

Q. So your opinion included a belief, and I understand that you say that this was provisional, that it was probable that encephalitis was the cause. Is that a fair way of putting it?

40

A. Not entirely, because I was never convinced he had encephalitis, to put it bluntly.

45

Q. But you said on 29 October that you thought he probably had encephalitis, isn't that right, isn't that what it says?

45

A. Yes. It says that's a summary of the consensus of thinking of the doctors and the process of investigation. It doesn't mean - well, I wasn't convinced at all."

50

Then he was taken to a report of results of a CT scan dated 23 October 1990:

55

"Q. And the indications from that report were that he the observed...

A. ...because I think it is open to question."

5 Dr Dezordi made it quite plain that, what needs to be taken into account, is that he considered himself quite experienced at that time, so those conclusions need to be taken into consideration, in that particular light, and at that particular point of time he was firm of the view of ruling out encephalitis as being a process which led to the ALTE.

10 Dr Wilkinson, as I have indicated, also went in some detail to the various clinical findings and then went on to say, "Well, look, there are a number of factors that now makes me confident and sure that we can rule out the processes of encephalitis".

15 There were a number of questions in relation to how he interpreted Dr Kan's report. The Crown said to you yesterday afternoon that, in a sense, Dr Wilkinson's view of Dr Kan's report is that he excluded encephalitis. I will take you, in a moment, to some of the detail of Dr
20 Kan's report to see whether that conclusion could be properly reached.

He then was cross-examined. You may recall this. He was cross-examined by Mr Cook. In fact he was shown a letter
25 dated 19 September 1999. I am sorry, it is September 19, 1991, which is exhibit 6. You will have this letter, in fact this exhibit. In fact I have a number of copies which I think might be easier. Might the jury have a copy of this document?

30 HIS HONOUR: Yes.

(Copies of exhibit 6 handed to jury.)

35 ZAHRA: You can see from the second paragraph of that letter that the doctor, in this letter to Mr and Mrs Folbigg, said the examination of the brain did not suggest any inherited disorder at all, "The changes which were
40 seen were of a type that could occur after seizure and encephalitis or interference with oxygen supply".

Now Dr Wilkinson was cross-examined at that point at some length. At one stage Dr Wilkinson said that he may not
45 have had all the material at that point in time, in other words, there was quite some cross-examination in relation to whether he had received various reports, and he was shown various documents. If I could just summarise what in fact occurred during the course of this cross-examination.

50 He was taken to the detail of the documents, and particularly documents that are now exhibit V. He was asked this:

55 "Q. So it appears pretty clear, doesn't it, doctor, that in relation to Patrick's, death by the time you wrote that letter to the Folbiggs you had all the relevant information. That's right, isn't it?

A. It would be reasonable to assume that, yes."

5 So he was taken through material to identify whether there
was any additional material that he obtained subsequent to
that letter, and in fact the result of that particular
process in cross-examination was that he concluded that it
would be reasonable to assume that when he wrote that
letter he had all the information that he relies on to
10 give his opinion in this court, in other words, that there
is nothing that he did not have at that point in time. So
this raises a real question, because he was then asked
this:

15 "Q. And it follows from that, doesn't it, that
your opinion, based on all the relevant
information relating to Patrick, was that
encephalitis was a possibility?

A. It would appear so from that letter.

20 Q. And that is the truth, isn't it, that
encephalitis was a possible cause of death?

A. I don't believe so now, and I'm not quite
certain what led me to make that statement. The
many purposes, as I recall, were we were
25 investigating whether there were any inherited
disorders, and they took some time for those
results to come back from Adelaide and other,
and other places. But really that is where it
was left. I do not believe so now, and I'm not
30 quite certain what led me to make that
statement."

That is how the evidence was left, that there was really
nothing in addition, that he has now, that he didn't have
35 then, and at that point in time, looking at Dr Kan's
report, the inherent pathology findings - at that point in
time he made a statement which you can read for yourself.
So despite the veracity of the doctor's evidence, and the
fact that he obviously was very firm of the view that
40 applying these particular processes, these particular
clinical findings, that he could now exclude it, we still
have a situation where he was writing to the parents of
Patrick in the way that you now have in front of you. So
it leaves that question to be resolved by you. It has been
45 left somewhat in the air. It is accepted that he expressed
quite strong views, but this is not a situation, as with
Dr Dezordi, that he may have only been two years in that
area of expertise at that point of time - Dr Wilkinson had
quite an amount of experience at the time when that letter
50 was written - but you could read from that letter that he
was clearly making other statements, consistent with the
changes which were examined, was seen: Were of a type
that could occur after seizures and encephalitis or
interference with oxygen supply.

55 Also in relation to the death of Patrick - and this also
applies to Dr Dezordi, because he examined the child -
there was no evidence of injuries in relation to Patrick

at the time of the ALTE; there was no suggestion of evidence of any abuse of the child.

5 Similarly in relation to the evidence of Dr Singhaira, who
in fact carried out the post-mortem in relation to Patrick
- and at 561 line 13 he again indicated, and this is quite
clear from his report - that he made it abundantly clear
in his evidence that there was in fact no evidence of
10 abuse; there was no evidence of any findings, any physical
findings, that might be consistent with suffocation. The
question is at 561:

15 Q. Part of the normal processes would be to
look for, firstly, signs of abuse?
A. That's correct, yep.

20 Q. And the examination of the body is very
detailed?
A. That's right.

25 Q. Looking for factors which might indicate
abuse?
A. That's right.

30 Q. You saw nothing about the external
presentation of the body of the deceased that
suggested that there had been any trauma?
A. Yes.

35 Q. There was no evidence of any bruising?
A. Yes.

40 Q. There were none at all?
A. No. No.

45 Q. Were you also looking for, as part of the
processes, any signs of manual asphyxia?
A. Yes, we were. We were looking for petechia
and changes in the airways and stuff, yes.

50 Q. You found no petechia?
A. No, we didn't.

55 Q. You found no other signs of--?
A. No.

Q. -- of manual asphyxiation?
A. No."

50 So this again is an important part of the question of
whether the Crown can prove murder. There is no history of
abuse. If the Crown is inviting you to reach certain
conclusions about the diary entries, where is the
manifestation of this low level of frustration that leads
55 to losing control, losing cool, manifesting itself in
anger?

Dr Singhaira clearly relies on the findings of Dr Kan in relation to understanding the mechanisms of the death. It is now no doubt apparent to look at the evidence of Dr Kan. Dr Kan is the neuropathologist and initially saying that whether the infiltrate that he saw on examination of the slides could have related to treated encephalitis. He indicated that he would say that there was a relatively remote possibility. However in cross-examination he was asked this, about the causes of the infiltrate that he saw - this is at line 28:

"Encephalitis, in one of its varied forms, encephalitis is certainly one of the causes."

That's in fact what he said, encephalitis is certainly one of the causes.

Secondly at 928:

"Q. Also, for example, if there was a seizure, it could be the result of epilepsy?

A. Yes. That could bring about the changes, provided the seizure was prolonged enough and there wasn't any - and if there was sufficient deprivation of oxygen supply to certain parts of the brain because of the seizure.

...

Q....to the possibility of a seizure consequent upon an abnormality of the part of the brain that cannot be identified by your examination of it?

A. That's correct."

He indicated that from his finding (930 line 30):

"A seizure may lead to an hypoxic event at five months.

Q. And if there was such a seizure that that might lead to an hypoxic event?

A. It could.

...

Q. ... death being caused by a history?

A. That's true."

In re-examination he was asked whether he observed any abnormality of the brain, which would have caused a seizure in the first place. At 931 he said:

"I could not precisely pinpoint any lesions...would have been capable of triggering off seizures".

In further cross-examination Dr Kan, page 931 agreed that "a seizure could cause a prolong deprivation of oxygen".

Is that a convenient time, your Honour?

5 HIS HONOUR: Yes. We will adjourn now until 10 o'clock,
ladies and gentlemen.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

5 CULVER: Your Honour raised yesterday's possible
corrections to the exhibit list that was given to the
jury. In fact my instructing solicitor has confirmed that
those corrections are valid corrections. So for exhibit AE
perhaps if the correction could be made that there are six
photos of Laura's room at the Millard Close, Singleton.

10 HIS HONOUR: These are corrections to the document marked?

CULVER: It was MFI 38.

15 HIS HONOUR: These are corrections to MFI 38. Yes. I am
sorry, the first one is exhibit?

20 CULVER: AE, that should read "six photos of Laura's room
at Millard Close, Singleton"; and the second correction is
for exhibit AG, and that should be "photo 25 - verandah".

HIS HONOUR: Yes.

25 CULVER: Quite a different description. Thank you, your
Honour.

HIS HONOUR: The jury have copies of this. How do you
propose to let them know about it? Do you want me to
simply announce it tomorrow and ask them to change them?

30 CULVER: That would be suitable your Honour.

HIS HONOUR: Well the changes are simple. I think they can
be done in that way.

35 Very well, 10 o'clock tomorrow morning.

ADJOURNED PART-HEARD TO WEDNESDAY 15 MAY 2003 AT 10AM

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MDC:BOA:RT:8

D26

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION5 BARR J
AND A JURY OF TWELVE

TWENTY-SIXTH DAY: THURSDAY 15 MAY 2003

10 **70046/02 - REGINA v KATHLEEN MEGAN FOLBIGG**

15 CULVER: Your Honour asked for a copy of the 1996, 1997
diary to be added to exhibit J to be in conformity with
the jury's copies. I have that copy. There is one thing my
instructing solicitor has checked in the photocopy as
against the original, and it seems that all the copies may
be missing three pages of the diary. I have raised this
with my learned friend.

20 I have copies here. I wonder if your Honour could inquire
of the jury whether or not they have these three pages. It
seems to be a photocopying error. I have the inserts for
them.

25 HIS HONOUR: Can you identify the three pages, please?

30 CULVER: Firstly I hand up the 1996/1997 diary. It has the
excerpts at the front, and it does have the insert in it
about which I am referring now. If I can hand to your
Honour the insert. The first page is a page that should
be in everyone's copy. I have that there so people can
identify where the insert is to go. The three pages follow
in sequence that first page.

35 HIS HONOUR: So they will all have the page, which is on
top of this bundle of four.

40 CULVER: That's correct.

HIS HONOUR: It is thought none of them has the three that
follows.

45 CULVER: That's correct, your Honour.

HIS HONOUR: Madam Crown, have you said all you wanted to
say?

50 CULVER: Yes. Thank you, your Honour.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Good morning, ladies and gentlemen. Let me explain to you the reason there has been a delay in our commencing this morning.

10 You will notice Mr Tedeschi, the Senior Crown Prosecutor, is not here today. I told you very briefly yesterday why he was not going to be here yesterday and why, with your cooperation, for which the Court is grateful, we were able to complete his address by sitting a little late the day before.

15 The person in Mr Tedeschi's family who died was his mother, and he has been somewhat badly affected by her death. That is why he is not here today. Mr Tedeschi, through Miss Culver, who represents the Crown, has asked if I will consider not sitting at all tomorrow, and Mr Zahra has been good enough to agree that it would be
20 appropriate for us not to sit at all tomorrow. I expect that by next Monday Mr Tedeschi will be back with us, I hope so. So when we are finished today we shall adjourn the case until 10 o'clock on Monday.

25 I am told we will go, as far as I know, precisely in the way we expected it to go: Mr Zahra will continue to address you, and if there is any part of the day left, then I shall start to sum up. I shall not finish my summing-up today.

30 A couple of other matters. You have copies of a document marked 38 for identification, the exhibit list, which the Crown provided for you. I wonder if you would be good enough to take out your copies of that list (jury
35 complied). There were a couple of errors in it. I think AE was the first Madam Crown; is that right?

CULVER: That's correct, your Honour.

40 HIS HONOUR: You will see that AE, which is on the second page, just below halfway down, says that that is four photos of Laura's room. In fact there are six photographs in that exhibit. So if you would be kind enough, just to amend your copy cross out the "four" and substitute "six".

45 Two lines further down, or two items further down is exhibit AG, photo 25. "Photo 25" is correct, but the description of it is wrong. It says "Blood on Laura's pillow". That is wrong. It is a photograph of the
50 verandah. Would you please cross out "blood on Laura's pillow" and substitute "verandah".

I have finished dealing with that list now. One of the
55 diary exhibits is exhibit J, and included in exhibit J is the 1996/1997 diary. You have copies of the exhibit. I wonder if you would be kind enough to get them out. If any of you doesn't have it with you, please don't feel

embarrassed about it, it is not intended to be a school lesson or a test.

5 What we believe is that there may be some pages missing from your copies. Could I ask you to find a page in the 1996/1997 diary headed on the right, and of the double photocopied page, the heading "13/3/97 Thursday 10.30 pm". That is a page that we believe you do have. So if you don't, we are in trouble. Do you all have that page? (Jury 10 indicated in the affirmative). I don't want you to feel embarrassed. If you would like to look over with your neighbour. This is our problem, not yours.

15 Now, let me assume that you all have that page. Would you turn to the following page and tell me whether the text runs on. You see at the bottom of the page, right hand page, "13/3/97". It says "decided I am not going".

20 The next page you should have should say at the top of the left hand page, "there" and "there of a morning anymore. He's always too busy". That is what we thought.

25 Turn over. Does any of you have a page headed 18/3/97 at the top left? "Sat night 11.30 pm". No, I am getting shakings of the head. That is what we thought. Does any of you have page 16/3/97? I think when I said "18/3/97", but I think it may be 15/3/97. There is a page: "16/3/97: Sunday night 10pm". We think you don't have that either. You're all shaking your heads. Very well.

30 Now, the Crown has some copies for you and they will be distributed to now. When you receive them, would you mind putting them into your folders in the appropriate place, immediately following the page that I first identified for 35 you and which you all have. Thank you, Madam Crown.

CULVER: Thank you, your Honour.

40 ZAHRA: Yesterday afternoon you were handed a copy of exhibit 6, which is a letter of Dr Wilkinson to the accused and Craig Folbigg, some months after Patrick's death. It's submitted to you that you could look at this letter and use it in a variety of ways.

45 Firstly, that this letter is proof of an opinion by a qualified doctor, Dr Wilkinson, who was in fact treating Patrick whilst he was alive, and involved considerations of the post-mortem investigation into Patrick's death and that his view, at this time, was that encephalitis was a 50 sufficiently realistic possibility for him to be able to tell the parents that could be why their son had died.

55 Secondly, it is submitted that it could be used as proof that Dr Wilkinson had a different opinion, based on the same facts and material relating to the death of the Patrick. That is a different opinion from the opinion which he expressed in giving evidence. Therefore you may approach his current opinion with the knowledge that with

the same facts, that those facts had previously led him to a different conclusion. In that way you may assess the weight of his current opinion against the background that at one time that he may have held a different view.

5

Another aspect of this letter is that it shows how medical opinion about the same issue can legitimately vary, and there can be a different opinions in relation to a certain set of facts or circumstances. However, ultimately it shows how encephalitis or seizures was sufficiently realistic as a possibility, at the time that Dr Wilkinson wrote that letter, and the question then remains as to the degree of confidence by which you can rely on that opinion to the extent that the Crown has invited you to do so.

10
15

Can I take you lastly, in relation to Patrick, to the other evidence in relation to his death.

20

Now, as you may recall yesterday, I had referred to both Professor Herdson and Professor Berry's view about the prospect that the ALTE was in fact the first manifestation of seizure disorder or epilepsy; and you may recall I put to you yesterday that they certainly had an opinion differing from that, based on their view about the extent of the brain damage that in fact was caused.

25

In relation to the death, however, both Professor Herdson and Professor Berry indicate that so far as the cause of death is concerned that it could have been caused by a seizure, no doubt obviously in the background of the seizures that have occurred during the time between the ALTE and the ultimate death of the Patrick. So obviously, accepting that there is a difference of view of the experts in relation to possibly what might have caused that original ALTE, that looking at the death in isolation, so far as what is observed in people and what is observed about the death of Patrick, that that death could have been caused by seizure.

30

35

Professor Herdson, so far as his ultimate diagnosis was concerned, said at the time of autopsy he would have given a diagnosis of undetermined because he would not give any other diagnosis, bearing in mind obviously the history of the clinical observations of Patrick, and obviously the history that has been related to you.

40

45

He was cross-examined about the possibility that seizure may have caused Patrick's death. This is 1044 at line one:

50

"Q. So far as the death of the Patrick is concerned against the background of seizure, the death could have been caused by seizure?

55

A. Yes, it could have. One would normally expect to find evidence of an epileptic fit causing death, in other words trauma around the mouth or the lips or whatever, and a variety of other findings which, as I understand it, were

not present, but one could not rule out an epileptic fit."

5 Again, there is a difference in the expert opinion as to
whether one could have expected that, in a case of death
by seizure, whether some of the factors that Professor
Herdson had indicated would necessarily be there. For
10 example, in relation to the bite marks, he was asked:
"Particularly in such a young child where the marks, for
example, biting of tongue, biting of lips, may not be
apparent". "Yes. They haven't got have many big teeth at
that time".

15 I will take you in a moment to what Dr Byard said. It is
simply not necessarily to find some physical finding. The
professor indicated, "that in fact includes the death
might have been caused by an epileptic fit". Clearly that
is the ultimately the position of Professor Herdson, as I
20 just read, but one could not rule out an epileptic fit.
The same process of reasoning was in fact adopted by
Professor Berry. Certainly he indicates, so far as looking
at the death in isolation, that could have been caused by
a seizure. However, obviously he says you have to take
25 into account the background of seizure and the background
of the ALTE.

Can I read to you what Professor Beal said 1139 around
line 20.:

30 "Q. Looking at Patrick's death in isolation?
A. It is likely that the same process that
caused the original turn caused his death.
However it is not impossible that
35 suffocation...but you can't be certain."

So asphyxial death being death from lack of oxygen.

40 So in a sense the experts have indicated you can get an
epileptic seizure which can cause a hypoxic event. But I
read to you what Professor Beal said, ultimately
concluding that you cannot be certain.

45 Can I take you to Professor Byard's evidence in relation
to both the ALTE and the death of Patrick. He indicated
that there are, in looking at the material, three ways
that one could possibly understand the ALTE.

50 He indicates that, firstly, there may have been epilepsy,
in the sense that may have resulted in an asphyxial event.
He indicated that happens in some babies. He went on to
say - this is 1209:

55 "It happens in some babies, 3 percent of babies
in the community...are unspecific."

Then he was taken, in a sense, to those three
alternatives. In relation to the first 1210 at line 12:

"Can I take you to the first of those...?"

5 A. ...some baby will die from it, and some babies will be found before they die and they can be resuscitated, and in fact it can get to the degree of brain damage that was observed clinically."

10 He does not exclude the fact and there is a divergence of opinion whether in fact epilepsy could have been the cause of that first ALTE. The question obviously whether the amount of brain damage would be the result of that is a question, obviously, ultimately whether that would cause, it is submitted to you, a hypoxic event where, obviously, there was starvation of oxygen. However Professor Byard 15 says that you can get the manifestation of the first epileptic fit and you can get that amount of brain damage observed clinically.

20 In relation to this issue further about the first manifestation of epilepsy of the ALTE, he said: "I think that that is possible". That is 1235. "Certainly based on the pathology I couldn't conclude that...yes, I can't exclude that possibility".

25 Then he was asked:

30 "Q. If there was this first manifestation of epilepsy which caused the ALTE, is there anything on the examination on neuropathology which would be consistent with that."

He was turned to the observation of Dr Kan and asked:

35 "Well, if that was the first manifestation of epilepsy, is there anything in your findings that would be inconsistent with that?"

40 You may recall I read quite an amount of Dr Kan's evidence. He answered that question saying: "No, there is nothing that could rule out that particular sequence of events, there being, first, an epileptic seizure leading to subsequent seizure disorder; and in fact there was nothing in the neuropathology which would exclude it?" He answered that question in this way: "No. Epilepsy is a 45 very hard thing to diagnose, and there often aren't any in the findings at autopsy. It is possible there is a defect in Patrick's brain...on histology."

50 Then he referred to a situation that he in fact come across. It might be important, obviously, to recall the qualifications of Dr Byard that were led extensively at the commencement of his evidence. He indicated in his researches, that he had in fact, in carrying out the autopsy, that he had four epileptic patients that he 55 carried out post-mortems in the previous year, and that he had checked them and they were all found to have normal neuropathology, and they have died from epilepsy; but what it means is that the electric circuit to the brain is the

5 problem, not the structure. If the structure is the
problem it is subject to changes which cannot be picked
up. So he doesn't rule out, looking at neuropathology, as
Dr Kan did, to the rule out the possibility that that in
fact was the subsequent of events.

10 So far as the encephalitis is concerned, Dr Byard
ultimately deferred to the experience of clinicians. He
obviously drew a distinction between their various roles,
and he deferred to what obviously, particularly Dr
Wilkinson had found, but you will recall what I said to
you this morning, how Dr Wilkinson's evidence could be
viewed.

15 Dr Byard was taken to the issue that Dr Herdson raised, I
mentioned a moment ago, about what observation might you
make if a person dies of epilepsy, would you expect those
conditions that Professor Herdson had referred to. He was
ask this question:

20 "Q. In relation to the epilepsy, Dr Herdson
referred to some of the observations that might
be made at the time of such a seizure, such as
vomiting...?"

25 ...

30 A. ...or you can have an arrhythmic disturbance
of the heart...you can't see anything there."

He was then asked in cross-examination, referred to the
fact - well, you can defer to what Dr Wilkinson had in
fact said in evidence. He ultimately at 1237 at line 10
said this:

35 "Q. Dr Wilkinson was essentially of the view
that there was no cause that could be found in
retrospect with the ALTE, that its causes was
undetermined. Do you agree with that?"

40 A. I would wonder how he excluded epilepsy as a
possible cause."

45 He was again, in cross-examination, referred to Professor
Herdson's findings of epilepsy, and he adhered to that
evidence from the passage that I just read, that it
doesn't necessarily follow that you would find the signs
and he wouldn't agree that those signs would be expected.

50 In relation to Patrick's death, again he indicated, if I
can just read this passage so it might be clear 1241:

"Q. Similarly, is the death with Patrick...?"

A. ...we can know, that's correct."

55 Most importantly, however, again taken to the issue about
even putting to one side the question of whether these
other possibilities can be excluded as a rational
hypothesis, in other words the process of reasoning is:

Well, look at these other possibilities, again, reminding oneself at all times that it is not a matter for the defence to prove that these were the causes of death or to have to prove to you what the exact mechanism of death is: It is for the Crown to exclude these possibilities. We must always remember, when I am referring you to this evidence, this is not a matter where, in referring to this evidence, you have to be satisfied that it has been proved to you that this was the mechanism by the defence. It is always a matter where the Crown has to exclude these. That is in fact the process that you must follow. When I say "must follow", his Honour will give you directions of law, and they are the directions that in fact you must follow. You may recall that at the start of the proceedings, obviously you were referred to as judges, there were 13 judges in this courtroom, however the roles are really quite different: His Honour is the judge of the law; he assists you in how you apply the facts to the law. You are the judges of the facts, and obviously no one can tell you how to decide this case. However, you must apply the law as his Honour directs you to, and you will be given directions, and obviously whatever I say, you must defer to what his Honour tells you, but this is a matter where the defence does not have to prove that this child died of encephalitis. It does not have to prove the ALTE was caused by that. It is for the defence to prove epilepsy was the process; not for the defence to prove this was in fact an ALTE.

HIS HONOUR: Mr Zahra, I interrupt for a moment.

You read a part of the transcript a few moments ago from page 1214 beginning at line 10. Part of Professor Byard's answer I think is not correctly recorded. You read it uncorrected. I think that the answer recorded at lines 14 and 15 was: "I don't think we can exclude encephalitis."

ZAHRA: Sorry, your Honour, there was download from the original disc.

HIS HONOUR: I mention it, because it might assist you.

ZAHRA: It certainly is what we say is the evidence.

Can I read that to you. It is our situation quite clearly, when I read to you this question: "Similarly is the death of Patrick".

"Q. With a catastrophic asphyxiating event in a background of possible encephalitis?

A. As I said, I would defer to the clinicians on that looking at the pathology, I don't think we can exclude encephalitis."

When I read that to you I read from an original disc, that has since been corrected, but it is exactly what we are submitting to you as to the thrust of Professor Byard's evidence: "I don't think we can exclude encephalitis".

That is what the doctor was saying at that point in time.

As I have indicated to you, the process of your reasoning is that you need to exclude these as a rational
5 hypothesis, you need to exclude them. It is not a matter for the defence to prove that these were the mechanisms.

What ultimately is the following step is really another significant and most important one. Can you conclude from
10 the evidence that the ALTE and the death were the result of an act of suffocation? These are two significant steps and they cannot be rolled up into one, that when you are looking at this medical evidence there is, in a sense, these steps in the process. It is not a matter for the
15 defence to prove that these were the conditions. It is a matter for the Crown to exclude them as a reasonable hypothesis.

The other issue, which is equally as significant is: Well,
20 what is the evidence of suffocation? These really are two distinct questions. Two steps in the Crown's proof. Can they exclude these as a reasonable hypothesis? But then ultimately the question is: What use can the medical evidence have on the question of whether this was
25 suffocation?

You may recall that yesterday, in relation particularly to Caleb, and obviously in my reference to the evidence of Patrick, and yesterday at the outset of my address to you,
30 I was submitting to you, particularly in relation to that phrase "consistent with suffocation", we need to take into account what the experts were saying, because there was no symptoms that that could be consistent. But what I was submitting to you was that you need to look at the medical
35 evidence, and ultimately you would conclude that there is no medical proof, in the instance of each case, that could be used to conclude beyond reasonable doubt that this in fact was suffocation.

40 Professor Byard was taken through this same process of reasoning. He was asked:

"Q. Looking at the ALTE, are there any findings
45 looked at in...?"

...

A. ...no there is not."

50 That is a consistent answer that the other experts have also given. Ultimately that is a significant barrier, it is submitted to you, to finding the accused guilty in each of these cases.

55 It is submitted, as I submitted yesterday, that ultimately one looks at the detail, and it is significant, when you are looking at the detail, that when the experts are taken, not only to the issue of whether you can exclude

various possibilities, but when they're taken to this ultimate question: Is there proof, medical proof, of suffocation? That none of the experts have indicated, in relation to any of the conditions, that there is in fact
5 proof of suffocation.

You may recall there is quite some evidence about some of the characteristics that might be expected. You might recall the submission I made yesterday, no doubt that
10 might explain the fact at times in relation to suffocation, there may not be symptoms; but it was suggested to you that in fact bearing in mind that there is the evidence that the child may be expected to struggle, depending on the age of the child, that it is
15 significant, it is significant that is no condition in relation to Caleb. Nothing was found, no history of abuse. Nothing that was found by Dr Cummings on the post-mortem. Nothing that was found at the time by Dr Dezordi at the time he treated that child clinically
20 when it entered the hospital with the ALTE. Nothing observed by Dr Singhaira carrying out the post-mortem of Patrick to suggest any sign of abuse, any sign of injury.

It similarly follows, that in relation to Dr Hilton and Sarah, and obviously Dr Cala in relation to Laura, in particular, that there are just no symptoms, no observable conditions that could amount to suffocation on that
25 medical foundation.

Ultimately Professor Byard was cross-examined at some length in relation to epilepsy. Despite the cross-examination, he continued to give his opinion that epilepsy could not be excluded, "I find that I can't ignore the fact that there has been a history of epilepsy and we have neuropathological findings to support a
30 damaged brain. I can't exclude epilepsy as a cause of death".
35

So the question remains sincere to whether, bearing in mind Professor Byard's expertise, his unchallenged standing, this is still a significant opinion. This is still a significant opinion and the question remains: Can
40 you exclude that opinion out of hand?

It is submitted to you that, bearing in mind what you know about Professor Byard's background, is that a condition that in fact you could dismiss? Ultimately in relation to Patrick, we obviously need to go through that process of reasoning. Firstly, look to see, in relation to these
45 matters, not whether the defence have proved that this was the mechanism, but whether in fact they can exclude it. The question is to really look to what is there about the medical proof that could be used as a foundation to suggest that this child, Patrick, was in fact suffocated.
50

55 Can I now come to Sarah. Again, as was the case yesterday in relation to Caleb and Patrick, again bearing in mind what the Crown says to you about the accused and what you

can glean from the entries in the diary, those matters that the Crown said to you that you can see from this pattern, pattern of thoughts in the diary, that this was a person who in fact had a very low frustration level, that in fact had totally lost her cool, lost her control and, at times, vented a high level of anger, frustration, random stress, so much so that she in fact murdered these children.

10 The same - it is suggested to you, and submitted to you, that you would go through the same process of consideration in relation to Sarah. In other words, look to see whether there is anything manifested in the relationship between the accused and Sarah, in the lifetime of Sarah, that might support those conclusions that the Crown are inviting you to make from the diary.

20 You may recall in relation to Sarah, there was some evidence from Craig Folbigg about the decision to have another child, obviously in the background that there had been two previous deaths. Obviously the Crown made submissions to you as to why the accused wanted more children. That may be one way of looking at that issue, but it is not the only one; that there are significant other views that could be had about this.

30 This was a situation where, the Crown says to you, said at the outset in the opening address, that the children in a sense were somewhat of an impediment to the accused to lead a lifestyle, which was socialising, going to the gym. You obviously recall those matters that I extracted from the Crown's opening address.

35 It is important to understand if that were the case, then really a decision to have other children might be somewhat inconsistent with that. In other words, if it is the case that was suggested to you, that these children were an impediment to her, in the way she really want to run her lifestyle, it is significant to take into account she did in fact want other children.

45 You may recall the evidence of Craig Folbigg that he said that the accused told him that it was a waste of time being married if they weren't going to have a family. That the only reason that you were married is to have a family. "If we weren't going to have a family" then, she indicated, she would leave, and certainly there was no utility to the marriage. We need to consider that evidence in the context of, obviously, if, what the Crown says to you, is an image of the accused's picture, that in a sense there was a low frustration level to children because, in a sense, it was inconsistent with the lifestyle that she wanted; then clearly it seems a bit incongruous that she would be putting the desire to have Sarah to Craig Folbigg in those terms, "A waste of time being married if we weren't going to have a family. The only reason you would marry is to have a family". So in that context it seems incongruous, that if this was the person who wanted to get

rid of Patrick, for example, or wanted to get rid Caleb to resume a different lifestyle that she had, she is reflecting on the need to have a child for those particular purposes.

5

The other aspects of evidence, again, similar to the way it was submitted to you yesterday, that you could look at her demeanour and her behaviour in relation to the impending birth of the children, because the evidence clearly is that she appeared to be happy when she was in fact pregnant with Sarah. This is - can I extract a little of this from the transcript, page 284 line 4:

10

15

"Q. When your wife was pregnant with your child Sarah...?"

A. ..."

20

25

You may recall the submissions I made about Craig Folbigg's evidence, use of the word 'appeared to be' and look at his evidence in the light of, obviously, the overall context of appearance of wishing to minimise anything that could be favourable to the accused. He was referred back to paragraph 35 of his statement where he said, "About February 1992 Kathy became pregnant...that's the truth".

30

35

40

In that context, again, it appears incongruous if obviously before this that the accused in fact had murdered Caleb and had murdered Patrick as the Crown suggests to you, this is in fact was really quite incongruous with the type of picture the Crown wants to paint about a woman with a low threshold of frustration, totally loses her cool, losing her control, venting high levels of anger, frustration and stress. Again incongruous with the picture that might be presented by Craig Folbigg in the sense the children were really quite an impediment to the accused, but really the accused was more inclined to in fact socialise and want to go to the gym and in fact not in a sense carry out her functions and her role as a mother.

45

So these observations by Craig Folbigg again, don't really fit into that pattern of a person as the Crown has sought to use the diaries. In fact there is nothing about the diaries, nothing in the diaries that can show itself to manifest itself in these excerpts of the evidence.

50

55

There has been much evidence in relation to the apnoea blanket and corometric monitor. In relation to the blanket itself you may recall obviously this was somewhat more primitive than the corometric monitor. It was in fact prone to false alarms, as was the corometrics monitor. I will take you to some of the evidence about that but the evidence clearly of Craig Folbigg (page 120 line 15), he indicated the machine would go off "regularly".

"Q. A lot?"

A. Yeah, regularly.

Q. When you say regularly?

A. All she had to do was hold her
breath...seemed to be."

5

He indicated that despite that the monitor was still used
for a period of nine months, ultimately it was decided
that the apnoea blanket wouldn't be used, not by the
initiation of the accused but in a sense they moved the
10 child into a single bed, to read exactly what he said:

15

"In a sense there was inner spring mattress that
was used and the possibility that the inner
spring mattress wouldn't feed information down
to the monitor's mat."

20

So in effect there is a legitimate reason it is submitted
to you why the apnoea blanket was no longer used but
ultimately it was used for a period of 9 months despite
what was submitted to you the unreliability of the
blanket.

25

The other aspect of the use of the blanket is, not only it
would go off frequently but it was causing the accused
stress. This is cross-examination of Craig Folbigg, 285
line 9:

30

"Q. You indicated it caused some problems
however...

A. ... it had stirred her, yes."

35

40

45

He was asked whether the monitor was designed for that
purpose to arouse the baby. He believed that was the way
it was designed. Putting that to one side that was the
effect of the blanket it had, as he described, an alarm of
high frequency which I presume meaning that it was in fact
quite a loud alarm and in fact it was causing the child to
stir from her sleep. We note ultimately the alarm was not
a remote alarm. He indicated with his hand the length of
the wire that led to the alarm and it was quite apparent
that the alarm was in fact very close to the child and
would wake the child.

50

He also indicated in relation to the corometric monitor,
again the alarm wasn't a remote alarm and in fact that
again it was there with the child, and I will take you in
a moment to some of the diary entries about the corometric
monitor which show, in effect, there was number of false
alarms and in fact there were number of times when the
alarm woke the child.

55

So these are matters obviously to be weighed and taken
into account about the ultimate decision and the ultimate
attitude that the accused had to the monitor, bearing in
mind obviously the two previous deaths the Crown says to

you, you would try absolutely everything and no doubt that is really quite a powerful submission that he makes, but at the same time we probably need a moment's reflection of what that situation might be like.

5

You might think after a short period of time when the false alarms are there with the blanket, you may have really a question about the reliability and real questions about the utility of the blanket; you might have real questions about the utility of the monitor, if in fact it is frequently going off, and not only that it is causing you stress, it is harrowing to you and in fact you find that there were false alarms, and not only that, the child appears to be woken as a result of it.

10

So whilst obviously what the Crown says to you is really quite an appropriate submission, we might need to just really say just stop for a moment, let us try and picture the situation not a day, not two days, three days, not a week, not weeks but months. Month after month, obviously the alarm is going off, if obviously it is found to be giving false alarms that you might think that it is reasonable to presume a person, even in the background, would start to think really, what is the utility and what the reliability of this monitor? So you need obviously to take that into account and you need to pause at one time and say, let us think about, not the fact it is not just a day, two days but in fact over quite a period of time where these monitors are going off.

15

Obviously the fact that as Craig Folbigg indicated, that the alarm was having quite an effect upon the accused. Not as an irritation but causing stress. This 287 at line 31:

20

"The alarm however was quite harrowing...

....

A. It appeared to be...."

25

Taken back to his statement paragraph 37 where he said this was quite harrowing for both of us. This was clear the impression that he got because, he indicates "there obviously that this was not just a matter of irritation but as it indicated it wasn't a very nice sound and harrowing, probably came from your own emotion", so there was not only the question of obviously the nuisance value. This is a question where obviously the alarm would cause those emotions. So these are significant aspects that need to be taken into account in the ultimate decision as to how this piece of evidence is to be used and what weight is to be given to this fact.

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One needs, it is submitted to you, to probably pause a moment and maybe try to get some appreciation for that. Appreciate this was not just a day, two days, three days, a week, this was in fact over some months. However, the monitor was persist for a period of some nine months.

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45

Now, in relation to the relationship between the accused and Sarah, this in fact is where Craig Folbigg indicates that in a sense that the accused got very frustrated with Sarah and that she would show her frustrations by growling. He indicated that the accused was dominating to Sarah and similarly with the evidence he gave in relation to Patrick where he started to indicate that the frequency of the growling was almost daily and at times, daily. Again, the weight you give to the evidence depends on how you view Craig Folbigg's evidence. How you view the reliability of his evidence as to whether you could rely upon that as an observation. The Crown relies on what Craig Folbigg says about obviously the observations of this growling. To suggest obviously in conjunction with what the Crown says about the diary, that you would have a picture of the accused as a person who would lose her cool, control and venting high levels of anger and frustration. But it was submitted to you yesterday when I was taking you to the evidence of Dr Marley, the evidence of how she was concerned enough, for example, to seek a further sleep study in relation to Sarah. These are matters are very significant evidence to use as touch stones in viewing whether you would accept what Craig Folbigg has indicated to you or the picture that he has that made to paint, of a very high level of frustration that the accused had with Sarah, or is it a matter where this was a mother who certainly had views about regimenting a child. This may be not a belief of a parent which you might find unusual. As we all know this again is the beauty of the jury system, you use your commonsense and experience in life and that experience no doubt would have been such that you would observe many mothers in their dealings with infant children, and to say the least that the range of ways in which children are brought up by their mothers, various immeasurably. But it is no so unusual you may think it is probably close to normal that mothers would seek to regiment their child that certain way. The use of the word regiment doesn't necessarily mean so rigidly that it would effect the child. It may be that certainly so far as patterns of sleep are concerned patterns of eating are concerned, that is important obviously to ensure that there are appropriate feeding, appropriate sleeping of the child.

Parents deal with that differently. Some are more regimented than others. Some are not regimented at all. The child is tired, it will sleep. If it is not, why try and get the child to sleep at certain times? So there is a range. A range of attitudes to parenting. This clearly in this relationship shows that there were different attitudes to parenting, particularly in relation to Sarah; that there were different attitudes about whether this child should have some appropriate pattern of sleeping, pattern of feeding, that the accused might have had as distinct from Craig Folbigg who had a view obviously, well the child will fall asleep when it is tired.

Now, you may think that this is hardly surprising, persons

will have different views and it appears that obviously this difference of views caused some tension between the accused and her husband.

5 Now, at the same time we can recognise there was a
tension. There was a difference in view. The question is
can that be used in the way the Crown wants you to? To
10 suggest that the behaviour of the accused was such that
because she wanted to regiment Sarah because she was
concerned at times that Sarah had a poor sleeping pattern,
that you can then elevate that to proof of murder. That
you can elevate that to a piece of evidence of murder. You
15 see these are the appropriate reflections, at least are
the appropriate attention to detail. On the face of it, it
seems quite a good argument for the Crown, well, really,
she was just regimented, she was not easy going with the
child Sarah, Sarah's problems sleeping. We can think, au
huh, we can understand she acted the way she did.

20 You need to pause for a moment there. In a sense you're
obviously using a piece of evidence and that piece of
evidence needs to be considered: It needs to be given
weight. In other words, it is suggested to you it is an
25 appropriate submission the Crown has made, but it is
submitted to you consider it, however, don't look at it at
face value. Reflect and think, really, is this a situation
where sure, there was tension, sure there was conflict,
but is it such that you can attach the weight to that that
the Crown wants you to?

30 It is submitted to you that really when you take into
account the matters I just submitted to you about what
your experiences in life have been, you have seen
35 different people bringing up children, the divergence of
views how to bring up children. It is clear there were two
versions two views in this family, there was tension. Does
that remove this tension so far out of the normal that you
would start to be using this as some proof along the way
to proving that the accused murdered Sarah?

40 You see, this it is submitted to you, keeps going back to
the submission that you look at the detail, that if this
is the submission, we will reflect on it, consider it, is
it so unusual that the accused might have wanted a certain
45 pattern of sleeping and eating of Sarah? Is that fact
alone capable of any weight, the fact there was tension
about this, is that capable of any weight or what weight
would you give to it in the over all picture? These
ultimately are matters for you. These are matters which
50 are no doubt jury questions and appropriately so, applying
no doubt your experience in life. You don't have to
obviously accept my submissions. You can't be told how to
decide this fact. What is submitted to you is that well,
it is an important submission of the Crown, don't just say
55 okay, look, put that to one side. You, ultimately, as you
deal with all other pieces of evidence, look at the weight
you might attach to that particular strand of evidence.

5 What weight can you attach to this strand when you're
carrying the weight of the strand? Isolation; take into
account the experience is, what is being portrayed here so
unusual you can attach weight to it as proof along the way
to proving the accused murdered Sarah? You see, there is
really, it is submitted to you quite a big step between
reflecting on the tensions within this family to
concluding this is a piece of evidence which can be used
to convict the accused of murder.

10 The other questions in relation to her returning to
Babyco, again these are matters that I indicated to you
that there was a difference in what Craig Folbigg
initially said, she was sick of being broke, sick of being
15 stuck at home. That is the way he tried to again portray
the accused. Again, I won't repeat the submissions I made
to you yesterday but again, it is submitted to you this is
a pattern of the way in fact he has given evidence.
Because he is continually having to be pulled back to what
20 he said previously in the statement, that in a sense in
paragraph 38 of his statement, he said that she returned
to work. "We had to do this for financial reasons". So
these are really very significant differences and we can
see in fact how the evidence of Craig Folbigg has evolved
25 from the time he made the statement to the time in fact
that he gave evidence. He ultimately, when pressed, said
this was a lie that he had told to the police, that she
had to go back to work for financial reasons.

30 So, again, we can in fact see, so far as the relationship
between the accused and the child Sarah, is it so unusual,
is the evidence about the accused and Sarah, taking into
account obviously the evidence of Dr Marley yesterday,
such that on the basis of evidence of, even accepting
35 Craig Folbigg's evidence at its highs, I say there was a
tension about the sleeping routine. Is that to be used in
such a way that it fits in with the way the Crown presents
its case? This was a person you can glean from the diary
who was person who totally lost her cool, lost her
40 control, venting high levels of anger, frustration and
stress. Because when Craig Folbigg just talks about that
sleeping routine, in cross-examination we can get some
flavour of it. This is 291 at 45:

45 "Was it the case there were arguments between
you about the need for the child to be kept to a
routine of sleeping?

A. Kathy was very vigorous...and rev her up."

50 He makes a suggestion, things not suggested this is
appropriate behaviour, one can understand this is normal
behaviour of a father coming home and wanting to interact
with the child. Then he went on to say "I didn't feel 8.30
was a necessary time for this child to go to sleep. If
55 she wants to go to sleep...why make it go to sleep".

Then it was a source of argument:

"It was a source of argument, wasn't it...?"

A. ...I had wound her up by coming...being excited to be with her."

5

That is a normal picture, it was a sort of tension obviously you can see from that, it was a source of tension and the accused has reflected on whether in fact in relation to the child, Laura, that she had dampened her ways in relation to obviously her experience with Sarah. Once we get this pictured, then the question remains whether what weight would we attach to this strand of evidence to suggest that her dealings with Sarah were such that it fits into this picture of a person who had a low level of frustration and representing a high level of anger and frustration.

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15

Is that an appropriate time, your Honour?

20

HIS HONOUR: Yes.

SHORT ADJOURNMENT

25

RESUMPTION

HIS HONOUR: Yes, Mr Zahra?

5 ZAHRA: Thank you, your Honour.

Can I go to the night of Sarah's death? It is clear that on this particular night that there was some tension between the accused and her husband, Craig Folbigg.

10

The question, however, remains as to whether the fact of this particular tension can be elevated, elevated to some proof that the accused murdered Sarah on this night. It is important obviously then to make appropriate findings of fact as to what did happen on this particular night, in other words, before inferences can be drawn or conclusions could be drawn from this evidence. It must be on the strong foundation of making a finding of fact or really what did happen on this night?

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Now, as was submitted to you before the break, that no doubt there were tensions in relation to the rearing of Sarah. The question of whether the child should be regimented to have some sleeping pattern or should have some regular sleeping pattern or routine or not? The question is: Was this night any different from what is otherwise may be an understandable tension in relation to putting this child to sleep, or does it have the sinister air that the Crown puts to you, to suggest that this is in fact the background of the accused murdering Sarah on this particular night? So that there is in fact a necessity to look at what happened on this night to determine what did happen. Looking at the evidence and making a finding of fact. What did happen before you then go on to consider where does this fit? Does this fit in with what the accused says happened on this particular night, or is this an understandable tension, one that was probably no different than the types of arguments in this relationship over the child Sarah, and whether it can be elevated any more than that, or whether it can be used in any way as proof of murder? So the foundation is trying to determine what happened on this night.

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It is submitted that the first factor that you would need to consider is that what happened on this night, and trying to determine the sequence of events in the way that the Crown wants you to, depends on the evidence of Craig Folbigg. Now, I have already made submissions to you about how you would view his evidence. What I propose to do now is in fact go to the evidence on this particular night and in fact the evidence of Craig Folbigg, to suggest to you that you could not make a finding of fact other than than this is no different and therefore not unusual than the sort of tensions that existed about the rearing of Sarah and that no weight can be given to it, and certainly it cannot be used in the way that the Crown has suggested to you.

5 So what I propose to do now is in fact go over that evidence of Craig Folbigg to assist you in obviously making the assessments and making the findings of fact which are submitted to you is the appropriate foundation, to then going on to consider what weight you would attach to it.

10 What we do know about this particular day is that in fact the family went out. It appears that they had an enjoyable day. In it appears, however, that Sarah, to use the words of Craig Folbigg, was in fact 'wound up'. He said this at 126 at the top of the page: "Sarah was all wound up from the day I suppose and I had a tendency to wind her up and Kathy took her to put to sleep to bed and that's when it 15 all went pretty ordinary out of that". So we can now put the day in some context, even on what Craig Folbigg says, that the child, Sarah, was "wound up."

20 The question that then remains is that accepting that as a starting point, how much of what then Craig Folbigg says can you rely on?

25 The first thing that he says is that he was in the lounge watching TV and that he could hear the accused in the bedroom with Sarah, and that he could hear Sarah crying and grumbling and that he could hear Kathy patting Sarah to try and comfort her and that he then says he heard her growl. Significantly, he then says that he went into the bedroom and that he in fact saw that Sarah was pinned to 30 the accused and he was asked what he meant by that. You may recall this, because Craig Folbigg was quite emotional at this point in time. He described it in this way, "in a bear hug, one armed bear hug and with her arm she was", and then he indicated "patting her on the bum", and he 35 made a motion at that point in time. You may remember that, because you may recall it was a fairly dramatic gesture that he made, a very significant one, and he became quite emotional. He was asked "could you describe to us in words" and he became emotional and he said "you, 40 you could hear it".

45 Now, the question remains as to whether you can accept, firstly, whether the situation did evolve in the way that Craig Folbigg said it did or whether this was just the type of tension that in fact occurred within this particular relationship over the child Sarah.

50 He was taken to the fact that when giving evidence that this was the, in a sense, the first time that he had raised this issue. If I could read from 294 line 10: He was referred to the statement:

55 "Q. Did you ever say anything at this first sitting about the slapping of the bum...

...

...horrible thing and day and over the period of

time since then I remembered that being the case."

5 He was reminded well, Mr Folbigg this was a very dramatic way that he explained it and he agreed it was. It was put to him in cross-examination you became emotional when you described the slapping noise and he agreed with that. Then he was asked "for some reason had you forgotten about that when you made this statement in 1999?" And he said 'yes'.

10 I will take you to the process here because of course there were some later statements when he mentioned this but what he was being taken to at this point of time was the fact that in that initial statement, bearing in mind obviously the significance of what he described, that in fact that that was not in the statement in 1999. He indicated why for some reason had he forgotten that and he said "I can't explain it any better than I already have." He agreed that it was very upsetting to him and he was very emotional.

20 He was taken to the detail of the statement. He accepted that in the statement he said "I went back, sat on the lounge, in the lounge room, listened intently" and that he heard a noise that sounded like Kathy coming down the hall. Again he was reminded that this was a very dramatic incident, that he had explained and he agreed that that was not in the statement.

30 He then went on to say that, when he was questioned about whether, why there wasn't any detail about this dramatic incident, then he said "I softened the blow throughout this and then he already explained that in the past, he can't recall whether he had entered anything in relation to that particular aspect of it. But it is significant, that that is not in that initial statement and does not really show itself or manifest itself until a much later, later time. So that is firstly, a significant aspect of your consideration of whether you will accept that what he has said has happened on this particular night, is what in fact did happen.

45 Can I take you to the other aspect of his version of what in fact occurred, where particularly he spoke about the accused throwing or that she did, she threw Sarah at him?

He was taken back to the statement. In the statement he said this, about her coming back into the lounge room:

50 "She came into the lounge room and she was carrying Sarah in her arms and Sarah was crying. Kathy stood about three paces in front of her, of where I was sitting on the lounge."

55 It was then put to him:

"Q. And you then described that she moved her arms forward and let go of Sarah?"

A. That's what I described there.

Q. You say that is one?

A. That is one of the things I changed.

5

Q. That is one of the things you later edited?

A. I softened it."

10 Then he was taken to a statement that he had made to the solicitors:

15 "Did you tell the solicitor that, so far as throwing the child, you over-exaggerated that she threw the baby at you and that it was not true?"

20 And he agreed that they were the conversations that had he with the solicitor and question, "well you told him, didn't you?", and he said, "I did".

25 "Q. That you over exaggerated and you said to the solicitor that you told police that she threw the baby at you and that was not true? A. I was sitting next to Kathy at the time, I recall."

30 That was the answer that he gave. But ultimately, so far as this part of the sequence is concerned, that the Crown relies solely on what Craig Folbigg has said, and to accept what he has to say, it is submitted to you that you would have to make assessments of his credibility and you would no doubt recall the submissions that I have made to you about whether you would accept that as a true version of what in fact occurred.

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40 We can get some insight into the fact that this really is not what occurred, because again we know that there was a listening device, and we know that in fact the listening device picked up a piece of conversation between Craig Folbigg and his wife about this suggestion by Craig Folbigg, that she threw the child at him. In fact parts of this transcript were read to him.

45 Now, just to place this in the picture. This was a situation of 23 July 1999. It was a discussion between he and his wife after his wife returned from making the record of interview. It gives really quite an interesting insight into a number of aspects, not only in relation to whether you can accept Craig Folbigg was telling the truth about the version, but in relation to what he says, that in fact the accused was telling him what to say, telling him what to say, because when you look at what was said here - and this is a listening device, a police listening device which really does give quite a contrary picture; in fact the picture it gives you, it is submitted to you, is that what the accused was saying to Craig Folbigg was "go back and tell the truth", not 'I think you should go back and tell them this' or, 'I think you should go back and

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change your story'. What she is saying here is 'go back and tell them the truth', and I will read some passages to you where this becomes fairly obvious.

5 So setting the scene; the wife comes back and it is submitted to you in a sense you can glean from what she says that she appears to be indignant about what he has told the police:

10 "Your wife said this; Bernie said something about the night Sarah died. I recall that I put her to bed, bed, okay. And the major difference between what you said...Thank you very much."

15 Again the token of this is that she is indignant at the suggestion that she threw the child at Craig Folbigg:

20 "My first response was that, was that I never threw my children anywhere, thank you very much...remember even doing that."

25 The listening device then records Craig Folbigg saying "yeah, yeah, I mean I remember the night she wouldn't go to sleep, so I walked up the hallway and then I just told... and then you came in".

30 Now as I say, this is a conversation that obviously that they did not know that was being recorded by a police tap. This is what Craig says. Now compare that to what he says in evidence and in the emotional way that he is describing the slapping. He explains this and says well, really, obviously, and the Crown says to you well, accept that he is besotted and this is
35 the reason. It is a matter for you ultimately to weigh that up but it is submitted to you that you will have real misgivings, real misgivings as to trying to understand what he is saying there in that light, and that you might more readily accept in a
40 sense that what has occurred here was really nothing out of the usual; it certainly wasn't a normal night, in the sense this obviously there was some conflict; but the question then is really: Is it able to be elevated, as the Crown wishes you to, based on Craig
45 Folbigg's evidence? When you look at what he was saying here, and obviously in the context of his wife saying, approaching him and being indignant about the suggestion and then he in fact says this. He explains this, and obviously asks you to accept this. It was
50 evident to me, by what I read here, that I was covering my arse what I was telling her. Then in a sense Craig Folbigg says to you "accept that". Accept that. What was submitted to you was in a sense, it is not only a question of whether you can accept what
55 Craig Folbigg said, but this clearly shows, in this conversation, that really we may have some concern and some difficulty in elevating what happened on this particular night in the way the Crown suggests

in fact had happened.

5 One other interesting aspect about the listening device is he, Craig Folbigg says in evidence, 'I was covering my arse', that is what he was saying there, in a sense. 'It was evident to me by what I read here I was covering my arse by what I was telling her'.

10 Then he moves on from that, in that he moves from that in the listening device, he in fact suggests that he has been manipulated by Detective Ryan. This is a listening device of a conversation between Craig Folbigg and a person, Tanya, on 26 July. This is "you know, he come, he come and planted some bullshit in my head when I was at me lowest point there when Kath had left me."

20 Now this is a listening device of a conversation that he had with a person and he later says "he's just going to try to assassinate her character", then at another page of the transcript to this conversation where he said "he, yeah, you know, I mean he hasn't been really in what I gather, he hasn't been really sort of following people up who we originally spoke to who had good things to say about her and how she was, as a mother, you know". And then in relation to another listening device to his sister Carol he has tried to assassinate Kath's character. That's all he is doing.

30 Then further he said to his sister "oh, he, what he's trying to do is trying to establish that she couldn't cope as a mother". Then it was put to him "your sister". Then says "no, well, I wouldn't say that. I wouldn't say that". So, really, it is quite interesting because these are the observations he has made at this point of time and in a sense it is submitted to you he tries to shift away from what he originally said in this way. What his state of mind was at that point of time one can only tell but the issue is here, is that if obviously the Crown is saying to you accept what he said on the night, that this was this very significant slapping of the child that he saw, you have obviously got to take these things into account.

40 Then you may recall this, I only briefly refer you to it but he then went on in fact to suggest that Detective Ryan wanted to be and that he thought that he might jump ahead of him and go on Sally Jesse Raphael. These are things obviously that you need to weigh up. I won't go through up but these are matters you need to weigh up in assessing Craig Folbigg's evidence.

55

There is one interesting aspect, however, of what he is saying in these conversations, because again it

gives us some insight of an opinion that he has about his wife's grief, that might be somewhat contrary to the message he is trying to give in evidence and this appears at 310 line 16.

5

He was then taken to some further excerpts of the listening devices and he said "well, they've look, look, oh, they are convinced...she is, like, here". Now it is important to understand that really this is in fact after Laura has died and no doubt well after this funeral where he says 'well, look, we got back into the car and this is what Kathy did'.

10

Now if that did happen in the way, it might be important to really look at this, look at what he is saying here in that context because this is not a matter of him speaking, this is a matter about him speaking to other people that he in fact has known. "Well they've look, no...but they don't see what she is like here". Then there's a female voice that says, 'yeah but, you know', and he says 'you know, they don't see what she's like in private which is what she is an intensely private person'. And then the female says "because they don't know Kathy".

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And then the conversation goes on, the female says "and because they don't know Kathy". And he says "mmm". She says "you know they don't know Kathy". He says "I know". And she says "they don't, they don't know how she operates, you know, sort of, and I think that's, they're sort of trying to draw up a profile. Well, to me, Kathy is a strong intensely private person".

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Then he goes on, he says this, again referring to the officer, "What he and I think, that also narcs him too, that anybody there, sitting there waxing lyrical about what, what a good mother she was...like you don't want to hear that". And then actually he makes some other observations about, placed in the situation where you have had children die, a number of children die, die in the family, the question of whether you can in fact conclude anything from demeanour and the desire to, in a sense, get on with life. He uses this expression - and it is again in relation to a comment about Harry M Miller. He goes on and he says "What are you supposed to do, crawl up and die?" In fact this is exactly what he said "yeah, I mean we're getting that like, like, he is looking down his nose...crawl up and die".

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45

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Now this is an observation that is recorded on this listening device. Again, another interesting insight into whether what is the appropriate reaction when a number of your children, your children die, and in a sense what you can conclude from the mere fact that someone might go back to work or get on with aspects of their life.

55

He says (317 line 54), this is another part of the transcript of the listening device "I said to him on Saturday, you know...bullshit, bull fucking shit, mate you wake up every day, it is another fucking day". Now, this is in fact a conversation with his sister, Carol, and she says this "You know, I mean, as far as the morning of, of Pat, I remember him feeling a very lost person and I still remember her crying. I still remember youse both, youse both crying".

So in a particular context where he is having a conversation with his sister, that in a sense what he is saying here is an insight, in a sense, as a human being, what you do, and the fact that, well look, if you do want to then cry and get back, try and get back to life. Then in a sense that one must understand that that really is something that is not that unusual because no doubt he is reflecting there on his own experience.

Similarly there is another comment that his sister makes in the same conversation. "It makes it all just so much, just when you get on with it and you say,...lives". That is a comment that he made in answer to his sister "well, they're even casting aspersions...lives". Then he goes on to say this to his sister, "I mean do you think I would want to get back together with Kathy...that she did this". Now, again, this is in the context of well, after Laura's death and funeral. It seems inconsistent for him to state those things if obviously what he observed of the accused in the car was in fact what happened.

Another aspect of this particular night - and this is a crucial platform of the Crown's case - and this is a question of whether Sarah was in her bed at 1 o'clock. The Crown's case is that you would accept what Craig Folbigg has said, that she wasn't in bed at 1 o'clock, that in a sense that what the Crown is saying is that the accused was out of the bedroom, that she in fact murdered Sarah and then returned her to bed, returned her to bed and then feigned that she, or pretended that she had found the child.

It is submitted to you that there are so many different versions in this particular time sequence, and that there are so many statements made by Craig Folbigg as to whether the child was or was not in bed, that there is in fact no foundation at all to conclude, as the Crown wants you to, that Craig Folbigg said that his wife was out of that room at 1 o'clock.

He indicated that in his statement of 19 May, that he referred to it as about 1am, when he was taken to that statement at 342 line 12: "At this time you

referred to it as approximately 1am. Then he answered, "Approximately 1am". He then says "I saw that Kathy was not in bed and I'm sure that Sarah was in her bed". And that's what he has continued to say in evidence in this court, that there was a street light in the street, and that there was sufficient light in the room for him to see inside, and that he remembered seeing Sarah laying in the bed.

He was then, in cross-examination, taken to parts of a record of interview. Now, you may recall that this was a record of interview where he was brought into the police station and he was in fact placed under arrest. He engaged in a record of interview and that he said certain things about what he then put in his statement. He was asked this, and I can read some parts of the transcript at page 354 line 47, he was referred to question 53 in that record of interview when the officer said:

"Q. Do you remember telling me that you threw Sarah up...and saw that Kathy and Sarah weren't in your bedroom?"

The transcript notes there was no audible reply to that question and the question at 55 "do you remember telling me that" and this is what he answered - so this is in the record of interview after the statement - well after the statement - "do you remember telling me that?" Answer: "I don't recall telling you that. I can recall the night". He was then asked: "Was that the truth?" Answer: "I didn't recall, when pressed...recall the night". Then he was taken to question 25 again; "Okay, do you...?" Answer: "Yes". These are the questions and answers of the police officer to Craig Folbigg in this record of interview.

"Q. Okay, do you agree, do you agree with that answer?"

A. When I woke...I can't be sure that Sarah was in bed."

Now that is the answer that is recorded there. As I say we have got the statement of 1999; we have got the record of interview, and there are various parts of that record of interview which is April 2001, where in fact at the start of the record of interview where he said "I can't be sure that Sarah was in bed". Then he was shown something by the police officer and then he gave this answer "when I, when I woke the first time I couldn't see Sarah in the bed in the dark. I could see the silhouette of the light around the door and I assumed". So we move from "I can't be sure that Sarah was in bed" the answer, to this "I assume". He was asked, you see, he said this, "I assumed, and that's why I comfortably went to sleep...won't to that". Then he explained, "Why would you ever say that"? And he said, "because I was all over the place emotionally". He was

asked "you see, but you told Detective Ryan on the 19th that the baby was not in bed" and he said "yes". Then question "you had no trouble telling him then?"

5 "A. He asked me a question in a very casual, comfortable way. It was a little bit laid back. It was a fairly stressful day but he asked me, just tell me word for word what life was like, what did you live like? What did the babies
10 live like, et cetera et cetera et cetera et cetera. I just waxed on."

He was asked:

15 "Q. You waxed on?
 A. Waxed on?

 Q. Talked at length? Was that the mood at the time, just waxing on?

20 A. I was nervous but I was waxing on a bit, like I am now."

In the record of interview at question 105 and following - this is from 357, line 42 - he was then taken to the
25 differences. He then started to say in the record of interview: "Do you wish to make a comment about the differences?" And he said: "I've got nearly a elephant's memory. It is nearly a videotape in my head...stays desperately clear".

30 Then at 107 he is asked, "Craig, what is the truth...then you get some sleep mate so I went back to, to sleep". He then said that when he answered the question he was - the
35 previous question, where that question, he was taken back to it, that where, in a sense, he was qualifying whether he saw Sarah or not. He indicated that even in the record of interview he went through these passages where, at the start, he still felt torn, that he was, when he was taken
40 back to that question 98: "Remember this is what I was asking you before lunch...bed". He was asked about the answer and then he answered - the question was:

 "Q. So when you gave that answer you were intending somewhat to protect your wife at the
45 time?

 A. I was still torn.

 Q. But intending to protect your wife?

50 A. I didn't know what to do.

 Q. You were intending to protect your wife at the time?

 A. Yes."

55 You may think, in understanding why the difference are there, that really the only way that it could be reconciled is by accepting Craig Folbigg's evidence of that, and that is the only way that we can understand this

gymnastic, the way that he interprets it "just waxing on, that explains some of the difference, or "I was torn", "I was torn at the start but then I had firmed up and I had decided to tell them the truth at the end of the record of interview". Again there is no other independent evidence. You are left with interpreting that on the basis that Craig Folbigg is telling you now to accept that, accept that from him, that the accused was out and Sarah was not in bed at 1 o'clock.

There is another touchstone - again this is going back to the listening device - and there in fact is an interesting interchange between he and his wife in relation to the question of whether Sarah was out of the room, and there is this question about "Why can't they think that?", where his wife says, "The problem was I found them all", and then he says this, "Hold on a minute. Hold on a minute. Hold on a minute. Can you hear me out. All right, I get up and I kill Caleb, because the next person to find him would be you, all right. Sarah - you're out of the room. I wake up. I admit that I wake up at 1 o'clock. I kill her in her sleep while you're out of the room". Now, it is quite unusual that this statement by Craig Folbigg occurs in this listening device, and it is very difficult, it is submitted to you, to understand what, in effect, is exactly going on in his mind at that point of time. But underlying this is an interesting premise, or an interesting foundation, and that is that when he is putting up that is other was a preposterous version, it is on the foundation that in the sense he kills Sarah whilst she is out of the room. It is probably only a small minor matter, but it is an interesting observation if we are really looking to other touchstones, that the foundation that appears put up, this preposterous version, is that he has done this while his wife was out of the room and Sarah was still in the room. It is a matter which is difficult to reconcile. However at the same time it may be support or gives some interesting insight.

There was another reference to this part of the evidence - and this is at 411 line 15 of the cross-examination of Craig Folbigg; this was in relation to his statement in May 1999, and in the context of after referring to the incident with Laura. He says this: "Time just rolled on and my wife hasn't come back to me...because of this I contacted Detective Ryan and told him some things that were not true. I told him that on the night Sarah died Kathy and Sarah were not in the room when I woke up at 1 o'clock".

Then it goes on: "I suppose I told Detective Ryan those things out of spite and because I was hurt that Kathy would not come back to me. Even so, everything that is recorded in this statement is the truth. Honest to God".

Now, as we do know, in fact that is a passage that was read from the May statement, that he is saying that everything that is recorded in this statement is the

truth, "honest to God". Well, even on his own evidence he said that he went back and changed things to lie on her behalf, and when they came back for the second sitting he lied throughout that. It was put to him, "Look, if what
5 you are saying now is that this May statement is riddled with lies and that you ended by saying even so, everything that is recorded in this statement is the truth, honest to god", it is still, it is said to him, "Well, you have
10 spoken about the differences here, and we can accept your evidence because you have sworn on the bible". And it was put to him, and this was at 412 line 15, "You see, you made a distinction in cross-examination...hand on a bible". He invites you to accept in his mind there is really quite a distinction there that, in a sense, you
15 would accept from him that in a statement which he says is riddled with lies he can end it, okay, with the conclusion "truth, honest to God", because in fact his hand wasn't on a bible at that time. Now that is a matter for you, for you ultimately to accept, but that is a matter that
20 ultimately goes to the issue of his general credibility and whether you accept what he is saying in his evidence in this trial.

25 One other aspect about whether you believe that Craig Folbigg saw that the child Sarah was out of the room at 1 o'clock, is the fact that he did not tell anyone until a considerable time later, in fact six years later, that the child was in fact out of the room at 1 o'clock.

30 The first time that he told anyone that the child was out of the room at 1 o'clock was in fact May 1999, when he made that statement. So the difference between, obviously August 1993, which is the date of the death of Sarah and May 1999, which is about, it was about six years, it was
35 submitted to him that in that six years he told no-one, he told no-one that the child was out of the room at 1 o'clock. It is submitted to you that that in fact is a significant factor.

40 It is significant, because if we understand what happened on this particular night, we can in fact see that there are a number of persons who attended the house at the night. He told none of them. He didn't tell, for example, the most, importantly, you might think, the ambulance
45 persons who were there apparently attempting to tend to the child. You might think that if the child was out of the room at 1 o'clock that a short time later, a little more than half an hour later, when the ambulance people were there trying to treat his daughter, why wouldn't he
50 say to the ambulance officers, as some important history of what has just happened, "Look, ask my wife. Half an hour ago she was okay", or "Half an hour ago, ask my wife, she was with the child". He said in fact that that did not enter his mind at that point in time. So we have this
55 question: "Why is it that it is only six years later that he raises this, and why didn't he raise it at that point in time when, you might think, that that would be pretty predominant on his mind that, "Well, look I can recall a

little while ago my wife was with this child, and apparently we can ask my wife what the child was like twenty minutes ago". That doesn't happen.

5 He was then cross-examined about Professor Hilton, and that he knew that he carried out the post-mortem, that he had discussions with Professor Hilton; in fact, as Professor Hilton had indicated, that certainly, when Professor Hilton had told him what he believed to be the reasons for death, that he did not tell Professor Hilton this fact.

15 He was asked, "Well how could this be, when you had this discussion with Professor Hilton, why wouldn't he say to Professor Hilton: Look, we just can't understand this because twenty minutes before this she was with my wife". Again, you might think that this was an important feature, that if it did happen the way he said, well, why didn't he raise this in the six years? Why didn't he raise it with the ambulance officer? Why didn't he say: Look, Professor Hilton, I have got this vital information, because 20 minutes before this my wife was outside the room with this child.

25 There is another aspect about the times and what his observations were at the time. You may recall in evidence that he started to become more and more specific with the times, as time had gone on. In relation to 1.30, you may recall he specifically said "I swung around, looked at the bedside clock when the screaming was occurring" and he saw in fact that it was 1.34. Now, we know that that is not possible, because in fact we can go through the sequence of the triple "0" call. That was received at the station where the ambulance subsequently departed from. However the call was to triple "0" and then to another police at Newcastle, and then to the place where the call was dispatched. You can go to the chronology to in fact determine that. I think 1.24 was the time that the call to the ambulance was booked, but we know in fact that there were two steps before that. So, in a sense, really it can't be 1.34. The Crown says: Look, he must have made a mistake. He really swung around when he was trying to resuscitate the child before the ambulance persons had arrived. You may recall that, in a sense, Craig Folbigg was really quite emphatic when he described that he was on the bed, swung around, and looked at the bedside clock. It is important, when you are realising these times because, the Crown said to you, that you can accept from that diary entry that was found in the bread box that really what the accused was doing was making an admission that she murdered her child at 1 o'clock in that statement when she notes that Sarah had died at 1 o'clock. Really much depends on, obviously, whether we can look at these times with any degree of precision; because if, for example, that this call to this depot was at 1.24, and we can maybe look at a minute or two minutes before that as taking around the time when the triple "0" was called; and we know the sequence of, obviously, coming into the room. In

fact if we work backwards. We might think, well, really she was in fact found dead very much around 1 o'clock, and that is what that may indicate, not in fact that there were two steps: That she had murdered the child at
5 1 o'clock and made a note of it in her diary, and at 1.30 was the time when the child was in fact found.

We know from those times that, in a sense, the 1 and 1.30 really are not set in stone, that there are variations
10 there, but we can use as a yardstick, the 1.24, and work backwards, and then ask ourselves: Well, is it really then remarkable that when she notes that in the dairy that she in fact notes that, in a sense, it was probably about
15 1 o'clock when she came into the room and found Sarah dead, so it appears at 1 or shortly thereafter. So what weight then do you give to that page of that diary that was found in the bread box. We know for certain that what we are doing is working backwards from 1.24, and we may
20 arrive at about a time which is not that far off 1 o'clock, to make a statement in the diary about 1 o'clock, very much about the time when Sarah was found dead.

Now, you may recall I said to you a moment ago, in
25 relation to the listening devices, that there was one part there. You may recall with these listening devices in the home there is nothing to suggest from the Crown that there was anything to support what Craig Folbigg said, in a sense, that she was either coaching him or telling him what to say.

30 What is submitted to you is that the only excerpt we have is the direct opposite, that she in fact is telling Craig Folbigg to go and tell the truth. This is in relation to
35 question 93 - I am sorry - that there was nothing in the listening devices - I am sorry, nothing in the listening devices to telling her to do nothing else from the truth. And it was put to him, in relation to question 93 in the record of interview, this question: "Did you tell her
40 what you, what you told me about her being up with Sarah?" Answer: "I didn't tell her specifics of the conversation...Well, you're just going to have to go and tell them the truth. I was a good mother. I was a loving
45 mother, and all that". Now that's what he said in the record of interview. I may have misrepresented that, but that's just my memory now, there was nothing in the listening devices to suggest that she was telling him what to say. The reference to "going to tell the truth" is in
50 this question or this answer to question 93 where she said to him, "Well, you're just going to have to go and tell them the truth".

Then when he was questioned about this, this is 356 line
50:

55 "Q. Are you suggesting that she told you otherwise at any time...

Q.... did she?

A. No."

Now that is the evidence ultimately of Craig Folbigg. So, really, we are left with this situation.

5

Now, going back to that coincidence notice, the coincidence statement, of the list by the Crown - and again this question about whether she would have resuscitated the child, or in fact that that would have been the first thing that she should do.

10

Again, we have a situation here where she has screamed, and in fact when she screamed Craig Folbigg jumps out of the bed and raced over to Sarah. He said, "I grabbed her off the bed. She was floppy. I turned around and put her on my bed, and Kathy was sitting in the hallway just outside the door at that stage screaming and crying, with her knees up under her chin, just crying". The Crown says the most appropriate sequence should have been: She then realises she should have immediately gone to resuscitate the child, rather than screaming, which then alerted her husband, who then went to perform, seek to perform CPR on the child.

15

You may think that is one statement that the Crown can make, but when looking at this as a piece of coincidence evidence it is important to realise, really is this sequence so out of kilter, with what are the sort of things that might occur in a situation such as this, and the fact that she wasn't the first to race over, but after screaming and reacting in this way, that it was Craig Folbigg who did that, whether that can be given the significance that the Crown wants you to; or can you understand it in the way that she may have panicked, she may in fact have commenced screaming and crying, and within a short period of time that Craig Folbigg had woken, and then went to grab the child off the bed? So we need really to go into the detail of that sequence and again stop for a moment and reflect, reflect and see whether it can be given the weight: The mere fact that she wasn't the first to race over to the bed, and it was Craig Folbigg who first raced over, whether we can understand that in the way that the Crown wants us to. We do know on the night that clearly she was very stressed. We have that evidence from a number of sources, particularly the ambulance officers, McDermott, who observed the mother to be extremely upset (571):

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"Q. She was sobbing?

A. That's correct...at the house."

55

We have a very graphic description that was given by Stephen Saunders, who was a police officer, and he noticed that in fact both parents were distressed (576 line 17): "And Mrs Folbigg was particularly I upset...in that

state". At the time he indicated he had been a police officer for 16 years, and then question:

5 "Q. And the level of distress that she was displaying that you...

A. I found observing her distressing."

10 In relation to the version of the sequence of events, I think the Crown indicated that Mr Saunders had taken the version from the wife. Can I just read part of this cross-examination. It appears that, really, in a sense, the officer obtained the history (576 line 40):

15 "Q. That is Craig Folbigg, the father of the child...

...

20 Q. His wife had woken to go to the toilet; is that right?"

He was then referred in re-examination to the reliability of that particular history and then taken to a report of the coroner that might in fact have suggested otherwise. Ultimately it is difficult to rely firmly on the view that this history was taken from the wife, bearing in mind those two different recollections, but I put that to you because if the Crown says: Look, you can rely on this particular version as coming from the accused, that there may be some question about whether that reliance can in fact be given.

Can I just take you to the question of the accused's reaction after the death, not only on this particular night. Craig Folbigg does in fact talk in terms of how certainly the breathing process differed. They breathed in different ways. He indicated that he had got hooked into his job "big time". Then he has, "Kathy at first...short while, and then she got the job back at Babyco, and that had prompted us to move back down to Newcastle".

45 Then he was asked, again in cross-examination, taken back to his statement on 19 May: "Once again Kathy and I were in the position...overcome with grief". The next sentence in paragraph 48: "Kathy appeared devastated also...more than me". Further on: "I was confused...devastated also". Question: "And you described Kathy being devastated in those times...after Sarah died".

50 So if in fact we have this mental picture that the accused, in a sense, really did not show any grief, and that that is a factor to be taken into account in deciding whether she murdered Sarah, well, really this in fact, the detail of the evidence. Again if there is still this remaining picture as to whether she was then really murdered this child, because it was then becoming really quite inconsistent with the way she wanted to live and that she really did want to go to the gym and socialise,

again, looking at the detail of this because, there was in fact a separation:

5 "Q. And did you have one separation or more than one?

A. We had more than one.

Q. And what was she doing in her life...

10 A. And the gym together and going out to the nightclubs and dancing, and what have you together, so she was pretty much getting on with things."

15 Now some of the interesting aspects about that are that really so far as going to Weight Watchers and the gym, this is in fact the first time that we have heard of it. If we have any suggestion of obsession with weight and image, to even look at Caleb's death, we can see in fact really this, when we look at the detail, this is in fact
20 where it is first introduced. That was the evidence he gave in evidence of in chief, but then when he was cross-examined about this time of separation, again we get a clearer picture, one that may not have been apparent by his evidence-in-chief, because he was asked this at 386
25 line 41, about the fact that she didn't go out after the death of Sarah until the time of separation. In fact he agreed that that was about five or six months. So suddenly we have a picture of, not a picture of, not a person, who in a sense, was going straight out after the death of
30 Sarah and going to nightclubs, but in a sense he agreed that, in a sense in that five or six months after the death of Sarah, that there was no going out, he answered this:

35 "A. No, you're right, it was five or six months...

...

40 Q. So the first time that she went to the gym was in fact after she went with your sister to Jenny Craig?

A. That's correct."

45 He then talks about the reconciliation, then in fact that there was a process before the reconciliation, and it was at that time that they had moved into what he described as a "really nice house": "We had good jobs, good friends. It was a lot of fun. It was then that she started to go to
50 the gym and she seemed happy". He talked in terms of remaining in contact during the time that they had separated. He in fact indicated that he, himself, had gone out during the course of their separation, in other words, after the five months and before they reconciled. 389:

55 "Q. Was it the case that also during the course of this separation you went out yourself...?"

He answered that he would go out, he formed friendships.

He was introduced to people at other local clubs. He became - every other week he would go to the pub, he was mixing with the other persons. When they reconciled, and returned to living together, that Kathy moved in with him, he introduced her to the persons that he had met during the course of separation, and she became good friends with those people and, in a sense, that they were the persons that he went on to mix with when she went to the gym. These were persons in fact that she mixed with when they were at Singleton.

So again, looking at that evidence in relation to Sarah, no doubt obviously we have Craig Folbigg's evidence about his observations on the particular night and his observations about her growling everyday, and her inability to cope with the children, but again the whole foundation for that is Craig Folbigg's evidence. Again, there is no evidence of any injury.

Yesterday I referred to Dr Marley's evidence, who treated both Patrick and Sarah. He inoculated the child. Saw nothing. Saw a good relationship with the mother. There is just nothing, no other touchstone, no other evidence, apart from what Craig Folbigg says about this. On that basis we would submit you just cannot find: There is no history of abuse, no manifestation, no other observation during the whole of Sarah's life that we can look to outside Craig Folbigg's evidence. Again, if we are needing this manifestation, if we are using the diary in the way that the Crown wants you to, to conclude that she is a person who totally lost her cool, lost her control, venting a high level of anger, frustration and stress, again apart from what Craig Folbigg says, and we submit you would dismiss that, that there is nothing upon which you can safely conclude that there is any manifestation in the life of Sarah to conclude that there is any manifestation of the thoughts that the Crown says to you should be relayed on in the way you look at the diary.

Your Honour, that a suitable time? It will I will go after lunch to the medical evidence.

HIS HONOUR: We will take the luncheon adjournment

JURY EXCUSED

IN THE ABSENCE OF THE JURY

ZAHRA: I can indicate I will be another hour.

5 HIS HONOUR: That is all right. Mr Zahra there is no time
pressure on you at all. You must take your time.

LUNCHEON ADJOURNMENT

10

RESUMPTION

5 ZAHRA: Just before lunch I was referring to the evidence
that Craig Folbigg had given in relation to part of his
record of interview where he told Detective Ryan that the
accused told him to go and tell the truth. Mr Folbigg was
cross-examined about that and it is implicit in his
answers that what he understood by her telling, going to
10 tell him the truth, that it was her truth, not his. I will
read two questions and answers 356:

15 "Well you didn't say that she told you to do
anything but that, did you, Mr Folbigg? You
didn't say anything to suggest that other than
her telling you to go and tell the truth?
A. Well, you're just going to have to go and
tell them the truth; you're going to have to go
and tell them the truth, I was a good mother, I
was a loving mother and all that. Kathy's
20 truth."

Then on 355:

25 "Q. Wasn't it the case...
A. ... Her truth."

30 However, you will recall the question and answer I read
ultimately in 356 in cross-examination:

35 "Q. Are you suggesting that she told you
otherwise at any time other than the truth...to
tell the truth, did she?
A. No."

He says that he inferred from that that it was to go and
tell her truth but in cross-examination he cannot
specifically take it any further than that.

40 Can I go to the medical evidence in relation to the child
Sarah? Largely, the medical evidence in relation to Sarah
comes from Dr Hilton who had carried out the post-mortem.
It is a parent that the Crown submitted to you that they
would say that Dr Hilton should not have returned his
45 diagnosis as being consistent with SIDS. You may recall
that the Crown in fact cross-examined Professor Hilton
about various matters suggesting to him that the finding
of SIDS was not made on an appropriate basis.

50 In relation to Professor Hilton's evidence one must
firstly to look at the foundation of whether he could make
the finding that he did, and he has come to this court
having been a pathologist for over 30 years. He in fact
was head of the New South Wales Institute for some 12
55 years and had carried out in fact autopsies on some 2
thousand babies. In particular he had experience in
relation to SIDS. He at one stage was Chairman of the SIDS
International Pathology Committee. That he in fact had

published on SIDS, both in journal, articles and in texts. He has been members of various SIDS associations and he fact was instrumental in starting up particular programmes to ensure that cases of sudden death in infants was brought to the attention of qualified pathologists, you may recall he instigated a programme in Western Australia. He also set up a programme in New South Wales.

The programme that he instituted was that all babies dying suddenly and unexpectedly, anywhere in New South Wales, were initially brought either to Glebe or to Westmead as part of this particular programme. When he commenced that programme in 1993 and in fact the body of Sarah Folbigg came to him as part of that, as that particular programme.

Now, ultimately Professor Hilton has indicated that his finding from that the death of Sarah Folbigg was consistent with SIDS and that is no doubt been quite an issue before this court as the Crown's address has made quite clear.

It is, however, important to not dismiss what Professor Hilton has to say. It is soundly based in his experience and he at the time was aware of the previous deaths and he continued to give evidence saying that his examination of the child was in fact a thorough examination.

Much of the issues in relation to Professor Hilton's findings have at times resolved around the question as to whether in relation to the punctated abrasions on the mouth of Sarah, whether he should have photographed those punctated abrasions. There has been much opinion expressed about the appropriateness and the fact that those injuries should in fact have been photographed. One may be distracted by that issue.

However, it may be that that is an issue that has been raised by other experts but the question whether you then can move on and dismiss his opinion out of hand because of that fact, is really quite another issue. Because quite clearly when pressed, and I will take you to this in a moment, that he maintained that his own observations based on his own experience with these punctate abrasions had no significance, no doubt in his experience and no doubt in relation to the particular programme that he was involved in, you would expect that if he was of a different view that he would have said so.

The danger in being distracted by that issue, and it is an issue no doubt that you would need to consider, because obviously the Crown says well, this may have been an injury consistent with smothering. One could get distracted and think well, does it necessarily follow that we can dismiss Professor Hilton's evidence on that basis? The fact that he didn't have photographs? It must be kept in mind that Professor Hilton wasn't engaged at the request of the accused. She had no role to play in whether the photographs were taken or not. This was a situation

according to what was the protocol established in this State that the child was taken to obviously either Glebe or Westmead as part of this particular programme.

5 The fact that there is no photographs that others can
comment on, or to test what Professor Hilton has to say
may be in fact a distraction in the sense that if
something is suggested by these injuries, it is for the
10 Crown to prove it. It is not for the accused to prove to
you that because photographs were not taken then that she
must in her case exclude the possibility that these
injuries may be the result of suffocation.

15 It is ultimately for the Crown to prove its case. If this
evidence is not there, so that other experts can look at
the marks in a photograph, that has nothing to do with the
accused. This child came before Professor Hilton as part
of a State protocol. That doctor had decided on the basis
of his experience that those injuries had no relevance.
20 The danger here is that one might tend then to speculate
as to what those injuries may have been. In fact really
all that can be done is to speculate because the
photographs were not taken. Then there has been no other
opinion to test Professor Hilton's view about those
25 punctate abrasions.

To be distracted by that may be an error because it may
mistake where the onus of proof lies. That is the danger
here. Is it suggested by the Crown that in the absence
30 sense of photographs, in the absence of any other
evidence, that you would start to consider that there is
something sinister about those marks. That is, it is
submitted to you, the danger in this particular case
because there is really nothing to suggest that those
35 marks might have been other than marks left during the
course of attempted resuscitation by Craig Folbigg. The
danger is here is in fact reversing the onus because
Professor Hilton didn't take the photographs. It is not
up to the accused to prove there was nothing sinister
40 about this because we can speculate those marks might be
some support this child might have been smothered. It is
submitted that is quite a danger. It is for the Crown to
prove its case. The short fall, if it is, has not been
brought about by the accused because Professor Hilton
45 hasn't photographed it, would be wrong to start to
speculate whether these injuries have any sinister
application.

50 A pathologist with 30 years experience, particularly in
relation to children and particularly in relation to SIDS
knowing there had been previous deaths, said in fact that
they were of no significance in the present case. It would
be wrong to then start to speculate as if in fact there
was some onus that the accused must discharge that there
55 is something sinister about these marks. It leaves you in
the situation where you must ask yourself, why is there
reason, why is there reason to dismiss Professor Hilton's
view that these marks were not significant in the present

case? When one thinks about that for a moment, if one moves away from that to start to consider there might be sinister implications in the injuries, one is clearly speculating, because he didn't take photographs that there might have been some sinister implication until it is shown otherwise; that is the danger here.

This observations made by a very skilled pathologists said that those injuries were not significant. It would be wrong to speculate because of the absence of photographs that there is something sinister. There is no evidence to suggest that those marks are sinister. The fact that no photographs were taken does not make it sinister. That is the danger. That is the danger of being distracted by this issue of the photographs because if we decide this case on the evidence, the evidence is that an experienced pathologist of 30 years experience, carrying out autopsies of 2000 babies who in fact had particular expertise in SIDS, that told you they were not significant. That is the foundation of the evidence. A bit dangerous to start to speculate and suggest there is something sinister when there is just no evidence. The evidence must remain as that. That in fact that there is no injury. That there is no injury, that there is nothing in this child Sarah that was determined at autopsy which amounted to any medical proof of suffocation. It would be wrong to suggest that those punctate abrasions or the scratch on the arm or any proof of suffocation when the only evidence is that an experienced pathologist said they were not significant. That is the evidence. It would be wrong to speculate, that is the evidence.

That is in fact the foundation upon which this case must be looked at, and when one looks at the cases in combination. We still have the situation where none of the experts that were called were able to point to any conclusive medical evidence in the case, looked at in isolation that that evidence would amount to suffocation in that instant case. That is where the evidence has stopped and it would be wrong to speculate otherwise. It would be wrong to speculate on the basis of punctate abrasions when the evidence is that an experienced pathologist said that they were of no significance.

Ultimately, as I have indicated to you looking at the medical evidence, and looking at the cases in isolation and experts taken to the case in isolation, there is in fact no positive medical proof in the individual case of suffocation. Again, this is where when the phrase is use "consistent with suffocation" must be distinguished. "Consistent with suffocation" means if there are no injuries, we don't expect at times to be injuries with the suffocation, then it could be consistent in that way. It is a very, very clear distinction to be made of Professor Hilton talks about those other signs at autopsy that might indicate suffocation. Again, they're probably familiar to you, particularly on locations outside the chest, eyelids cheeks, surfaces of eyes may be damaged."There is a fine

little membrane...other signs indicating they were the typical signs."

5 None of those injuries occur in the five instances before the court here today or not observable, clear to the four post-mortems, none of those signs were present.

10 Now, in relation to Professor Hilton's evidence there is also the issue in relation to the uvula he found that is really of no significance. During the course of post-mortem and Professor Byard indicated, I will take you to detail in a moment, still it involves an exclusion of that in the process of obviously whether you can make positive findings about the cause of death, but clearly
15 Professor Hilton indicated in his own view that that may be somewhat of an incidental finding, it may be a post-mortem artifact. What is the importance, where the importance is in Professor Hilton's evidence is that with the examination of this particular child, there was no
20 positive medical evidence of suffocation. He diagnosed that death was consistent with sudden infant death syndrome.

25 We can read into that, that what his finding was that there were no other findings which permitted him to reach any other conclusion. There findings that permitted him to reach a conclusion that this was suffocation. Referred to those signs there were no signs of suffocation, ultimately he concluded that the diagnosis would be SIDS.

30 He explained it in this sense, he arrives at that because of the importance were that there were no negative findings. That there were no negative findings in the sense of no findings that could be attributed to
35 smothering. This appears at page 628:

"Can we take it from what you diagnose...

40 A. ...in part of negative findings and in part on positive findings...are the more important."

45 One can see why that is the case. Because in a sense what are the findings? What are the negative findings? What are the findings in relation to suffocation? You can in fact glean from that answer what he is saying there is that when you arrive at this diagnosis in a sense you pay particular regard to the negative findings that is what you're keen to determine, and this is in fact where they are more important. To obviously looking through the
50 processes and to see whether in fact if there is any positive medical evidence of other diagnosis, particularly obviously, whether there are any factors or any aspects of his findings which might amount to suffocation.

55 Clearly, despite the cross-examination he continued to say that in the circumstances that he would favour the diagnosis of SIDS as opposed to intentional suffocation. The question remains, the Crown have clearly indicated to

you that he should not have arrived at that finding the question is ultimately for you: Can you dismiss what he has said? Can you dismiss his diagnosis? Can you do what the Crown said in the process of removing the reasonable hypothesis that this child died of SIDS? Can you exclude this opinion by this person who has this particular experience?

In relation to the other evidence, in relation to Sarah, professor Herdson said this. He was asked to look at Sarah's case in isolation he went on to say:

"This case is close to the criteria of SIDS. But as soon as there is evidence of any trauma that would ring alarm bells to me, I am lost because I don't really know what the nature of trauma was."

Referring obviously to the marks the punctate abrasions.

Again, he was asked whether he could exclude those injuries as being inconsistent with resuscitation? When one considers those things really, ultimately, there is no other issue that would prevent professor Herdson reaching that conclusion that this case is close to the criteria for SIDS. And that is in fact where that evidence remained.

He was asked this, 1045 line 50:

"Assuming the punctate marks had no significance...

A. ...yes, I did say that. I did agree I did say that."

If we remove the significance of the punctate abrasions and what I am saying to you is really you cannot infer any sinister implications to those marks, then in a sense Professor Herdson's evidence is that if they have no decision as Professor Hilton says, that the pathology in relation to Sarah most closely resembles that of SIDS.

Professor Berry also made similar findings. He dismissed the uvula and said he could not put any weight on it at all. He did, however, clearly says in relation to the punctate abrasions that he said this, when asked whether it could be consistent with resuscitation 1063, 30:

"In fairness I must say one does find abrasions...resuscitated."

If there was any doubt about those abrasions and whether there was sinister implication that they should be put out of one's mind when one takes into account what Professor Berry was saying:

"In fairness I must say that one does find

5 abrasions on the faces of infants who have been suddenly and unexpectedly or died suddenly and unexpectedly, most of them have been resuscitated. Often initially in panic by a parent...of ambulance men and so on."

10 You can see in fact he says that it is not infrequent in these situations that you would find these marks as a result of resuscitation. It is submitted to you that the case, deciding on the evidence, not on speculation, that these punctate abrasions and lot of what Professor Hilton says in the light of what Professor Berry says about the likelihood of marks like this, during the course of resuscitation, particularly panic by parents, certainly he said, in fairness, that one needs to obviously take these matters into account.

His ultimate opinion is this:

20 "I probably would have in isolation given the cause of death of SIDS but with slight misgivings about Sarah's age."

25 You may recall obviously the various expert opinions in relation to the age ranges, but that does not necessarily exclude SIDS. It may as he said, give some slight misgivings but that would have been the diagnosis that he would have given. Similarly with Professor Beal, she said this: 1142 at line 4:

30 " I find this very similar to the first child...
A. I accept either diagnosis."

35 Cross-examination 1148, 47:

" In relation to Sarah, again you would give the diagnosis...these are non specific.

40 A... Non specific, yes."

Can I take you to Professor Byard's evidence in relation to Sarah? In relation to the punctate abrasions 1216, 20:

45 "It is very, very difficult because we don't have...who had attempts at resuscitation."

50 So he, similarly to Professor Berry, considers obviously that those factors are relevant. He was asked about his diagnosis and he would say undetermined because obviously the question of the uvula is still one that remains. However, if it were not for that, his diagnosis would have been that he could not exclude the possibility that Sarah died of SIDS.

55 Most importantly, again as with the other experts, that there were no medical symptoms in this individual case which amounted to suffocation. 1217, 41:

"Looking at all the findings of Sarah...whether that was involved in obstruction."

5 But there is in fact no symptoms, no evidence looked at in isolation which could amount to proof of suffocation.

10 Can I lastly go to the child Laura? Again, look at the evidence and again as I submitted to you now a number of times, that really when one tries to determine whether this in fact fits with what the Crown says to you is the case of a person gleaned from the diaries as a person who would lose her control and a person to have a high level of anger. We need to look at the evidence to see if it fits in that pattern.

15 Well, the first issue again that can be examined, the same as with the other children, is to look at the circumstances leading up to the birth of Laura to see in fact whether there is anything about that time which might fit into that picture that the Crown says that you must conclude, because there is only one way of reading the diaries in painting this particular person that had the low level of frustration.

20 We have the evidence of Craig Folbigg about conversations about having the child, Laura. Now, again, as with Sarah, you may recall before lunch time I was making the submission the Crown says to you there is really a sinister purpose in her wanting to have other children. That is in fact to prove to herself that she was not in fact a failure because she in fact murdered the other children.

35 It was suggested to you in relation to Sarah that this might also be positive proof of the fact that really she wasn't a person who was distracted by another lifestyle but wished to be rid of her children. This was someone who in fact wanted children and wanted in fact to be a family.

40 One of the interesting aspects of the conversation that Craig Folbigg had related about Laura was that in a sense he said in this conversation that, whilst he certainly wasn't very receptive at the start, that she had pressed right buttons. She was saying things like, this is what exactly what he said 151:

"I got basically a copy book repeat...that sort of stuff."

50 He talks in terms how vulnerable he was to those suggestions 152, 44:

55 "How often would she bring it up...she knew what buttons to push...being a Dad, the fun of babies, having bobbies around."

So let's try and picture this situation: These are the conversations, knowing about what Craig Folbigg has said,

about the way the accused is towards her children. Now, if his evidence is to be accepted, you might think that her parenting of these children in relation to the way she dealt with Patrick, starting to growl every day and with Sarah about battle of wills and the growling every day, let us consider, firstly, Craig Folbigg's evidence in isolation; the picture he paints about her parenting. Particularly, of the children Patrick and Sarah, the picture he paints.

You might think that really he is painting a picture consistent with, no doubt, the way the Crown wants you to conclude about the accused, a person who had a low level of frustration, a person who would totally lose her cool, lose her control, vent a high level of anger, frustration and stress. This was not happening occasionally but the growling would be every day.

Now, if this conversation took place in the way it did, what was in Craig Folbigg's mind at that time? Why was she able to know what buttons to push? And when she was saying these things, why didn't the flood of the memories of her low level of frustration and losing her cool, losing her anger, losing her temper, losing control, growling every day; you might think that the picture he is painting is such that there were no positive buttons to push. There were no buttons. If we look at his evidence and his description of the accused as a mother, that this must have been a nightmare for him.

You might think that if his evidence was true, there were no positive buttons to push. He said the buttons she pushed were parenthood, being a dad, the fun of babies, having bobbies around.

You might think that really is quite telling; you might think, as he indicated in cross-examination when he related these conversations, he was doing his best to say what the previous conversation were. Why didn't he say at that point in time, look, you can't handle children, you want to go out, you want to go to the club, you want to leave them everywhere. If that is the case you might think that there were no positive buttons to push. But he said there were. It is submitted to you that really that is quite telling because the buttons he said she was able to push, his recollection of fun of babies and having bobbies around, that really is an important starting point in relation to Laura.

He indicated that certainly during the course of pregnancy with Laura, again he was returned to this question about her going out. He agreed that so far as during the course of the pregnancy, this was put to him 396, 47:

"I put it to you during the course of pregnancy...I just don't recall the frequency."

You can see the gym wasn't in existence at this point in

time. Looking at the detail of evidence, if this is the picture intended to be presented to you about her really wanting to neglect children and nothing to do with the children, or an impediment to going out clubbing, it just
5 doesn't fit in with the detail of evidence. Again, her demeanour at the time Laura was born, 378:

"Q. Your wife happy at that time?

A. She appeared to be."

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Nothing to suggest at these times anything negative.

Again, some evidence in relation to the monitor and the use of the monitor. I have made submissions about this in
15 relation to the apnoea blanket. What is quite important here when you look at the exhibit in relation to the diary that was kept, exhibit AA, when you look at the exhibit and this is really quite important, again in the context of really looking through the eyes of the accused, what
20 was the utility?

You may think that after a period of time, particularly during the day, that there may not have been a real
25 utility in the corometric blanket, particularly when she was awake. One can see taking into account the matters I have already raised to you in relation to the other monitor, but we have in fact the same pattern here. We can see in fact from the diary, we can in fact, see
30 essentially these were false alarms.

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The Crown posed the question yesterday. How did she know they were false alarm? You might think when you see this
35 over the month that it becomes quite clear that they're false alarms, particularly when you look at her notes and obviously that comes to realise very quickly that these were fact false alarms. What can be seen also when you look at the detail is that in a sense the alarm was causing the child to wake, causing the child to stir. So
40 before we start to conclude as the Crown wants us to, about the use of this monitor, we would need to stop for a moment and look at the detail and again try and imagine the situation where, if this was what the alarm was doing, despite it being a little more complex than the blanket
45 itself, it was still prone to these false alarms.

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One might imagine that one might have thought about the utility or reliability, bearing in mind it was not accurate, particularly those matters that were not of concern. You might think over a period of time, particularly in relation to the day, the use of the corometric monitor, bearing in mind it was waking the child because of the alarm, it was near the child, and could not be removed from the child. There was the examination of the utility and the effective reliability of the machine, accurately depicted, whether they were matters of concern or not. That is a matter, where you would need to go through the detail of this and try to get some picture of the fact that not only was the alarm giving false alarms and again, in relation to what Craig Folbigg talked about, the effect of the alarms emotionally, bearing in mind the background, and then over and above this, it appears to have no real utility, questions about whether it is reliable in picking up the appropriate incidents or not. You can imagine the situation where in fact over time, particularly during the day, that this monitor may not be used, particularly when one is awake. These are matters obviously that you need to take into account in determining the weight that you would attach to that piece of evidence, in a sense to conclude that what the accused did was murder Laura. I mean, obviously, that is a strand of evidence that the Crown says to you is significant for that purpose. Obviously you need to take into account that really over time the fact that the machine, even though it was more complex than the blanket, the question may be over time, bearing in mind it was waking the child, whether there was some utility in keeping it on when in fact the child was awake.

Now, in relation to, again, the accused being the primary carer of Laura. Sure she was home with the child. This obviously gets to the question of coincidence, as to whether she was the person who found the child, and the use you can make of that evidence. At 161 line 44 he agreed she was the primary care-giver. He was working at the time; he was working five and a half days a week. He indicated that, again, as he did with the other children, that she would tend to become frustrated and cranky. Again, the evidence in relation to that is heavily reliant on the evidence of Craig Folbigg. Again she was the primary care-giver during that time, as far as the day to day care of Laura is concerned.

You may recall he was taken to parts of his statement that I have referred to previously, that he was working, and in his statement he said, "I now realise this was wrong and Kathy was doing everything at home".

So he was actually asked again the question about whether she was becoming stressed every day, and he was taken back to his statement where, in a sense, the expression used in his statement was "Kathy appeared to get stressed occasionally with looking after Laura". You could see in fact that that has evolved, no doubt, to creating a

picture of the accused being cranky every day. He was asked this in cross-examination at 398, in relation to that statement, "Kathy appeared to get stressed occasionally, looking after Laura", he agreed that he made that statement and the question was:

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"Q. Was that the truth?

A. Yes.

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Q. You consciously used the word 'occasionally'?

A. Yes.

Q. Was that the truth?

A. That's how it appeared."

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So again we get, when attending to the detail, really get quite a different picture if obviously we considered the course of this statement, as he now says is the truth, that in fact she was getting stressed occasionally.

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It is interesting also at one point 133 line 34 that he could understand how she could get stressed at times, because he was again referred to his statement, and he said this, "Q. You go on to say, 'I can understand that she was home with her all the time and would have been stressful. I used to get stressed sometimes when Laura demanded my attention constantly'".

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Now you could obviously see how important it is to put things in perspective. On the one hand, Craig Folbigg tries to create this picture, but he when taken to the detail: "When you said in your statement", he said "occasionally" but he emphasised with his wife, in a sense, becoming stressed at times, when he said, "I can understand that she was home with her all the time and would have been stressful. I used to get stressed sometimes when Laura demanded my attention constantly". So the question is really: When you look at the detail, can you elevate that evidence? Can you elevate that evidence to prove, in a sense, the strand of the proof, that is that she in fact murdered Laura?

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Now, there was some evidence about the relationship between the accused and Craig Folbigg at this time. Now it is quite clear that there were times when she considered leaving Craig Folbigg, and we have letters. We have letters about that. We have letters where she had written, indicating her desire to leave and to take Laura with her.

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Now, the Crown no doubt says: Well, look, that really is a piece of evidence that you can consider. The Crown says that you can consider that that is part of the evidence that she was a person really who felt encumbered by the children and wanted to get away. That was the reason. That is the reason she wanted to leave: Because she wanted to rid herself of the obligations of the family, rid herself of the obligations of the child, and in fact go to clubs

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5 or go to the gym; but when we look at the detail of why this relationship was breaking down, there is nothing to suggest that it was in the communications, a desire to rid herself of the child, because in fact that letter you have as an exhibit clearly indicates a desire to take Laura with her.

10 The other aspect of the relationship is that when you look at the letter and you take into account the evidence and, in a sense you recall the interchange that she wrote the letter, and in fact that he then went and typed a letter, a letter in fact that he didn't give to her, but it is interesting to see what his evidence was about her response, that he went to her, and this was part of the letter: "Over the years you have become an oppressive and
15 depressive person...all those years ago."

20 Now that appears to be the reason that this marriage was on the rocks. That is what you can glean from the letter; not that she wanted to leave Laura. In fact she said the opposite. She said she wanted to take Laura. It is interesting to take into account the evidence of what her reaction was when he approached her after reading the letter. What it was that she said "finally you talk to
25 me". In other words, that was the response "finally you talk to me", not "No, look, I'm going anyway. I can't stand it here. I just want to go to work and I just want to go clubbing". "Finally you talk to me". Now this might indicate that really it would be difficult to glean the fact that she wanted to leave the marriage as proof or
30 part of the proof of murder, because when you look at it it may be that the problems with the relationship were communication, and in a sense that what the evidence was, that is what she said, "finally you talk to me".

35 "Q. Again, did you say to her that...home early and you speak at length about supporting each other and being considerate of each other's needs and feelings."

40 Now this is the danger of accepting superficially that the mere fact of her wanting to leave Craig Folbigg is somewhat proof of murder, or part of the proof, when you look at the underlying reasons. It seems it be a
45 distraction that we are really looking into, why this marriage was on the rocks at this point of time, but we probably need to do that, because if the Crown is suggesting that we should give weight to this, if you look at it, maybe it was just the problem between them -
50 nothing to do with the accused's relationship with the child, but most importantly in that letter that she talks about taking the child with her.

55 We have in fact quite some evidence from Craig Folbigg about the incident of these three particular days leading up to the death of Laura. One of the first matters that was raised with him was that this statement that he made with these three incidences was only made for the first

time in this way in this detail on 30 December, a little over four months before he gave evidence. It was put to him that what he was doing in this case was attempting to portray normal domestic situations in a sinister light.

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Now, we can in fact see some evidence of that because, so far as some of the sequence of events is concerned, and much in the same way as the evidence in relation to Laura, after the relationship to Sarah where in fact it was put to various sequences and shown that these sequences were not shown in previous statements. It becomes quite clear that really there is real doubt as to whether you would place any weight, it is submitted to you, on whether you can rely on what the accused did on this particular occasion, particularly on the morning, as being some foundation for understanding why the accused murdered Laura on this particular morning.

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Can I just refer you to some of these, and some of them are relatively minor, but as a total picture, we again get a flavour of the way that Craig Folbigg has approached these three days; because it is submitted to you that really there is no other evidence, apart from what Craig Folbigg says, and if the Crown is relying on this to set the picture or to set the foundation for what it says is a murderer, that you would obviously have to look at Craig Folbigg's credibility generally.

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There in fact are some differences. For example, you may recall that he referred to the phonecall where she rung back and apologised. Now, you may recall that when he gave evidence about what this conversation was, that he said that in this conversation that he was putting to her that, "Really, look, why don't you come and visit? Why don't you come and see me?", basically putting it on her to say, "Well, look, bring the child here. If you think everything is all right. If what you are saying is true, that you're sorry and everything is okay, the child is fine, why don't you bring her here to work so I can, in effect, see for myself?" This is in fact what he said, "I said 'No, if you say Laura's fine and you're fine, come in and have morning tea with me', and that was the end of the phonecall and she arrived". This is a statement that he made only some months before giving evidence, and we know obviously that there have been a number of statements that he made before that.

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When we look at what he said, that when Laura arrived at the office, that "she was active, she was giggly, she sat on his lap, and then afterwards at about 11.30 she came to the door, opened the door, and said, 'I better get bugalugs home. She is due for a sleep' and I said 'Okay. No worries'".

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He then said in evidence that when they left they both waved, they both waved to him.

It was put to him that, so far as such expressions as saying that the accused said "I lost it with her", again he conceded that that was not in the original statement that he made to the police.

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You may recall that this is heavily relied on by the Crown as fitting in with what it says. How you can interpret the diaries: "I lost it with her"? He conceded it was not in the original statement. It was not in the conference, in the notes, or mentioned in the conference that he had with the Crown in October 2002 also. The first time it manifested itself was in this statement of 30 December. It was put to him that really what he was attempting to do over time was making these situations look more and more sinister as time had gone on.

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When he was cross-examined, he was in fact taken to various parts of what he said about these three days. He accepted that in relation to the force feeding of the child, for example, he was taken to the May 1999 statement, and he agreed that that was not stated in that way. He was taken to parts of the statement.

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"We sat and watched the news on television in the lounge room. Kathy got out of bed about 7am that morning, and I started getting ready for work. Laura became upset and started crying and chucked a tantrum. I walked out and said to Kathy...Well, that was a softened description of what had happened."

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Then it was put to him, well, it wasn't until 30 December, some months before, was the first time he mentioned those things, and he said "when I was given an opportunity".

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"Q. You were never given an opportunity before then to talk in terms of the child being pinned down?

A. No, not since May 1999."

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So you can in fact see that there were quite some differences, and it is submitted to you it is very significant, some of these matters, such as the pinning down, the force feeding, they only originate very recently, and also some of the aspects of what he was saying, don't even appear, for example, that "lost it with her", don't even appear in a conference with the Crown in October of 2002.

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When we look at some of the things he said in the statement, they are quite different to what he says in the evidence. Again, looking at the tenor of this "apology phonecall" in the statement, he relates this at 815:

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"That morning I received a telephone call from Kathy and she said...and she said 'yeah, no worries'."

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Now that's the conversation he has related in the statement. Quite different to the one that he related in evidence here, in the sense that he was just saying to her: "Well, if what you say is true, well you bring her here", effectively saying that he wanted to see the child. You can in fact see, even when it was put to him in statements, that he said things that such as: "I don't really know what I'm doing. I'll probably be having morning tea with the girls", how you could see in fact that he even, in the course of statements in evidence, even varied that. But you could see in fact that in 1999 he was saying, "Do you want to come down here for the morning? And she said 'Yeah, no worries'". Now these, on their own, are very minor things, but they again support this view, that there has been quite an evolution in his evidence, an evolution to making it more and more negative upon the accused to making domestic situations and tensions more and more sinister, and it is a clear pattern which clearly affects the credibility of Craig Folbigg's evidence.

Another aspect about the detail of the evidence about the relationship, and obviously the question of her going out. Again, when we went to the detail about the accused going out - 714 line 43:

"Q. So far as after Laura's death was concerned...

A. Yes, I don't recall."

So we can in fact see that when we look at the detail, that if there is any suggestion that she murdered Laura because she wanted to get back to the gym or she wanted to go out, well, quite clearly it does not show itself in the detail of the evidence, that she does not go out during the times when, after the death of Laura and before they separated.

Then he is taken back to his statement that in relation to the accused going back to the gym, "Kathy went back to the gymnasium on the following Monday", being 8 March 1999, "This was because her girlfriend from the gym came and got her and were supporting her". So obviously when you go into the detail it paints quite a different picture.

We also have evidence of the call during the accused's case of that being very much the case. So we need obviously again to look at the detail of Laura's life to see whether it fits into that pattern, whether in fact it supports those states of minds that are suggested in the diary.

Again, even in the simple thing about waving as she left his place of employment at that time. In examination-in-chief he said they both waved. He later then went on to say, "No, only the child waved". In the statement that he made, in the original statement, they both waved. In the statement of 30 December, only one

waved. You might see this as a very minor thing. In cross-examination he was asked:

5 "Q. What is your memory here today...
A. She didn't wave."

10 Even in this court in examination if chief he was reminded at 431 line 14, "No, she didn't wave". This is an example, it is submitted to you, of the evolution, his evidence that in fact he just does not want to say anything that might be positive about her state of mind at the time, because we have got this evidence of her at the gym, everything appears to be quite okay at the gym. We have got evidence from a number of different witnesses, Kerry Anderson and others.

15 Kerry Anderson was called in the Crown case, and evidence from the witnesses in the accused's case, that in a sense there was nothing about what in fact had happened on that particular morning at the gym that suggested that there was any tension or frustration or venting of any high level of anger or frustration.

20 The other aspect about the relationship is that there is this letter, which was the letter that was returned - this was the letter that he wrote, sorry, and didn't give to her where, in a sense, in this letter, he stated his views and he said that when he wrote that letter these were his views at the time - not that it was the truth or made up - but that was his view at the time. This is what he had in that letter:

25 "Through good times and bad, for richer, for poorer, through sickness and in health, as long as we shall both live...It is something I have wished for a long time. I am also proud of the fact that Helen thought enough of you to want you back at work with them."

30 Now this was a letter that had he written two weeks before Laura had died, and in fact he indicated that that was his view at the time, but he did not give her the letter. So you might conclude from that, it is submitted, that it does appear to be inconsistent with the type of behaviour that the Crown suggest that you can infer from the diaries. Here he was saying two weeks beforehand that he was immensely proud of the mother that he was to Laura.

35 Your Honour is that a convenient time?

40 HIS HONOUR: Yes. We will take the short adjournment now, ladies and gentlemen.

45 SHORT ADJOURNMENT

50 HIS HONOUR: Yes, Mr Zahra?

55 ZAHRA: Can I take you to the evidence of a number of

witnesses, Lea Bown, Melissa Smith, Deborah Grace and Barbara Unicomb that were called during the Crown case.

5 In relation to the evidence of Lea Bown, that there were incidents that the Crown is relying on, particularly an incident where the accused was alleged by Lea Bown to have yanked the child out of the chair, and other incidents in relation to her behaviour to Laura that appeared to be "over the top".

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It is submitted to you that you would be concerned about that evidence, because when in fact she was cross-examined, the incident where she is now giving evidence about the yanking of the child was referred to her in a statement as this, "On one occasion Laura wouldn't go to sleep, and another time when she was feeding her, Kathy got a bit angry and short-tempered with Laura. It probably was because she was tired herself". That is in fact the way it was described originally in the statement. However, by the time that she had given evidence these had become, it was submitted to you, quite more significant: The yanking of the chair, and "over the top", but it is submitted to you that they weren't so described at the outset, and that is a matter obviously to be considered in assessing the weight. She explained that by saying, in a sense, she was not telling the police the truth at the start, because she thought in fact there was a witch-hunt, that it wasn't lies, that in fact she thought it was a witch-hunt, and she needed in fact to say it in that way. These are matters obviously, ultimately, for your assessment; but, again, if there was a consistent view that would be, no doubt, much stronger but clearly over time "a bit angry" and "short-tempered" has become "yanking" out of the chair" and behaviour "over the top", so there are questions obviously of the assessment of the weight of would you give that.

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Similarly, in relation to her reaction in the car after the funeral. That has evolved from a statement in her original statement, where she agreed that she painted a picture that she was, is grieving (at 800 line 10):

40

"Q. I see you paint a picture...

A. ... There was just no way."

45

So we can see in fact there has been a change in her evidence. The evidence that the Crown relies upon about the sequence on the night of the death of Laura, again was a statement that she made some six years later; and again these are matters that - and when it was put to the accused the accused said that, she said that that is not what she said - there are questions, obviously, that need to be taken into account as to what reliance you have on that particular sequence.

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55

So far as the other witnesses are concerned Mrs Smith, Deborah Grace and Barbara Unicomb. They were called no doubt in relation to the question of the accused leaving

Laura with other persons. You might think that, particularly in the light of the fact the Crown made no real issue of this in his closing address, that in a sense when the detail of leaving the child with others, it was not otherwise than quite appropriate, and it wasn't with such a frequency that the Crown has suggested to you in his closing address, that you would in fact reach any adverse conclusion about that.

It is submitted to you that really when the detail was gone through there, that really the frequency wasn't, as might once been thought, of some months, at times, had passed, particularly in relation to Melissa Smith, before she looked after the child.

Karen Hall, it seemed, had looked after the child with a little more frequency, and she described at times when it was appropriate that she looked after the child, appropriate arrangements were made, so far as the monitor was concerned, at times when she had to look after the child at her home. There has been nothing suggested by the Crown in closing address, it is submitted to you, the detail of evidence, that does not suggest anything untoward about her leaving the child quite haphazardly in the circumstances.

One last aspect in relation to the evidence about Laura - again this relates to the coincidence evidence about whether she was a person who would attempt to resuscitate the child. It is important to obviously take into account that in relation to Caleb the ALTE, in relation to Patrick and the death of Sarah, that Craig Folbigg was there, and it appears that he in fact was alerted to the children by the accused.

I have already made submissions to you about obviously taking those factors into account, but what we have here is in fact some tangible evidence. We have, as the Crown has described it, a machine, in a sense that we can tell a lot of things actually about her tending to the child. We have the triple "0" call. This is a really important part of the case, because this is quite tangible. This is something you could listen to. This is something you could use to try and understand what her state of mind was at the time. It is important to listen to that triple "0" call, and it may be one of the first things that you might want to do. You might, after listening to it, pose this question to yourself: Is that the sound - is that the sound of a person who had just murdered her child? I am not going to make any submissions to you about that. You listen to it. You listen to the tape. It may be important even to listen to it at the outset and ask yourself: Does that fit in with what the Crown says about the accused, about her failure, in a sense, to murder the children, leave them? If there is anymore graphic evidence that you need, just listen to that, it takes about a minute, and then ask yourself the question: Did this person just murder her child? It is submitted to you that it is a

very graphic piece of evidence to suggest completely otherwise. This really obviously addresses those issues of coincidence evidence. You might obviously take into account.

5

Can I go to the medical evidence in relation to Laura. Dr Cala no doubt carried out this post-mortem. Again as I have submitted to you in relation to all the other children, where is the evidence of suffocation? Where is the positive medical evidence of suffocation? Now, in looking at this particular aspect in relation to Laura, it becomes really very, very prominent, because, firstly, there are no - there is nothing that Dr Cala was able to see about this child, no particular haemorrhages on the eyelids or face, no injuries around the mouth. There was nothing, nothing about this child, at post-mortem that revealed any evidence of suffocation.

The other interesting aspect is that really this was a child who clearly might be expected to be able to struggle. So that was a significant aspect too. Clearly from the cross-examination of Dr Cala, that he realised the significance of that, knowing obviously the history as was put to him - in fact I might just read some of this; this is part of the cross-examination at 708, that in fact that there were no petechiae haemorrhages on the eyes or face, no injuries to the face or the mouth; that he carried out a detailed examination of the mouth, not on one occasion, but on three occasions:

30

"Q. You found no injuries to the face or the mouth. That was a particular area of specific investigation by you?

...

35

A. There might be a struggle, yes."

He agreed with that. He indicated that it was a significant process of his inquiry. In fact it was so thorough that he performed a facial dissection of this area, in other words, to determine whether, as there were no apparent bruises on the face, in this area, he carried out this dissection. In other words he was looking for even the most minor of bruising or injury, than in fact is obviously below the skin surface. He agreed it was a very detailed process, and in fact ultimately he could point to nothing:

"Q. So far as your findings overall of Laura are concerned, that can be significantly...

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A. ... and my finding of no positive findings doesn't exclude suffocation."

But he went on to say that, similarly, that because of that detailed examination, ultimately there were in fact nothing, and he performed the facial dissection around the mouth. Again, even nothing below, although of the most minor nature.

55

Dr Cala obviously noted the myocarditis. His evidence is that his determination that myocarditis was not the cause of death is based on two findings: Firstly, his
5 macroscopic view of the heart. In other words, looking at it with the naked eye, the question of whether, amongst other things that he saw, whether there was some stripey appearance, some other feature around the heart, that in fact it may be flabby, and he said that none of those
10 things were there. However, he agreed in fact they were non-specific, in other words, the absence of those macroscopic conditions does not exclude, does not exclude, myocarditis.

15 There was an issue obviously about whether he could perform a diagnosis from a video. He said that he could. Obviously questions were raised by other experts about whether you could conclude from the video, bearing in mind that we know that children, that persons can die
20 unexpectedly of myocarditis without there being any previous symptom. So ultimately he says, obviously with the findings macroscopically, which he says that, in a sense that, he agrees that ultimately even in their absence, it does not exclude sudden death by myocarditis.
25 Again, no signs of any manual asphyxiation. No other injuries consistent with suffocation. But so far as the microscopic examination is concerned, that he referred to the myocarditis. He in fact indicated that he took multiple samples of the heart. They were placed on slides,
30 and as the evidence has revealed that, in a sense, the examination of those slides have been such that it appears that myocarditis was present in those, all of those samples.

35 The other aspect about the myocarditis is that some of the experts, I think it is only Professor Berry who did not see the necrosis who examined the slides, but others in fact did see the necrosis, which is in fact quite
40 important, in other words, to determine the extent of the myocarditis in this particular heart.

45

You may recall obviously the concession of Dr Cala that you don't need a great deal of myocarditis to cause death. It may be that if, for example, the myocarditis is in the conductive system; in other words the signalling system, the conductive system in the heart, that that in itself could in fact have caused death, but some parts of the heart are more important than others when one has considered the effect of myocarditis.

He indicated in fact he described that this myocarditis the lymphocytes that aggregated in certain areas of particularly -- the heart, left ventricle, inner side of the heart where the left ventricle chamber sits collecting blood. He goes on to say in a sense that there are also aggregates on the surface of the heart itself.

So it is submitted that there were really quite significant findings of the presence of myocarditis and the question remains, whether that myocarditis could be excluded? So again looking at these two steps, can myocarditis be excluded? That is not a matter for the accused to exclude it, the accused case to exclude it is not for the accused to prove that this death was due to myocarditis. It is for the Crown to exclude it, even after that question is considered, the question still remains, what is the positive evidence? Is there positive evidence of suffocation? Ultimately, even with Dr Cala's evidence, we cannot arrive at that situation where that doctor carried out the post-mortem, can say that there are, looked at in isolation so far as the observations medically on post-mortem of this child, there is no similar symptom, there is nothing, there is no proof of suffocation, that he in fact saw at the time of performing the post-mortem.

Can I just briefly refer to, obviously, some of the other evidence in relation to myocarditis? Professor Herdson said what is the significance of myocarditis given the total circumstances, I don't think...of death. Then Professor Berry. "It is extremely difficulty... In the days before her death. It...presents an explanation for the death... It is not a certain explanation because it could...I think in isolation most pathologists would probably described Laura's death to myocarditis that is in this isolation".

He was taken to some of the other general issues about, obviously this is not a question of the quantity of myocarditis, it can be significant even in smaller presences, but in fact the question I was about to ask, it may be in a sense, it could be smaller myocarditis but if it is in, for example, the conductive system it could be fatal? " Yes, it could be serious...that may not lead to death". It may be in fact even smaller amount of myocarditis that in fact could lead to death.

Again, in relation to Laura, when Professor Berry was asked this question, that there is no strong positive

evidence of suffocation in the individual case, he agreed that there was in fact no positive evidence looked at in isolation, that there is no symptom that he could conclude that would amount to proof of suffocation. Similarly in relation to Professor Beal. She said this:

"I would vow to pathologist...I honestly don't know the answer to that."

So then she gave evidence about the sequence which I will come to, whether in fact you can tell from the agonal rhythm whether in fact you can tell the sequence, but even in relation to the sequence, the one that she had indicated she said "no, no, I can't include you absolutely". She was asked if she examined the slides. She said no that she was relying on others to form that assessment. He was asked specifically what weight she would give to Professor Byard and referred:

"He is a person well qualified in this area...Looks at all infant deaths...absolutely I have written chapters for his book."

That is the evidence of Professor Beal. Professor Hilton was also present at this autopsy and again he gave similar evidence in a sense he said that; "in your opinion in his examination of the slides lead to this child's death? A. Yes, it could have...this child's death". Again, saying it would be inconclusive to look at the video and doesn't preclude that myocarditis might have caused sudden death in that instance.

In relation to the evidence of Professor Byard, in relation to Laura, again he looked at the slides, there were seven slides, eight samples, each one of the section of the heart had areas where there was inflammatory cells so there was information, there are some areas, the heart muscles died and also swelling of the tissues. So this is an established myocarditis. He explained obviously the range of presentations in myocarditis. Again, as was consistent with the other experts, but it is important to take into account parts of the heart, particularly if obviously the myocarditis was in the conductivity system. Also, that he observed necrosis and he said, "to make a diagnosis of myocarditis...have died" in this particular case there was evidence of dead heart cells and indicating there was not just one focus. -- one that much that was sampled, not just mild myocarditis, it is quite well established and quite well spread.

Clearly he could not exclude the fact that this death was the result of myocarditis. Again, saying this is not a question of Dr Cala being in a better position, he disagreed there should be macroscopic findings. Dr Cala was in the same situation in relation to observing the slides and indicating on the basis of certain research that you may recall that he remembered to some 32 cases that he had examined, five out of the 16 of the cases

where the children died of myocarditis, died suddenly. And it might then be suggested that is unlikely, therefore, for a child to died suddenly.. Because it is unusual or unlikely is no - the fact is, it is ultimately quite significant in this proportion of persons that he examined that of those 32 cases, five of the 16 who died of myocarditis, died in fact suddenly.

So he also addressed questions Dr Bailey raised being called by the Crown about where five or ten percent of people with - had myocarditis. He said he could not understand, that to determine one would have gone to a heart -- that doesn't happen with people with colds, the flu. Myocarditis was common at -- he disagreed with that, saying it is not actually common in all of the autopsies. In his ultimately decision he said in isolation, looking at the sides...was myocarditis. It is a request, whether you can dismiss his expertise, particularly in light of what Professor Beal said of his experience in looking at the slides.

Going to the next step there was no symptom or findings on pathology that could amount to evidence of suffocation.

There was also the evidence of Dr Jones. He also addressed this issue, as with Dr Byard, in a sense with this agonal rhythm, you cannot tell one way or the other that sometimes for many minutes one gets this agonal rhythm and in fact Dr Jones, again supporting what Dr Byard said and obviously what Dr Beal said, it is not conclusive. It is a very difficult foundation for one to conclude that there was a loss of breathing before cardiac arrest. So that again needs to be looked at clearly. It is not conclusive and would be difficult to support a finding beyond reasonable doubt that that in fact was, would not be able to say, to support the finding that was the appropriate sequence.

One aspect about Dr Jones's evidence is that in relation to this question, whether you would expect to have macroscopic findings, whether you would have as Dr Cala says well, it is important that there were no symptoms examined by the naked eye, you may recall Dr Jones referred to researches and certain literature in cases where, when examined, that there were cases that didn't necessarily follow, if a person died suddenly with myocarditis, that one would expect there to be any macroscopic findings. He again refers to this question of sequence, of it being inconclusive. You may recall he was asked to look through the traces, clearly there was nothing there to permit the conclusion that -- indicates a sequence of death.

Can I lastly come to the further aspect of the diaries? The Crown says that you can look at these diaries and you can consider that they represent evidence of guilt or blame. It is submitted to you that that is a clear inference. It is able to be gleaned from these diaries

that they may amount to an expression of guilt or blame. The question is, however, whether they are admissions of guilt or blame of having murdered or are they feelings that she had of blame, because of what might be recognised
5 as a range of human emotion.

You may recall in my opening address to you when one looks at these diaries, one may need to consider the ranges of human emotions and at times people might ask "what if"
10 questions. They may feel blame, they may think they should have done something else and they might reflect on blame. If obviously these diaries could be looked at as evidence of feelings of blame or feelings of guilt, there is in fact the next step; are they feelings of blame and
15 guilt of murder or are they feelings of blame and guilt because she continued over this time of many years to think about the "what if" questions and thought in fact if she was to blame because certain parts of her
behaviour. So there is really quite a difference there.
20 One needs to really not only consider they might be indications of blame or guilt, but the question ultimately has to be answered whether they are evidence of blame or guilt of murder or whether they are in fact another state of mind.

Can I just quickly take you to some parts and these are questions and answers that you might want to read in time? In fact reflect on them because it is submitted what they
30 indicate is truly expressions of guilt or blame, but not expressions of guilt or blame that she murdered these children, but in fact asking these "what if" questions.

One aspect of how she describes these diaries, you could see in fact she describes them, for example, at question
35 459 at her babble books. But also at 480, talks about it being her babble book. We can in fact see, I will run through some of these questions, give you the numbers and take you to parts of them. But it is important, obviously, to read these answers and reflect that really what the
40 accused is feeling blame and guilt about is that she could have done other things and one might expect this as being part of the expected range of human emotion. For example, at page 309, use the expression. "In relation to Sarah, that is the day I will probably recriminate for the rest
45 of my life that I wasn't sort of awake when I got out of, when I got out of bed".

Then in fact at page '97, in a long answer. This interesting because obviously it assists in relation to
50 the state of mind about the corometric monitor and the question about relaxing or being complacent. She said: "We were really general enjoying...I think everything was okay so, yeah".

So we can see there is a feeling of blame or guilt but we really need to obviously consider the context of this. Again, it is asking these "what if" questions, feeling
55 blame. We could have done more, may be we relaxed too

much. That is the blame, not that we murdered, that she murdered this child. We were complacent. Maybe we were asking these "what if" questions, we were complacent.

5 Question 517, you can see obviously there feelings that she had failed. These are again her reflecting on her particular role and her involvement to reflect whether she was responsible for Sarah's death, because she in fact was a failure. I come to some other excerpts, 596, in
10 relation to where she talks about, I'm ready this time. She talks about frame of mind and obviously being in a negative frame of mind and how in a sense that something she needed obviously to work at and to consider.

15 604. The question of why, should try your hardest this time...not no miss anything. When you look at the excerpts of the diary, it would be important to look at them through an understanding she was feeling guilt, she was feeling blame. But when we look at the answers in the
20 record of interview it gives some insight what the route cause of blame is, the feeling of being a failure, feeling of she maybe got too relaxed, too complacent, maybe she could have done more, maybe paid more attention. They're the feelings of guilt, they're the feelings of blame.

25 Can I take you to question 661? In relation to the diary entry about suffering psychological mood swings. I sort of decided by then...really really mellow and just... What they want...go from there". So there are really true
30 feelings of blame and guilt, but not blame and guilt in relation to killing the child but asking these "what if" questions.

35 Again 662. "Well if you've got a frustration...along the line", you can see what she is saying. She's reflecting on the fact that maybe these frustrations that she experienced had some impact on the death of the child, particularly Sarah. 677:" Are you talking about blame?
40 A. You can't have something like is this happen without one looking at another and saying there is...to be held".

45 678:" Why I think when I wrote that...with the look of blame". Then 680:" The first thing you both do...never have happened". 681:"Q. Do you think there is good reason for...that is that a natural thing...It is more a perversion of blame you know".

50 You could read the whole of that answer but you can see those particular entries. Again 684 talking about the battle of wills and sleep depravation. Look at her demeanour. The Crown says these are fanciful answers. Look at her demeanour, the quick responses to the question. 684: "I always viewed by battling...through my
55 mind".

She goes on. Again, we can look at the excerpts the Crown impresses on you and she was feeling blame about whether she in fact caused the death because of that battling of

wills, but that is the blame, that is the fault that she in fact sees in herself. Again 695 and 696 again, these feelings: "Do you believe that you were attempting...should have done...it's just a sort of thing that you do".

5

Then question 700 in answer to the question of major personal sacrifice, where you can see there the feelings of guilt. Question 704/705 in relation to the thoughts of terrible things "yeah yeah, it is you know...didn't help the situation". Then question 706 and 708. " In retrospect I sit here now and look back at my children...Brats probably". Then 709. "With the other three but not Laura...pretty much a good kid".

10

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Then 710." Yes, I know that but after four..." this is at the end of tape number six, look at her demeanour at that time the tape counter is around 1609 minutes, at the end of tape number six. Look at the end of tape six and seven where all the questions and answers I referred you to. It may be important to look at the demeanour she expresses real emotion, where she indicates, you started to reflect that maybe there was this fault and blame. Question 717. "Seemed to be thinking...If other women can do it". You can fact see then, 719, about what again her diary entry, " how responsible I feel for them all...they weren't sort of thing". Then 723. "Yeah the inadequate feelings that go...something to do with you". Then 724." Why do you say you were a terrible mother...they were still all there nasty to their kids". Goes on and reflects again, was I strong enough, a good mother to make sure this one stayed with me? And goes on, 726, we again see these same sentiment.

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It is important for you to really look at her demeanour at those times and again bear in mind obviously what the Crown says about these diaries. It is important before you consider the conclusion that the Crown invites of you, that these diaries represent her true state of mind, whether in fact you can see any support for that. Again reflecting on what Craig Folbigg said in re-examination, a man who lived with his wife for some 16 years. With those attitudes you read in the diary...no. He saw no manifestations of them.

40

45

Look at the detail of the evidence. It would be very difficult to conclude that really we can understand the murders of these children on the basis of these diaries alone, that totally lost her cool control...and stress. I thank you for being immensely patient during my submissions because I have had to go to the detail and it is very hard to listen when parts of slabs of transcript are read and I apologise and thank you for being immensely patient through that process. That is the process. It is the detail. I will end the way I finished.

50

55

This is not a matter of just concluding, well, you can't have that many kids die of natural causes. She must have killed them, she must have murdered them. You have to

5 move from that. The submissions I made at the start, a
month and a half ago, you must look at the detail. Just
don't look at that, on face value, go to the detail where
is it in relation to Caleb. Where is the evidence, the
10 use of coincidence evidence, the use of tendency evidence,
this power of enveloping the evidence in relation to
Caleb. Ask yourself before you return these verdicts how
is it that we can conclude, looking at the cases in
isolation, how is it when we go to the detail of evidence
15 in relation to Caleb, how can we conclude she murdered
Caleb? For example, that this in fact, I will end my
submissions the way I started, look to the detail. Again,
I apologise for the length and a obviously very difficult
time that have required for you to consider, even late
20 hours in the afternoon, parts of transcript and me reading
passages out to you. This is the attention of the detail
that is so required. When you do that, you would have
misgivings and disquiet. The Crown must prove this case
beyond reasonable doubt. It is not for the accused to
25 prove the Caleb died of a floppy larynx. These are
matters where the onus of proof is on the Crown. It is
submitted to you when you go to the details, you will have
these misgivings and disquiet, and it is submitted you can
not return verdicts of any of these counts. Again, I
thank you for your attention.

HIS HONOUR: Ladies and gentlemen, we shall adjourn now until 10 o'clock on Monday, when I shall begin to sum up the case to you. I wish you a pleasant the weekend.

5

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: You have probably had too many other things to think about in the meantime, but have you had any further thought on the "may well", "will probably" choice?

10 ZAHRA: I think the Crown was going to refer us to the authority, and we could not find it, and we rely on the recent CCA decision in Grant.

HIS HONOUR: Grant again was "likely".

15 ZAHRA: Yes, your Honour. I would ask that your Honour consider, in the absence of my friend referring to other authority, I think Grant is helpful in reinforcing the Crabbe test.

20 HIS HONOUR: The trouble is that grant did not go on appeal on that point. It is only a single judge view of it.

ZAHRA: But in the absence of the Crown referring, I could not find any authority.

25 CULVER: I do have that authority.

30 HIS HONOUR: Your reference to Grant is interesting, because in dealing with the concept of dangerousness in manslaughter by "unlawful and dangerous act", the trial judge told the jury something about the reasonable person. The trial judge said this:

35 "An act is dangerous if it is such that a reasonable person, in the position of the accused that is a 43-year old man, apparently experienced in the use of guns, when not intoxicated, would have realised that by that act, the deceased was being exposed to an appreciable or significant risk of serious injury."

40 I must say I think that that is the first reference I have seen to the reasonable person.

45 ZAHRA: The Wilson test.

HIS HONOUR: In unlawful and dangerous act/manslaughter, which attaches personal attributes like the accused as a reasonable person.

50 ZAHRA: A distinct approach to the provocation. It seems I agree with your Honour. I had previously seen a similar situation where a person was described in a Wilson test. The passage your Honour may get assistance from in the NSWLR is paragraph 34.

55 HIS HONOUR: This is A Crim R, but it is a paragraph number, is it?

ZAHRA: Yes, paragraph 34.

HIS HONOUR: This isn't Wood J's judgment, is it? Is it the reference to Pemble and Crabbe?

5

ZAHRA: Crabbe, yes; originating from the Northern Territory.

10

HIS HONOUR: That is well-established. It is just a question really of whether the other terms are synonymous.

What do you want to say, Madam Crown, if anything?

15

CULVER: I hope to have the authority, to which Mr Tedeschi referred to earlier, on Monday morning. If I can find it before then if I might fax it through to your Honour's associate, and to my learned friend; that may be more convenient

20

ZAHRA: Yes, thank you your Honour.

HIS HONOUR: Would you mind doing that?

25

CULVER: Certainly, your Honour.

HIS HONOUR: Well, Monday then

ADJOURNED PART-HEARD TO MONDAY 19 MAY 2003 AT 10AM

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EE:BOW:RT:8

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION5 BARR J
AND A JURY OF TWELVE

TWENTY-SEVENTH DAY: MONDAY 19 MAY 2003

10 **70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG**

15 IN THE ABSENCE OF THE JURY

15 CROWN PROSECUTOR: There are two matters that I would like to mention. I am afraid I have misled your Honour on the requisite test in relation to reckless indifference to human life. In fact, I got it completely wrong. Your Honour may have, indeed, found out, since I made my submissions, that there have been a number of cases in which the wording that I have suggested to your Honour has been disapproved. The only circumstances in which it has been permitted has been in circumstances where other more correct terminology has been used in addition. Your Honour should tell the jury that reckless indifference to human life means that the accused must contemplate, foresee or anticipate the likelihood of death.

20
25
30 HIS HONOUR: I will hand down to the Bar table a copy for each of you of the written directions that I have settled on. You will see that I have used, in the written directions, "will probably" and, in question 2 (c) and corresponding questions, "would probably"; "would probably follow".

35 CROWN PROSECUTOR: We would agree with that.

40 The second matter is this: I am concerned, in the event, if it does happen that a conviction is recorded, some other counsel for the accused, in another place, might suggest that, despite the fact that the accused in this trial has disclaimed the issue of infanticide, some direction ought to have been given in any event. What I wish to do is place on record that, had that issue been alive in this trial, the Crown would have sought to have led a considerable amount of further evidence about the accused and her state of mind at varying times, and would also have sought to lead the evidence about her background and the background of what her father did to her mother as relevant to that issue of her state of mind. I just thought it was important to place that on the record.

55 HIS HONOUR: That has been recorded.

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Ladies and gentlemen, I must say one thing to
you before I begin the summing-up. Some of you may have
read a newspaper article on the weekend about a case
called Gonzalez, in which Mr Tedeschi has been doing some
work. An article in one of the papers, if not very
10 carefully read, might have given the reader the impression
that Mr Tedeschi was in Court on Friday making submissions
to the Court about the Gonzalez matter. In fact,
carefully read, one sees that the article did not say that
at all, and what was being reported was something that Mr
Tedeschi had said to the Court at some time in the past.

15 I mention that to you because, as you are aware, we did
not sit on Friday for a reason which I gave you on
Thursday; namely, the unusual, personal circumstances in
which Mr Tedeschi found himself last week. That was the
reason and that remained the reason. He was not somewhere
20 else in Court on Friday.

HIS HONOUR SUMMED UP

25 FOR SUMMING-UP SEE SEPARATE TRANSCRIPT

30

oOo

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

BARR J
AND A JURY OF TWELVE

MONDAY 19 MAY 2003

70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

SUMMING-UP

HIS HONOUR: Ladies and gentlemen, this summing-up is the last stage in the trial before you retire to consider your verdicts. In it I shall give you directions about all the law you need to know. I shall identify for you what the Crown must prove before it can obtain from you a verdict of guilty on any charge. I shall summarise for you the questions of fact that arise in the case and the arguments put by counsel for the opposing parties.

I shall also make some reference to the evidence, but, because of the way the issues have turned out in this case, I shall not be making any detailed reference to the evidence. The Crown Prosecutor, in his closing address, did not refer to the detail of the evidence. Mr Zahra took a different approach and read you much of the detail of the evidence from the transcript. In the circumstances, it will not be necessary for me to be reading vast tracts of transcript to you.

First, I have to explain the important distinction between your function and mine. I am the judge of the law and you are the judges of the facts. Throughout the hearing my job has been to ensure that the trial has been

conducted according to law and that only such material as the law allows has been put before you.

Now I must give you directions of law. The law gives to me alone the responsibility to carry out these functions and the oath which you have taken obliges you to accept without question every direction of law that I give you.

You will find, and this commonly happens, that I shall be repeating some things that counsel have said to you about the law. I do not do so in any way to correct them, and I do not do so by way of criticism of anything that they have said. I do it because I must. It is my obligation to tell you what the law is.

On the other hand, you alone are the judges of the facts. You alone decide the questions of fact that arise. You alone are responsible for the delivery of true verdicts at the end of the trial. A true verdict is one that results from the faithful application of the law that I give you to the facts as you find them.

Although your task might seem to be a somewhat daunting one, sitting in judgment on a fellow member of the community, it is a task which is being performed every day of the week by dozens of juries throughout the State, juries no better and no worse qualified for the task than you are, juries made up of people like yourselves, drawn from the community more or less at random, more or less a cross-section. They are for that reason no doubt a pretty

diverse group. What the community expects of those juries, and what those juries in fact do, is what you are asked to do now, namely, to bring to bear on the material before you, that is the evidence that you have heard and the submissions of counsel about that evidence, the same faculties and abilities that you apply in making important decisions in your own lives. You are to bring to bear your experience of life, your knowledge of human nature, your understanding of human behaviour, your education, whatever additional training or experience you may have, your intelligence and, above all, your common sense.

Of course, here the task is not quite the same as when you make a decision in the course of your own lives, because here you approach the task as judges. You approach the task impartially and dispassionately, not allowing yourselves to be influenced at all by prejudice or emotion. The facts of this case are unusually likely to give rise to emotion in the mind of any person. Whatever the cause or causes might have been, it would not be easy to imagine a more tragic series of events happening to a single family. Depending on the view you take of the facts you may feel sympathy for Mr Folbigg, a father who is not accused of having played any part in the deaths of the children or in the harm Patrick suffered, who experienced the death of all his four children. You are bound to feel sorry for him.

Depending on the view you take of the facts, you may

have some sympathy for the accused, who did the lion's share of caring for the children. At night when Mr Folbigg slept, she alone was responsible for feeding them and, where it was required, managing them.

You may feel anger that four innocent little children should die.

I do not presume to tell you that such emotional feelings are out of place or wrong. My reason for mentioning the matter is to enable you, if you have such emotional feelings, to acknowledge to yourselves that they exist. And that is for the purpose of identifying them and then firmly laying them aside so that they play no part in any decision that you make. You must be on your guard. You must not judge this case with your hearts but with your heads. No prejudice or emotion must play any part in any decision you come to.

When you make decisions in your private affairs you are entitled to take into account whatever information you have about the subject matter, however it came to you. It is different in this trial because here your sworn duty is to apply yourselves only to the evidence that has been presented to you in the course of the trial. Your duty is to return your verdicts only on that evidence. You are required to put out of your minds anything you may have heard about the matter in any other way.

I warned you at the beginning of the trial that you should be very careful when any report in the news media

came to your attention. I repeat that warning now. For all I know, you may have read reports or heard reports or seen reports about the progress of this case. I told you at the beginning of the trial that reports of those kinds are normally adequate to do the job that they are intended to do, to give members of the public who otherwise know nothing about the trial a brief idea of what is happening at the trial, but that is all that those reports try to do. They are not designed to assist you, the jury, to know what the evidence is, or to know what the submissions are, based on that evidence.

I repeat that you must come to your decisions in the matter bearing in mind only the evidence that has been put before you and the submissions of counsel based on that evidence. Put out of your minds any information you may have received about the trial that has come to you from any other source.

There is another respect in which your task here is different from that of making decisions in your own lives, because here you act not as individuals but as members of the jury. In that task all of you are equal, no matter what differences there may be between you in gender, age, education, experience, or in any other respect. Each of you is expected to, and is entitled to, express his or her own view, and each of you is expected to listen while the other members of the jury express their views. Each of you should feel free to disagree with others and criticise

the views of others if you disagree with them. On the other hand, you should be prepared to listen with an open mind while others express their reasons for disagreeing with you. You should at all times remember that your first view of some particular aspect of the case may not be your final view.

It is to be hoped that by this process of discussion and exchange of views, you will arrive at verdicts upon which you all agree. There is no provision in the law of this State for a jury in a criminal trial to reach a verdict by majority vote. Your verdict on any count, whatever it is, must be unanimous. That does not mean that you must necessarily all agree as to the path with which you reach your ultimate decision on any count. You may very well differ as to whether or not you accept a particular piece of evidence, or as to the weight that you would give to some particular piece of evidence, or to some argument that counsel has addressed to you. You may differ about matters of that kind, but your verdict on any count must be one on which you are all agreed.

Because I have no part to play in the process of fact finding, my opinion on any question of fact is irrelevant. Generally it is not my intention to express opinions about disputed questions of fact but it is always possible, from something that I say, from the way I express myself or in some other way, I suppose even by the expression on my face or the tone of my voice, you may gain the impression

that I hold some particular view about the facts or about some aspect of the facts. If that should happen then you should clearly understand that it is your duty to reach your own independent view about every question of fact. If at any time you happen to perceive that I have a particular opinion then it is your duty not to allow that to influence you in your opinion. You must reject my opinion unless it happens to coincide with your own view on that particular matter.

What I propose to do is to endeavour to summarise for you the events which have been described in the evidence, to point out those matters about which there seems to be no dispute, and to remind you of what appear to be the areas of significant doubt or conflict. Some parts of the evidence I will touch on briefly; others I may deal with in more detail. Some, in fact most of the evidence, I will not deal with at all.

It is important, therefore, for you to bear in mind what I have just said to you, that you are the judges of the facts. As to what significance any part of the evidence should bear it is your opinion that matters, not mine. So if there is some piece of evidence which you regard as significant but which I do not mention or which I pass over only briefly, please understand that the fact that I deal with it in that way does not mean that you should leave it out of account. You should take account of the whole evidence and give each part of it such weight

as it appears to you to deserve. On the other hand, if I mention some particular piece of evidence it does not mean that you should give it particular weight because, again, how much weight it is to have is for you to decide.

What I will be doing in my reference to the evidence is not intended to limit in any way the evidence which you consider or to direct you in any way as to how you are to consider it, but merely to draw your attention to particular parts of it in a way which I hope will be of assistance.

During your deliberations you will not have in the jury room a transcript of the evidence, but you should understand that if at any time you feel it would be helpful I can read to you from the transcript any part of the evidence that has been given. If at any time in your deliberations you want to hear any part of the evidence again you need only send me a note, which the Sheriff's Officer will bring me, and I will have you brought back into Court and read the evidence for you. That can be done as often as you like and for as large or as small a part of the evidence as you like.

You will have the exhibits in the jury room with you. Insofar as the exhibits comprise tapes of one kind or another you will have the equipment on which you can play those tapes.

It is a vital part of your function to reach conclusions about what evidence you do or do not accept,

what evidence you find to be reliable and credible and what evidence, on the other hand, you feel you have to reject because you cannot rely on it.

Because that is an important part of your task I urged you at the beginning of the trial to pay close attention to the witnesses as they gave their evidence. To a very large extent the decision whether or not to accept or rely upon what a person tells you involves an assessment of that individual human being. It is because that is such an important part of the criminal trial process that we use a jury of citizens like yourselves.

In performing your task you should bear in mind that what you are concerned with ultimately is not just honesty but reliability. Of course, you may well decide not to rely on the evidence of a particular witness, because it appears to you that that witness is not being honest, that is to say, that witness has not done his or her best to give a truthful account of what he or she knows.

Quite apart from questions of truthfulness, you will need to bear in mind that the evidence of a completely honest witness may not be reliable, or not all reliable, because of errors in observation, errors of recall or inability adequately to describe what was seen or heard.

When you come to consider the question of the credibility or reliability of witnesses, you should bear in mind that you do not have to make a decision which involves accepting everything which a particular witness

has said or rejecting everything that that witness has said. You may of course do that, but it is also open to you to recognise that a person may have lied in the past or may tell some lies in the course of giving evidence but tell the truth in other respects and at other times. A person may give accurate and reliable evidence about one part of the case, but his or her evidence on other aspects may be unreliable, whether because of faulty recollection or because he or she has, in relation to that part of the evidence, some motive to distort or conceal or embellish the truth.

You are entitled to approach the evidence of any individual witness on the basis that you may accept all of what he or she says, or you may accept none of it, or you may reject some parts and accept and act on other parts. You may find when you strip away parts of the evidence of a particular witness in whom you do not have confidence, that there still remains a part of the evidence of that witness that you can accept and rely upon. You may find, on the other hand, that there is just nothing left as a result of your doubting some part of the evidence of that witness, or your concluding that he or she has been actually untruthful on one matter at least, sufficient to destroy your confidence in that witness entirely so that you feel you are no longer able to rely on anything that that particular witness has said.

Of course, in determining whether or not to accept or

rely on any piece of evidence, or the whole of the evidence of any particular witness, you are not obliged to limit yourself to a consideration of that witness' evidence in isolation. You are entitled to, and you should, weigh all the evidence together and consider each part in relation to all the rest.

I should add that the directions I have just given you are directions which I always give in a criminal trial. I have not had in mind, when giving these directions, any particular witness who has given evidence in this trial.

Every question as to the credibility or reliability of any of the witnesses or any part of the evidence given by a witness is a question of fact and is therefore a question for you alone to decide.

Part of your role as judges of the facts involves drawing inferences from direct evidence. We all draw inferences, consciously or not, in our everyday lives. Inferences are conclusions of fact rationally drawn from a combination of proved facts. If A, B and C are established as facts, one might rationally conclude that D also is a fact, even though there may be no direct evidence of it.

Sometimes we rush to draw inferences too quickly and sometimes we speculate. In a trial like this it is very important that you do not rush to an inference too quickly and that you do not speculate. What you have to do is to

approach the evidence calmly, rationally, logically, applying your reason to it and contemplating the various possibilities as to what might be the proper inferences to be drawn from it. Let me give you an example that may help to show you how to go about the process and the problems you might fall into if you reason too quickly and without clear, calm logic.

If you were to telephone the house of a friend and find that there was no answer to your call, you might immediately draw the conclusion that your friend was out of the house. Well, you might come to that conclusion, without thinking too much about it, but there may be other reasons why the call was not answered. For example, the phone might be out of order or the service might have been cut off. Your friend might have been in the shower and unable to come to the telephone. Alternative inferences such as those need to be considered before you come to a conclusion by inference from a combination of facts that you have found proved.

Let us return to the illustration about the telephone and add some more facts. You go around to your friend's house and see that there is a pile of newspapers at the front door and letters sticking out of the letterbox. You might think, in addition to what you know about the telephone call, that you can more confidently draw the inference that your friend is indeed away from the house.

That is all that reasoning from inference means. You

must calmly and logically look at all the pieces of evidence and determine what if anything is the proper conclusion to draw.

In a criminal trial you must be satisfied of the guilt of the accused beyond reasonable doubt. One consequence of that is that you must be extremely careful about drawing inferences. You should examine any possible inference to ensure that it is a justifiable inference.

I want to say something to you about the way in which the Crown has set about proving its case. The Crown has not put before you direct evidence to show that the death of any of the children or the harm that resulted to Patrick was caused by the act of the accused, or that when she did the act the accused had the relevant state of mind. I shall explain to you later on what the relevant state of mind is that the Crown must prove.

An example of direct evidence would be that of a witness who saw or heard exactly what happened or who heard the accused say that she had done what the Crown says she did. There is no evidence of that kind here, so the Crown case is what we call a circumstantial case. The Crown relies entirely on circumstantial evidence.

Circumstantial evidence is evidence of a fact or a series of facts from which you are asked to draw the conclusion that another fact or series of facts exists. The ultimate facts you are invited to infer are those that constitute the offences, so the Crown is inviting you to

reason by inference that the accused killed each child by smothering, and that she did so with the necessary state of mind. In the second count, Patrick's ALTE, the Crown invites you to reason by inference that the accused caused it by smothering him and that when she did so she had the necessary state of mind. I have already told you about the care you must exercise when finding facts by inference.

A case based on circumstantial evidence may be just as convincing and reliable as a case based on direct evidence. One reason is that circumstantial evidence may not suffer the unreliability of evidence that depends upon fallible human observation or recollection or that comes from dishonest witnesses. Consideration of the whole of the facts relied on in a circumstantial case may lead to the conclusion that the Crown has proved beyond reasonable doubt that which the law requires it to prove.

It is essential, however, that you carefully examine the evidence and decide whether it is reliable before you draw conclusions from it. In deciding whether you should draw the conclusions the Crown asks you to draw you must also consider all the evidence pointed to by the accused and give proper weight to the submissions made on both sides.

The evidence shows that the accused was in or near the presence of each child on each of the five occasions that resulted in death or grievous bodily harm. Except on

the occasions when she was at home at night with Mr Folbigg she was the only person who had the care of the child concerned at the time of the event. Even when Mr Folbigg was in the house it was the accused who was attending to the child.

The accused could have given evidence but she has not, and you may be wondering about this. I have already told you that it is for the Crown to prove its case and not for the accused to disprove it. The accused does not have to prove anything. You must understand that her silence is not evidence against her. You are not to treat it as though it were some kind of admission of guilt. You are not to use it to fill in any gaps you perceive in the Crown case or to top up the Crown case. You must not speculate about what the accused might have said in evidence. You must not speculate why she has not given evidence. There may be reasons of which the jury is unaware why an accused person exercises the right of silence.

The fundamental issue that arises out of each of the five events giving rise to the charges is whether that event happened naturally or by human intervention. It has not been suggested that any of the deaths, or Patrick's ALTE, could have happened in any other way, for example by accidental suffocation. The evidence permits only one conclusion or the other. If any event happened by human intervention the person who intervened could only have

been the accused because she was the only person in the vicinity on each occasion and there could be no suggestion that any other person was responsible.

I shall outline for you in due course the circumstances surrounding each of the events giving rise to the charges but, quite apart from the circumstances immediately surrounding the events giving rise to any charge you are considering, you are entitled, when deciding whether the Crown has proved its case on that charge, to take into account the events giving rise to the other charges as well.

The Crown case is that there was a remarkable degree of similarity in the five events. They were so similar, the Crown submits, that it would be unreasonable to conclude that the deaths and Patrick's ALTE, or any of them, happened naturally.

The law is that sometimes there may be such a striking similarity between different events that a jury may safely conclude that they did not all happen by coincidence. Putting it another way, the circumstances of the events are so remarkably similar that it would be an affront to common sense to conclude that they all happened naturally and coincidentally.

If, having considered the submissions of the Crown and the defence, you come to the view that the five events, or any number of them, are so strikingly similar that they cannot all have happened naturally, you are

entitled to take that conclusion into account in considering whether the Crown has proved its case on the charge you are considering.

I must give you a special warning, however, about taking into account when considering any particular charge the facts which give rise to the other charges. You must not say that simply because the accused killed a particular child or caused Patrick's ALTE she must have killed all the children and caused Patrick's ALTE. Putting it another way, if you are satisfied beyond reasonable doubt that the accused is guilty of any of the charges, you may not say that she is therefore automatically guilty of them all. That is an unfair way of approaching the matter and you must not use it.

The Crown and the accused have called evidence of the opinions of expert witnesses. Ordinarily the law does not permit witnesses to give evidence of their opinions, but it recognises that when a witness has special knowledge based on training, study or experience that witness may provide information and opinion which is likely to be outside the experience and knowledge of the members of the jury.

You are to treat the evidence of expert witnesses as you would any other evidence in the case, weighing it against all the other relevant evidence, in the light of the submissions which counsel have made to you about it.

You are not bound to accept the opinion of any expert

witness just because that witness happens to be appropriately qualified to express the opinion. That will be obvious to you because on a number of issues that have arisen different experts have come to different opinions on the same facts.

Sometimes the opinions of the expert witnesses have been based on the facts known by the particular witness. For example, Professor Hilton gave evidence of his findings at the post-mortem examination of Sarah and of his opinions based on those findings. It was the same with Dr Cala, who gave evidence of his findings, and his opinions based upon them, about Laura. Other witnesses have merely given evidence of opinion assuming the correctness of findings made by others. You will appreciate the distinction. Before you can accept and act upon an opinion based upon assumptions of fact you need to be satisfied that the assumed facts have been established.

When any expert witness was asked to state an opinion about the cause, or probable cause, of the death of any child, or about Patrick's ALTE, the witness was limited in the material that could be taken into account in coming to that opinion. The witness was allowed to take into account all the circumstances surrounding that child, including the medical history of the child, the conditions in which the child was discovered, the state the child was then in, the post-mortem results, and the results of any

tests carried out thereafter, but no expert witness was permitted to say what his or her opinion might have been about the probable cause of death of any child, or about Patrick's ALTE, after taking into account also the fact that the other children died unexpectedly.

You will remember that they used expressions like "looking at it in isolation", and that counsel used such expressions as they framed their questions. Like the expert witnesses, you are invited to come to a conclusion about the causes of the deaths of the children and of Patrick's ALTE. However, as I have already explained, unlike the expert witnesses, you are not confined in the way that they were confined. You are not confined in considering the death of any of the children, or Patrick's ALTE, to the matters directly affecting the child in question.

When you come to consider whether the accused smothered any child, you are entitled to take into account far more than the doctors were in coming to their opinions. You are entitled to take into account, as they were not, the unexpected deaths of the other three children, and Patrick's ALTE, and all the circumstances surrounding those deaths and that ALTE. You are also entitled to take into account all the other evidence in the case, particularly the entries made by the accused in her diaries from time to time, and any meaning that you attribute to those entries.

At the end of the trial you will be asked to deliver five verdicts, one for each count. There is no rule of law which says that because the accused is guilty or not guilty on one count the result must be the same for any other count. You understand that the term that I have used "count" means the charge. There are here five charges, five counts. The words have the same meaning.

Four of the five charges brought against the accused are of murder, one for each of the four children Caleb, Patrick, Sarah and Laura. The crime of murder is defined by an Act of the Parliament. Murder is committed when the unlawful act of the accused kills the deceased and is done with intent to kill or do grievous bodily harm or with reckless indifference to human life.

In a little while I am going to hand you a document which sets out the principal directions of law as to what the Crown must prove before you can properly find the accused guilty of any charge. I am telling you now so that you will not be unduly anxious about recording everything that I am saying. However, there is a danger in what I am about to do because you may think, well, the judge is going to tell us in writing what we need to know so we do not need to pay close attention to what he is saying. You must listen carefully to everything I say because you must understand everything I say. Not all that I say will be written down for you. There will be important matters of law which I shall give you only by

word of mouth.

The first count in the indictment charges that the accused murdered Caleb Gibson Folbigg at Mayfield on 20 February 1989. I do not want you necessarily to take them out now, but you have your copies of the indictment, and you will find that they are the bones of the charge.

There is no doubt that Caleb died at the time and place charged. Two issues arise for your decision on this count, namely whether the accused did the act that caused the death of Caleb and secondly, if she did so, whether when she did the act she was intending to kill him or do him grievous bodily harm or whether she acted with reckless indifference to human life.

The Crown must satisfy you about both these things and each of them beyond reasonable doubt. The Crown case is that the accused did the act which caused the death of Caleb when she smothered him by placing some soft material, such as a pillow, over his face. The Crown has to satisfy you beyond reasonable doubt that that is what happened.

The defence case is that death resulted from natural causes but, of course, the accused does not have to prove anything. Another way of putting the matter, therefore, is that before you can find this element proved the Crown must satisfy you beyond reasonable doubt that death did not result from natural causes but from the deliberate act of the accused.

It has not been submitted to you, if you find that the accused smothered Caleb or any other child whose death you are considering, that the death or harm which followed was not caused by the accused's act. The process of cause and effect in such a case seems clear. However, you should understand that all the Crown has to prove is that the accused's act played some part in causing death or, in the case of the second count, the relevant harm to Patrick. It does not have to be the whole cause. So, if there were two factors, the smothering and some natural process, which combined to cause the relevant death or harm, the Crown would have proved that the accused's act caused that death or harm.

You must also understand that if the Crown proves that the accused did an act which caused the relevant death or harm it would not matter, that is to say it would not assist the accused, if the death or harm resulted more quickly or more easily because of some natural condition from which the child was suffering at the time.

There are four possible causes of death of Caleb and of any of the other children. They are: Identified natural causes, unidentified natural causes, accidental suffocation, and deliberate suffocation. Just those four. There seems to be no other available in logic.

There is only one identified natural cause for Caleb, namely floppy larynx. There is no evidence of any accidental suffocation of Caleb, or of any other child,

and Mr Zahra has not submitted to you that it is a finding reasonably open, so you may put accidental suffocation out of your minds.

In the case of Caleb, that leaves three possible explanations for the death, namely floppy larynx, unidentified natural causes, and deliberate suffocation. If suffocation was deliberate it could only have been the accused who did it. She was present near or at the time of death. It has not been suggested that there was any possibility that Mr Folbigg, who was the only other person in the house, suffocated Caleb.

Let me say something first of all about unidentified natural causes, and about what SIDS is and what it is not. SIDS is not a cause of death. It is not a disease. The fourth letter of the acronym is the initial letter of the word "syndrome" but it appears that SIDS is not a syndrome either. It is a diagnosis by way of a description which is applied where a child of appropriate age has died suddenly and unexpectedly, where unnatural causes have been excluded or are not suspected and where the cause of death cannot be identified.

The various expert witnesses have given their own definitions of what is meant by the expression, but I think that that fairly summarises the way the expression has been used in this trial. SIDS has been called a diagnosis of exclusion. That means that the diagnostician excludes unnatural causes and known natural causes of

death and concludes that the child died naturally in a way that cannot be explained.

The evidence is that there is no established relationship between apnoea and SIDS and no established relationship between ALTE and SIDS. That is the present opinion of members of the medical profession practising in the field. Until the Back to Sleep campaign began in about 1990 ideas were very different. It was then believed that there were such links. Now it is not.

You may have wondered whether the fact that all the children had the same biological father and mother might explain or go some way towards explaining why they all died suddenly and unexpectedly. The evidence of Dr Cooper was that until ideas changed after 1990 it was believed that SIDS ran in families and that if a family suffered a SIDS death the chances of any subsequent child of that family dying suddenly and unexpectedly of natural causes was greater than in the community generally. The evidence of Dr Cooper is that that is no longer the belief of experts in the field. He says that the opinion now is that there is probably no increased risk at all.

Mr Zahra has not submitted to you that the events that happened to injure Patrick and to kill the children were connected in any way with the biological relationship between the children, so if you have any notions of that kind you must put them out of your minds.

SIDS deaths are rare in the community. There is no

authenticated record of three or more such deaths in a single family. This does not mean, of course, that such events are impossible. It is an illustration of the rarity of deaths diagnosed as SIDS.

SIDS deaths have been more frequently diagnosed where certain conditions exist, for example, smoking in the family, low socioeconomic status of the family, climate, drug use during pregnancy and where the mother is young. Dr Beal said, and no-one has disagreed with her opinion in this respect, that SIDS deaths are more likely to be diagnosed where a child is prone, that is lying face down.

The experts tend to regard the classic SIDS diagnosis as applying to children aged between two months and six months, though lower numbers of such diagnoses are made for children below and above that age range.

Another term that was used in the medical evidence was "undetermined" or "unascertained". That expression was used to mean that the deaths could not be explained, by reference to natural causes and that unnatural causes were suspected or could not be excluded. So, the difference between the allocation of the term "SIDS" and the term "undetermined" is that with SIDS those making the diagnosis have no reason to believe that the cause of death might be unnatural.

The general medical opinion, about which there seems to be no dispute, is that except in cases where there are obvious signs of deliberate or accidental asphyxiation, as

where one finds bruising or other marks around the face, the nose or the mouth or where the child is found in a position which suggests accidental suffocation, it is virtually impossible to distinguish between a death resulting from asphyxiation and a death resulting from natural but unidentified causes.

You will remember that there was a good deal of evidence about the signs which may be found upon autopsy, small points of bleeding in the lungs, for example, but the evidence seems to be that such signs are consistent with smothering, but are not specific for it.

Just a word about this terminology. You have heard a number of experts observe that in such matters one cannot be certain in a diagnosis. When a particular condition is established on a post-mortem examination to exist, the pathologist will be able to say whether that condition could have come about from a particular cause. There the pathologist is speaking of a mere possibility. That seems to be the same as saying that the sign or condition found is consistent with having been caused in the manner postulated. The expression often used, that the condition is not specific for that cause, simply means that the proper medical conclusion to draw is that the postulated cause could have been the cause of the condition, but not that it must have been, or very likely or probably was, so that an opinion that a condition is consistent with a particular cause implies that it might also be consistent

with another cause or causes.

Let me remind you briefly of the facts concerning the death of Caleb. He was put to sleep at about 8pm and was seen at about 10 or 10.30pm by the accused and Mr Folbigg. They went to bed. Mr Folbigg was woken by the accused screaming. He went into the adjoining room where Caleb's bassinet was. The accused was standing at the end of the bassinet screaming. Mr Folbigg lifted Caleb. His lips were blue, his eyes were closed, his skin was warm to the touch. He was not breathing. Mr Folbigg blew into his mouth in an attempt to resuscitate him. He screamed to the accused to ring the ambulance, and she did so. The ambulance began to respond to the call at 2.55am, so these events must have taken place a few minutes before that time.

There is no evidence that any of the environmental factors that were mentioned might have had any bearing upon the events resulting in the death of Caleb, or of any of the other children, or of Patrick's ALTE. It has not been submitted by Mr Zahra that the family was low in the socioeconomic scale. The family seems to have been average in that respect.

No expert defined the young age of the mother in years, but it is not suggested that Mrs Folbigg was of an age that gave rise to a particular risk of an unexplained natural death in Caleb. The accused was twenty-one and a half years old when he was born.

As to smoking, the evidence shows that the accused never smoked, other than having the odd puff. Mr Folbigg was always a smoker. He stopped smoking in the house, at the accused's request, when she became pregnant with Caleb, and he never smoked in the house after that.

As to the evidence of Dr Beal, you should note that Caleb was on his back when found. If you accept her evidence, that fact makes a SIDS death less likely, though how you assess "less likely" in these circumstances I cannot tell you. Dr Beal was a long way from saying that SIDS deaths do not happen when children are on their backs.

You will remember the evidence of Dr Wilcken that tests were carried out on blood of Caleb which had been preserved, and a large number of possible natural causes of death had been excluded, so that many, or all, of the likely candidates as a cause of death, by way of infection or metabolic or genetic causes, were excluded.

One of the reasons I am going to be spared a detailed trawl through the evidence is that you already have in writing the parts of the evidence to which counsel have referred. In the document marked 39 for identification, you have a summary of the medical evidence concerning Caleb and of the other children. You should note that this is a document produced by the Crown, and it deals only with the Crown witnesses.

In addition to the Crown witnesses who are referred

to in this document, you also have evidence from two witnesses, Professor Byard and Dr Jones, but you will find there a summary of the evidence of the experts, and of their opinions, about SIDS in Caleb. You can read that for yourselves.

Professor Byard, let me remind you, would not have called Caleb's death a SIDS death. He would have said the cause of death was undetermined.

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 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.

The Crown submitted to you that when considering each death, and Patrick's ALTE, you should take into account the circumstances of the event itself, the facts surrounding the other events upon which the remaining charges are based, the medical evidence, and the accused's entries in her diaries. It is obviously appropriate for you to do so, and Mr Zahra did not disagree. However, he submitted to you that you should not be overwhelmed, when looking at any individual event, by your knowledge of the existence of the other four events. You should not be diverted from the need to consider the detail of the event giving rise to the charge you are considering.

Those respective themes were carried through into the submissions about each of the five events giving rise to the charges. The Crown's submission is that you should reject any possibility that floppy larynx was the cause of the death, but should accept the opinion of the expert on the spot, Dr Springthorpe, who said that it had nothing to do with the death. Mr Zahra pointed to the other evidence, particularly that of Professor Byard, to the effect that death from some interference by the larynx with the airways could not be excluded with the possibilities.

The Crown submitted to you the fact that the accused did not pick up the child or try to resuscitate him showed that she knew that she had killed him. Mr Zahra said that you should not be too ready to draw inferences from the behaviour of a person confronted with a sudden and tragic event. The fact that the accused did a particular thing, or failed to do some other thing, may, he said, indicate no more than helplessness through panic.

You may take into account the demeanour of the accused on the occasion, along with all the other relevant evidence, and if you are persuaded by it draw the inference which the Crown invites you to draw, but you must remember the care with which I have told you you must proceed when considering whether to draw inferences. You should also remember that people cannot be stereotyped and that one person may not react in the face of any emergency

as other people would react or as you might react.

I am going to now deal with some detailed submissions. I see it is twenty past eleven. I will take the morning adjournment now ladies and gentlemen.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Are there any matters of law so far?

CROWN PROSECUTOR: No, there are not.

The only suggestion that I would make is that, when your Honour is going through these written directions for the jury, when your Honour comes to the page on count 3, question 7: "Are you satisfied beyond reasonable doubt that the accused did an act that caused the death of Patrick?", there has been some evidence from some of the overview experts that the original asphyxiation could have been the cause of death via an epileptic fit. We would suggest that your Honour orally refer the jury to the fact: "Are you satisfied beyond reasonable doubt that the accused did an act on 13 February 1991?"

HIS HONOUR: Thank you for that suggestion. I had intended, of course, as we now understand among one another, that I shall tell them that they must be unanimous that it was an act on the day of the death which caused the death.

ZAHRA: Just one matter.

In relation to the issue of causation, I think your Honour directed the jury that they must be satisfied that the accused played some part in causing death. The decision in Royal talks in terms of "the act must substantially cause the death". The direction "played some part" might tend to suggest that there is, in fact, some lesser cause, or no intentional cause, or one that was not voluntary or intentional. I ask that your Honour consider that maybe the direction that should be given was that "her act must have substantially caused the death".

CROWN PROSECUTOR: I agree that the test is that it must be a substantial cause.

One other thing. Your Honour referred to the Crown case as being that she used soft material such as a pillow to asphyxiate the children. The Crown case was that it was a soft object such as a pillow or a hand. I would ask your

EE:BOW:RT:2

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Honour to add a reference to that.

HIS HONOUR: Yes.

SHORT ADJOURNMENT

RESUMPTION

IN THE PRESENCE OF THE JURY

HIS HONOUR: Ladies and gentlemen, may I just go back to a couple of things that I said to you before the morning tea adjournment.

When dealing with the first element of murder, I told you that the Crown must prove beyond reasonable doubt that the accused did the act causing death, and that is so. I told you that it was sufficient for the Crown to prove this element, even if her act and some natural process combined to cause death, and I told you that it was sufficient if her act played some part in causing death. It would have been more accurate to say, and I now say, that the accused's act need not be the only cause of death, but it must be a substantial cause of death.

I told you that the Crown case was that the accused smothered each of the children with the use of a pillow or some other soft object. I omitted to say that it is also part of the Crown case that the accused may have used her hand.

I was dealing with the arguments put by the respective sides on the death of Caleb, and I dealt with the Crown's submission that the evidence that the accused did not lift Caleb is an indicator that she knew that there was no purpose in doing so, no point in trying to resuscitate him, because she knew that he was dead.

I then dealt with Mr Zahra's submission in response.

I reminded you about the care that you must take when drawing an inference from the behaviour of anybody. I reminded you that people do not always behave in a stereotypical fashion and that there may be other explanations why the accused would not behave as others might behave or as you might behave and the reason that Mr Zahra put forward was that this may simply have been panic.

The Crown's next submission was that if you look at the entries in the diary, exhibit L, you will see that between midnight and 2am the accused was up attending to the child. There is a note of a feed there at midnight, and time goes on and finally there is the notation "Finally asleep" at 2am.

The Crown says to you that in those circumstances there was just no need for the accused to be up again. We know from the time of the ambulance response that the events must have taken place a few minutes before 2.55am. That is a time we can be sure about. Why would the accused have got up so soon after finally getting the child to sleep at 2 o'clock? Why would she have any need to go to the toilet? There was no need to check the child, and perhaps every need not to disturb the child again.

The Crown also said that it is remarkable that the accused was in the presence of the dead child not long after the time when he must have died. His body was still warm. The diary proves that he was alive at 2 o'clock.

The Crown also relied on the diary entry in exhibit G. This was not written until the day of Patrick's birth. You have the entry. I will not read it to you. The Crown says that what is written there is an acknowledgement of responsibility for Caleb's death.

The Crown says that the accused's motive was that as she said in her diary she was a person who did not like change. The Crown says that she did not adapt well to managing a baby. She became stressed and unable to cope. She smothered Caleb to bring to an end a state of affairs she was unwilling or unable to tolerate.

Mr Zahra makes the point that there is no evidence how quickly or how long it takes for a child's body to lose its heat. So, when dealing with the death of any of the children, the fact that the body was warm, if that is what you find, is of limited use to you. That is a submission which probably has greater force with the other children because we know that Caleb was alive at 2 o'clock.

Mr Zahra directs your attention to the diary entries for Caleb which, far from showing an inability to cope, shows a devotion, planning, and the basis for a conclusion that what was happening was that the accused was frequently checking upon Caleb because of her devotion to him, her concern for him.

Mr Zahra points to the evidence of the lay witnesses, who regarded the accused as a good mother and an attentive

mother. Of course, they were giving evidence about a much later time, particularly when they met the accused at the gym, but you can use this evidence, if you wish, because it shows the kind of person the accused was. She was unlikely to have been an attentive mother for Laura and Sarah and not with Caleb. So, that is the way that Mr Zahra would invite you to use that evidence.

Doctor - I have forgotten her name - the doctor who attended on the birth, made a favourable comment about the accused's ability and preparedness to manage Caleb.

There is no evidence, Mr Zahra says, that directly proves this stress that the Crown relies on. There is no evidence of untoward events in the house. There is no evidence of any arguments between the accused and Mr Folbigg at that time, and I am speaking here of the time when Caleb was alive.

There is no evidence of any marks on the body of Caleb which would suggest an abuse of him. There is one possible exception to that statement, and it is the presence, in the lungs, of haemosiderin. Now, haemosiderin seems to be an iron compound into which blood converts. The process takes thirty-six to forty-eight hours, according to the evidence.

Two of the witnesses gave evidence about this, Professor Berry and Professor Byard, and they agree that haemosiderin in the lungs is a product of free blood in the lungs. There has been bleeding. But the detection of

haemosiderin, of course, cannot say how the blood got into the lungs. They agree that it is consistent with smothering. They agree that it is not specific for smothering, that is to say that it is also consistent with other causes, other explanations, why the blood might be in the lung. So, you may use this evidence, if you wish, to conclude that, not less than thirty-six hours earlier than the occasion upon which Caleb died, there was bleeding in his lungs.

Professor Byard thinks that children may inhale blood at birth. I am not suggesting that he was saying that that commonly or usually happens but he thinks it possible. He says that there are other explanations - a nose bleed and the like. He tells you that in a study of SIDS babies twenty percent of them had haemosiderin in the lungs

The Crown says this may be evidence which assists you to come to the conclusion that what happened on the occasion of Caleb's death was that the accused smothered Caleb.

Mr Zahra points out to you that there is no evidence of any earlier event in the life of Caleb that might explain how there was bleeding in the lung.

I will deal with the dairy entries in detail in due course, but, insofar as there are diary entries that the Crown relies on as relating directly to Caleb, Mr Zahra says, and it obviously is the fact, that your use of the

diary entries really depends upon the meaning that you put on the words that the accused used. I may as well enter upon this subject briefly now.

The Crown asks you to look at the diary entries, and look at them together, and conclude that what is really happening is that the accused is acknowledging to herself, in her own private communication to herself, her responsibility for the several deaths of the children, including Caleb.

You will remember the entry that was made much later in the piece, in which the accused appears to be saying, the Crown says (it is a matter for you what she is saying) that the other children, the dead children, have warned Laura not to be a sickly child, to be a good child. The Crown says that entries of that kind show that throughout the accused was acknowledging to herself her responsibility for their deaths. That is the Crown's general approach.

The defence's general approach is this, that there is no direct statement of responsibility for a death, that you have to understand the state of mind of a mother who has innocently lost children. You have to try to understand how such a person might feel and react. You have to understand, and you can understand, how such a mother would blame herself, even though she was not responsible.

These were the statements that Mr Zahra was calling

the "what if" questions: If only I had done that. If only I had done something else. If only I had not done something. And you may think that a mother, having lost one child, let alone more than one, would be saying to herself "I wonder if I was in some way to blame?"

One of the Crown's submissions about these diaries generally is that, in fact, they do not contain any direct statement of that kind, and that you would expect the diaries to contain such a statement: "If only I had gone in five minutes earlier. If only I had not done this." The Crown says that you will not find a statement of that kind, and that is a remarkable thing.

Now, the Crown relies on this list of similar facts that I have told you about. It has been referred to as coincidence evidence. The Crown invites you to look at it. You have the list of facts set out in the document marked 41 for identification.

The Crown says that all these events occurred suddenly, they all occurred unexpectedly and, relating this to Caleb's case, Caleb was not expected to die - there was nothing wrong with him. The Crown asks you to put out of your minds floppy larynx: nobody believed that that was going to cause any trouble.

They all occurred at home. They all occurred during the child's sleep period. They all occurred when the child was in a bed, cot or bassinet. They all occurred when the only adult who was at home or awake was the

mother, so she had the opportunity to do harm. They were all discovered dead or close to dead by their mother, the accused.

Just dealing with those points to begin with, Mr Zahra says that there is absolutely nothing remarkable about that list of facts. It is what you would expect. The accused was the primary care-giver. Looking at the death of Caleb, Mr Folbigg did not attend to him. Mrs Folbigg did. She checked upon him frequently. You do not know how long Caleb had been in the condition he was when Mrs Folbigg woke Mr Folbigg.

The next one is that they were all discovered dead or moribund by their mother during what she claimed was a normal check. Well, again, Mr Zahra says to you: what is the difficulty about that? It really adds up to nothing. You know, simply by looking at the diaries, simply by listening to the people who described the way she managed her children, that she was the sort of person to check frequently. You see how she had the times divided up into half hour segments.

The next one is they were all discovered shortly after death. The Crown document, MFI 41, uses the words "very shortly, literally minutes after the cessation of breathing". Mr Zahra's response to that is: Well, you do not know. You cannot conclude that it is very shortly, literally minutes, simply judging by the temperature of the body, because there is no evidence how long a body

stays warm.

There is no evidence, in respect of these children, about the bed clothes, other than as they were when the child was found, when Mr Folbigg went and looked. You do not know whether they were covered before that time or not. So, you cannot readily draw conclusions from the fact of a warm body.

The tenth point the Crown makes is that, in relation to the four of the five events, the accused failed to render assistance. That was certainly so with Caleb, but Mr Zahra has made a submission about that and I have already dealt with it.

Subject to coming back and dealing with some of the diary entries that is all I want to say about the first element of the first count. If you are satisfied, all of you, beyond reasonable doubt, that the accused did the act that caused Caleb's death, you must go on and consider the second thing the Crown must prove. If, on the other hand, you all agree that the Crown has not proved the first element of the charge beyond reasonable doubt, your duty will be to find the accused not guilty on the first count.

I shall now deal with the second thing that the Crown must prove before you may properly find the accused guilty of the murder of Caleb. This element is concerned with the state of mind of the accused when she did the act causing death.

The Crown must prove that when she carried out the

act the accused intended to kill Caleb, or that she intended to do him grievous bodily harm, or that she acted with reckless indifference to human life. So there are three alternative states of mind that the Crown must prove, and it will succeed if it proves any of them.

The third state of mind, that the accused acted with reckless indifference to human life, needs some explanation because those words are lawyers' words and they will not mean anything to you. A person acts with reckless indifference to human life who fully realises that the deceased will probably die but goes on with the act and takes the risk of that happening. That is what reckless indifference to human life means.

The Crown will succeed if you all agree that the Crown has proved a particular one of the three states of mind, if you all agree that the accused intended to kill Caleb, or if you all agree that she intended to do him grievous bodily harm, or if you all agree that she acted with reckless indifference to human life, that she fully realised that what she was about to do would probably result in the death of Caleb but she went on just the same and committed the act.

The Crown will also prove its case though you do not all agree about which state of mind has been proved, so long as you all agree that the Crown has proved one or other of them. So, if it were the case that some of you thought that the Crown had proved one of those

alternatives and others of you, the rest of you, thought that the Crown had proved another of them, you would find this second element proved.

Now I do not think I need to explain what is meant by an intent to kill. The meaning of the words is obvious.

An intent to do grievous bodily harm. Well, grievous bodily harm just means really serious bodily injury. The intent to do any really serious bodily injury would be sufficient.

The intent to kill or do grievous bodily harm need not have been planned or premeditated so long as it existed at the time of the act causing death.

As I am sure you realise by now, the Crown cannot prove the relevant state of mind in the accused by direct evidence. It relies on your drawing an inference to that effect.

Sometimes someone's act may itself provide the most convincing evidence of intention when a specific result is the obvious and inevitable consequence of an act and when the actor deliberately carries out the act you may readily conclude that the act was done with the intention of achieving that result. So if a person hits another hard on the head with a hammer a jury might easily conclude that the attacker's intention was to cause really serious bodily injury. You may, as a jury, have no difficulty in coming to such a conclusion, but you must remember that you are considering the intention of the attacker, not

what your intention might have been if you had been in the position of the attacker.

Now, there have been no submissions from counsel about this element. It is not submitted that you should have any difficulty in inferring that anyone who deliberately interfered with a child's breathing intended seriously to harm the child, or would realise that a child might die, or would probably die.

The fact that there are no submissions from counsel is quite understandable. Mr Zahra would have no business in making submissions to you about this. You understand that his submission first and last is that the first element of murder has not been proved, that the accused was not criminally responsible for the death.

So far as the child Caleb is concerned, he was the first in time to die. I do not know what decision you will come to on any of these counts. It is possible, in relation to a later count, that you may decide that you can judge the accused's state of mind by reference to her experience. If, for example, you find the accused smothered Caleb, you might, in relation to a later count, take that into account when considering the accused's state of mind, if you find that she did the act causing death of any other child.

So, if she had previously smothered a child, that would be something that you could take into account in considering whether she realised that the death of the

child would probably follow. It would be quite legitimate for you to use that process of reasoning in relation to a later child, but you cannot use it in relation to the death of Caleb.

If you are satisfied beyond reasonable doubt about this second element of murder your duty will be to find the accused guilty of murder. However, if you are not so satisfied you must go on and consider whether the accused is guilty of manslaughter.

To obtain a verdict of guilty of manslaughter the Crown must prove, in addition to having proved that the accused did the act causing death, that the act was unlawful and that it was dangerous. An act is unlawful if it involves the deliberate application of force to a person without that person's consent.

I direct you that to hold a pillow or another soft object or a hand over the nose of a little child so as to interfere with its breathing would involve the application of force and would be unlawful. If you are satisfied that the accused caused the death of Caleb in such a manner you will have no difficulty in coming to the conclusion that her act was unlawful.

The last thing the Crown must prove to have you find the accused guilty of manslaughter is that the act causing death was dangerous. An act is dangerous if a reasonable person in the position of the accused would have realised that the deceased was being exposed by that act to an

appreciable risk of serious injury.

The Crown does not have to establish that the act of the accused was done with any particular intention to injure. The offence of manslaughter is complete even if no injury was intended and even if the accused did not realise that she was exposing the deceased to such a risk of injury. The test is whether a reasonable person in the position of the accused would have realised that the risk of injury existed.

For reasons which are just as obvious to you, you have received no submissions from counsel about manslaughter. Neither counsel has invited you to return a verdict of guilty of manslaughter. That is not surprising, since they respectively contend for a verdict of guilty of murder and a verdict of not guilty.

I have instructed you about the law of manslaughter because the law makes it necessary for me to do so and not because I am suggesting that you take any particular view of the facts or come to any particular verdict.

The second thing is this. A verdict of guilty of manslaughter is never available to a jury who are having difficulty about agreeing about whether the accused is guilty or not guilty of murder. You must never agree to settle for a verdict of guilty of manslaughter in order to get out of a difficulty of that kind. To do so would be against the oath you took to try the accused according to law. It would be unjust to the parties and to the

community and you are forbidden to do it.

If you are satisfied beyond reasonable doubt that the accused's act was dangerous you must find the accused guilty of manslaughter. If not you must find her not guilty.

Some of you may have heard that there is an offence in the State of New South Wales called infanticide which applies where a mother causes the death of a little child and where certain other conditions are fulfilled. It is a charge which is less serious than murder. You should understand that no question arises in this case that the accused may be guilty of infanticide. The question never arises.

I am going to hand you now the written directions I promised you and a list of questions which will help you apply the law to the facts as you find them in order to come to your verdicts.

We will mark the bundle all together. The documents will be marked 42 for identification. The original will be placed with the Court file and will remain there.

MFI #42 ABOVE IDENTIFIED DOCUMENT OF WRITTEN DIRECTIONS AND QUESTIONS

MFI 42 DISTRIBUTED AMONGST JURY

All I want you to look at for the moment is the first page of each of the two sets. I will deal with the written directions first.

This does no more than state in writing some of what I have already said to you. You will see that the

direction on murder is that murder is committed when the act of the accused causes the death of the deceased and, at the time of the act - I have got "omission" there but there is no suggestion of an omission here - the accused intends to kill, or intends to do grievous bodily harm, or fully realises that the deceased will probably die but goes on and takes the risk. You will see the note underneath that "grievous bodily harm" means "really serious bodily injury".

You will remember that I have told you that the Crown has to prove both those elements. You each, all of you, have to be satisfied that those elements are proved.

Will you go now, please, to the first page of the other part of the document entitled "Questions for the Jury".

The first one is: "Are you satisfied beyond reasonable doubt that the accused did an act that caused the death of Caleb?" If you are not satisfied, if the answer is "No", you must find the accused not guilty. Stop thinking about that charge there and then.

If the answer to the first question is "Yes", you go on and ask yourself the second question: "Are you satisfied beyond reasonable doubt that when she did the act the accused either intended to kill, or to do really serious bodily injury, or fully realised that if she did the act death would probably follow but went on with the act and took the risk?"

You will see that I have said underneath that if the answer to A, B or C is "yes", find the accused guilty of murder.

You will remember that I have also told you that you all do not have to agree about A, B, or C, so long as all of you are satisfied that the Crown has proved one or other of A, B and C. So, I have said, If the answer to A, B or C is "yes", find the accused guilty of murder.

However, if the Crown proves the first element but not the second, then, and only then, must you go on and consider manslaughter, because you will be satisfied that the accused did the act causing death, but you will not be satisfied that she did so with the state of mind necessary for murder. So you will go on and ask yourselves, was the act unlawful?

You will see that I have not provided for a "no" answer to that question. That is not an oversight. It is quite deliberate, because you can only find that the accused did the act causing death, on the facts of this case, by concluding that she did some such act as the Crown charges, held a hand or a pillow or something over the mouth and stopped the child breathing. Now if such a thing happened that was unlawful. That is my direction to you and that is why I have not permitted you to answer question 3 in the negative.

You would then go on to ask yourselves question 4: Was the act dangerous? and, if you answered that question

"yes", you would find the accused guilty of manslaughter. If "no", you would find her not guilty.

May I direct your attention back again to the first document, to the bottom half of that page, the first page. Manslaughter is committed when the act of the accused causes the death of the deceased, the act is unlawful and the act is dangerous. So, there are really only two questions for you there: Whether the act of the accused caused the death, and whether the act was dangerous.

You will see that I have written for you there what I have already told you, that an act is dangerous if a reasonable person, in the position of the accused, would realise that it exposed somebody to an appreciable risk of serious injury.

This is a reasonable person. This is not what the accused thought. You are not asking yourselves here what the state of mind of the accused was. That is the difference between murder and manslaughter.

This is an objective test. What would a reasonable person think? I have said at note 3: The accused does not have to realise that the act is dangerous. It is not her state of mind that you are concerning yourself with there. Now, that is all I want to say to you for the moment about the written directions and the questions.

I have dealt first with the murder charge for Caleb because the events giving rise to it took place first in time and the charge appears first in the indictment.

Generally speaking, however, you are free to consider the counts in the indictment in any order. You may find it helpful to deal with them in chronological order. The indictment is set out that way, and all the evidence has been taken that way. But you will appreciate that, as a matter of law, the result on one count does not depend upon the result on any other count. I have already told you that there are five separate counts and you must consider separately the charge on each count. You may find it convenient to deal with counts 2 and 3 together since they both relate to the child Patrick, and I will go on and deal now with the second count.

The Crown charges that on 18 October 1990 at Mayfield the accused maliciously inflicted grievous bodily harm upon Patrick with intent to do him grievous bodily harm. There is no dispute that on that day an event happened which caused damage to the occipital part of the brain, the one which governs sight among other things, and that blindness followed. There is a dispute whether the damage to that part of the brain was caused by the act of the accused in depriving Patrick of oxygen, so that epilepsy as well as blindness followed, or whether what happened was a spontaneous epileptic seizure, the first of a number of such events, which caused an interruption to the supply of oxygen and the resulting brain damage.

There is no dispute that the brain damage that produced blindness qualifies for the description "grievous

bodily harm". There is no dispute that to inflict injuries which produce epileptic seizures of the kind that Patrick suffered is to inflict grievous bodily harm. That does not mean that the question is settled for you. It is a matter for you, and I cannot direct you, and I do not direct you, that you must find that what happened to Patrick amounted to grievous bodily harm, or really serious bodily injury. I am simply pointing out to you that counsel have not submitted to you that you will have any difficulty in coming to that conclusion.

The first question that arises under this count is whether it was the act of the accused and not some natural, spontaneous event that produced these effects. Of course, that is something the Crown has to satisfy you about. There are two things the Crown must prove. First, that the accused inflicted grievous bodily harm upon Patrick and secondly that when she did so she intended to do him grievous bodily harm.

Now, the Crown has produced for you a summary of the facts. It is in this document marked 40 for identification and you all have copies of it. Patrick's ALTE - I have never given it its full name. I hope you do not mind. As you are aware, it stands for Apparent or Acute Life Threatening Event. It is dealt with on the second page of the document MFI 40.

The accused said that she heard Patrick coughing at about 3am. She saw him. He went back to sleep. That was

in an account to Dr Dezordi. She told Dr Dezordi that at 3.30am she heard sounds like gasping. Later she awoke for some reason, went to the toilet and checked on Patrick. She noticed that his breathing was laboured. He was on his back. You have the reference there to the explanation given by the accused in the record of interview. I will not read those answers for you. You have the references. You can read them for yourselves.

The accused screamed. Craig woke. The ambulance was summoned, and the time was booked at 4.30am. When the ambulance arrived Patrick was in respiratory distress. He was taken to hospital and was treated there.

The Crown submits to you that Craig Folbigg had been home for three months following the birth of Patrick and that this event happened within, I think, three days of his returning to work. The Crown says that that is a significant event, relying upon its argument generally that all these things resulted from the stress that the accused found bearing upon her.

The Crown says Patrick was a healthy child. Because of Caleb's death, particular care and concern existed, particular care was taken with Patrick, and there is every reason to conclude that there was no danger at all that Patrick might suddenly die or experience a serious development of this kind.

The Crown points you to exhibit J, one of the diary entries, one in which the accused complains about lack of

sleep, about Craig Folbigg not helping. The Crown says with Patrick, as it did with Caleb, that the accused did not pick up or render assistance to Patrick.

When Patrick was taken to hospital he was alive, of course, and his breathing improved. Two to three days later, seizures were first noted by the staff at the hospital and thereafter epileptic seizures were noted from time to time.

The Crown points out to you that there was no suggestion during the previous four months of Patrick's life of any epileptic seizure. If this was an epileptic seizure it was the first and it occurred without warning. None of the examinations of the brain showed the kind of damage which can result in epileptic seizures other than the scarring damage which presumably happened at the time.

You appreciate that it was four months later that Patrick died, and that after that event the brain was examined by looking at it under the microscope and by dissecting it. The pathologists noted scarring to the occipital part of the brain, the back of the brain, but apart from that damage to the brain, no damage was seen which was likely to give rise to epileptic seizures.

Epileptic seizures occurring naturally could not be absolutely excluded. I do not think any of the experts said one could be certain that the cause was not a spontaneous epileptic seizure. You appreciate that the experts, quite a number of them, expressed themselves as

not being in the business of certainty. They looked at probabilities and they told you from time to time that they thought some particular thing was quite unlikely, but they could not exclude it. This was the case, in due course, with epilepsy, at least from Professor Berry and Professor Herdson, concerning the source of Patrick's epilepsy and what led to his death.

It has been necessary for me to come forward and consider some of these matters with you that arose after the death of Patrick, but I am dealing for the moment with the ALTE, the one that took place when he was four months old.

I am about to change the subject, and I think that I will take the luncheon adjournment, ladies and gentlemen.

JURY EXCUSED

LUNCHEON ADJOURNMENT

RESUMPTION

IN THE ABSENCE OF THE JURY

HIS HONOUR: Are there any matters so far, Mr Crown?

CROWN PROSECUTOR: Yes, your Honour. At page 5, line 56, on our laptop, after the morning tea break, your Honour said words to this effect:

"Sometimes someone's act may itself provide the most convincing evidence of intention when a specific result is the obvious and inevitable consequence of an act and, when the actor deliberately carries out the act, you may readily conclude that the act was done with the intention of achieving that result."

Then your Honour gave the example of a person hitting another on the head. It just concerns me a little that that direction to the jury is a little bit close to what is colloquially known as the submission that a person intends the natural and probable consequences of their actions. I would ask your Honour to remind the jury, in relation to that direction to them, that it is not what a reasonable person might intend, in a given situation, but what they conclude the accused, herself, intended that is important, and whether or not they, or a reasonable person, might intend a particular result, or might have a particular intention, is not really the point.

A few lines further on, your Honour said this:

"Now, there have been no submissions from counsel about this element. It is not submitted that you should have any difficulty in inferring that anyone who deliberately interfered with a child's breathing intended to harm the child, or",

and I emphasise,

"would realise that a child might die, or would probably die."

The way your Honour said it was that your Honour corrected yourself and said "or would probably die", by way of correction, but the jury might not have appreciated that. For abundant caution, although your Honour has very clearly stated what the requirement is for reckless indifference, for that abundant caution, we would submit that your Honour might tell the jury that it is not that a child might die, but that a child would probably die, as your Honour said earlier.

Finally, in relation to Patrick's ALTE, your Honour spoke to the jury about the result of the ALTE and, in effect, said that there was no dispute but that the ALTE caused grievous bodily harm. The direction that your Honour gave was really more an appropriate direction for a charge of "thereby causing grievous bodily harm", which, of course, is not the charge. The consequences of the action are not the significant fact. What is required to be proven is the intention, on the part of the accused; not the result. The jury may have mistaken what your Honour was saying for being that what they needed to be satisfied of was that the result was grievous bodily harm, which, of course, is not the case.

HIS HONOUR: I have not come to deal with the intent yet. Anyway, I appreciate the distinction.

CROWN PROSECUTOR: Your Honour can probably cover that when your Honour comes to consider the questions in relation to Patrick's ALTE.

HIS HONOUR: Yes.

What do you say about my direction on specific intent, Mr Zahra?

Let me just see what I said. I thought what I said came from the bench book.

ZAHRA: I would agree with what my friend says about the first two matters that he raised.

HIS HONOUR: Can you show me where the direction is?

CROWN PROSECUTOR: It was after the morning tea break. I have a handwritten version of what your Honour said here, if it helps. It commences: "Sometimes someone's act may itself provide".

Would your Honour like a handwritten copy to assist in finding it?

HIS HONOUR: I am just going to see what it says.

What I said was this:

"Sometimes someone's act may itself provide the most convincing evidence of intention when a specific result is the obvious and inevitable consequence of an act and, when the actor deliberately carries out the act, you may readily conclude that the act was done with the intention of achieving that result. So, if a

person hits another hard on the head with a hammer, a jury might easily conclude that the attacker's intention was to cause really serious bodily injury. You may, as a jury, have no difficulty in coming to a conclusion, but you must remember that you are considering the intention of the attacker, not what your intention might have been if you had been in the position of the attacker."

Does that not do what you want me to say?

CROWN PROSECUTOR: It probably does.

ZAHRA: Could I only add, for more abundant caution, it may be, to apply the sample to the particular situation, that it is necessary for the jury to be satisfied that it was the accused's intention, or voluntary act, not the reasonable person, whether her intention was that.

HIS HONOUR: Yes, all right. I will go back to it.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Ladies and gentlemen, I need to go back to a couple of things I said to you before lunch, very briefly.

The first one was, when I was instructing you about the intent, one of the alternative states of mind which the Crown has set out to prove in order to prove the murder of each of the children. As you know, the Crown can prove the second element of murder by proving any of three states of mind, one of which is the intent to do grievous bodily harm, or really serious bodily injury.

When I was dealing with this I gave you an example of a man hitting somebody over the head with a hammer, and I said to you that in circumstances like that a jury would have little trouble in coming to the conclusion that by his act the man intended to cause really serious bodily injury.

I went on to say that, of course, you are considering what the attacker intended, not what you might intend, if you put yourself in his position; not some hypothetical person who might be in the position of the attacker. It is the state of mind of the attacker with which you would be concerned.

Here, of course it is the accused's intention with which you are concerned, not anybody else's. Not that reasonable person that you consider when you are thinking about manslaughter, if you think about manslaughter. It is the accused's state of mind about which you have to be satisfied in that element of murder.

The next thing is that, I hope it is clear to you now, for the third alternative state of mind which the Crown has set out to prove, namely reckless indifference to human life, the accused must fully realise that the deceased will probably die but goes on and takes the risk.

Those words "will probably die" are rather important. I do not want you to forget them. I say that because, counsel tell me, and I accept, at some stage during the summing-up I used a slightly different form of words that might lead you to believe that there was some lesser state of mind which the Crown could prove in order to discharge its obligation on this element. What the accused must fully realise is that the child concerned would probably die if she went on to do the act and that she did the act just the same.

Now, I am dealing with Patrick's ALTE. As you know, Patrick was taken to hospital. After a couple of days seizures were noted and he came under the care of Dr Dezordi. One of the things that Dr Dezordi was very concerned about was whether there was some infection of the brain or of the material immediately surrounding the brain, and he was anxious to establish the fact, if it were the fact, that he had meningitis. He was anxious to establish the fact, if it were the fact, that this was encephalitis, and accordingly tests were done.

CAT scans, brain scans, were done. The first was on 23 October 1990. An abnormality was noted in the occipital lobes which was thought to be compatible with encephalitis. A lumbar puncture was taken and that was clear.

You will remember the explanation about lumbar puncture. What it does is drain off from the spine, in the lumbar region, a sample of cerebrospinal fluid. That is the fluid which circulates right from the bottom of the spine to the brain. If there is a disease process in the brain, then white cells are produced, and they can be identified in the cerebrospinal fluid. That is why they do a lumbar puncture.

That lumbar puncture was clear, which suggested no disease process. I think at that stage Dr Dezordi was ready to exclude meningitis as a cause of the symptoms from which Patrick was then suffering.

Later on there was another brain scan - that was on 5 November - and the abnormality to the brain was noted to be there and to have increased. On the other hand, a lumbar puncture taken at about the same time was normal. If there had been a disease process going on between those dates Dr Dezordi would have expected to find white cells in the cerebrospinal fluid. There were none. He excluded infection as a cause of seizures. He concluded that the cause was unknown. He was ultimately of the view that the seizures did not cause the abnormality; it was the other way around.

There was a discharge summary when Patrick was sent home, which included the expression "probably viral encephalitis". You will remember Dr Dezordi was asked about this by Mr Zahra. He described it as "a working possibility" that he had in mind at that time. He was then a specialist of the experience of, I think, about two years. He has now had ten more years experience and his view now would be quite different. Whereas then he thought that an explanation of the symptoms that Patrick had suffered was possibly encephalitis he would not now have that opinion and his expression of the chances of that, of encephalitis being the cause, was "almost not possible". That is the way he gave his evidence to you.

Dr Wilkinson was the other clinician who attended upon Patrick. He thought that the changes which were seen in the brain could have occurred after seizures,

encephalitis, or interference with oxygen supply. That is an expression taken from a letter which he wrote, much later, after Patrick died, and after he had presumably seen the post-mortem reports and examination results.

You will remember he was asked about that letter. It is exhibit 6. You have a copy of it. Dr Wilkinson is not now of that view. He is of the view that the most likely cause was asphyxia.

If you look at MFI 39, you will see the opinions collated there of Professor Herdson, Professor Berry and Dr Beal. They are of the opinion that the symptoms were not caused by seizures. They are of the view that a first seizure in a series of epileptic seizures would not cause brain damage of the kind that was ultimately found after Patrick's brain was examined after death.

The second reason was that they would expect there to be a history of epilepsy and, of course, there was no history of epilepsy. If this was an epileptic seizure, which took place on the occasion of the second count in the indictment in October 1990 it was the first epileptic seizure.

Addressing you on the medical evidence, the Crown asks you to accept the present day opinions of Dr Wilkinson and Dr Dezordi and dismiss as a reasonable possibility encephalitis or epilepsy as causing the ALTE.

I have not taken you in detail through the summary of the medical opinion. It is set out in the documents you

have.

All the specialists accept that what happened was consistent with asphyxiation. A summary of their evidence, relied on by the Crown, was that the symptoms were consistent with deliberate smothering. It was not impossible that they might have been caused by epileptic seizure, but they thought it would be extraordinary. Professor Byard would not exclude epilepsy as a cause.

Just confining the submissions to the medical evidence for the moment, Mr Zahra points you to the letter of Dr Wilkinson and to at least the initial opinion, when he was on the job, of Dr Dezordi. They were at that time prepared to go into writing on at least the possibility that the effects which had resulted to Patrick came from epilepsy or encephalitis.

It is clear that Mr Zahra was unable in cross-examination to shake Dr Wilkinson or Dr Dezordi so as to adopt their original opinion, but, Mr Zahra says to you, well, they are very experienced doctors, they are specialists in their field, and they seriously entertained this as a realistic possibility at one stage, so it is an indicator that you ought to be very careful before you accept their final opinions now.

Mr Zahra says that insofar as you rely on the opinions of Professor Berry or Dr Beal you must bear in mind that they must, and they said they had to, defer to the clinicians about the condition of Patrick. The

conclusion that the symptoms were consistent with seizures or encephalitis was dependent, in part, on the report of Dr Kan, the pathologist. Mr Zahra relies on his evidence.

Moving away from the medical evidence, the Crown says that once again the accused was nearby when this thing happened. She was going to the toilet again, and that is a suspicious thing in the circumstances. She did not pick up the child even though he was still breathing and making a strange noise.

The Crown referred you to a number of answers which the accused gave in response to Detective Senior Constable Ryan's questions in the interview and suggested to you that her explanation was not worthy of acceptance.

Mr Zahra submitted to you, as before, there was no evidence of abuse of the child. Those who were examining Patrick knew that there had been an unexplained death previously in the family and they would have had their eyes peeled to note any sign of abuse. There is no report of any such sign. There is no evidence, Mr Zahra says, of tension in the house at the time.

Whatever this expression "battle of the wills" means, as later recorded in her diary by the accused, there was no evidence that there was any such battle going on concerning Patrick. The accused was happy before the birth.

The Crown relies on the list of ten points of coincidence evidence or similar facts that you have

written out for you. Mr Zahra points out that the one which depends upon the accused being on the spot within a short time after death does not apply here, of course. The facts allow for Patrick to have been in that condition for a long time before the accused found him.

If you are satisfied beyond reasonable doubt that the accused carried out an act of suffocation which produced that brain damage, blindness and epilepsy to Patrick then you must go on and ask yourselves another question.

Can I just refer you now to the written directions? Will you go to page 2 of the written directions? This charge is the malicious infliction of grievous bodily harm with intent to do grievous bodily harm. The Crown has to prove two things. The first is that the accused inflicted grievous bodily harm. Now, if you are satisfied beyond reasonable doubt that the accused smothered Patrick on the occasion of his ALTE, as I was saying to you before lunch, you probably will not have any trouble coming to the conclusion that she thereby inflicted upon him grievous bodily harm. No particular intent is needed to prove that first element of this offence.

Will you go to the second page of the questions? This corresponds with those elements. So, question 5 asks you the question that I have just postulated, are you satisfied beyond reasonable doubt that the accused inflicted really serious bodily injury upon Patrick? Of course, if the answer is "No" you will find the accused

not guilty on this count but if the answer is "yes" you must, before you can convict, answer the second question also in favour of the Crown.

That is question 6 in the list of questions and it is the second item in the list of elements that I prepared for you in the written directions, that is, in doing that act the accused intends to cause grievous bodily harm. So, there is a state of mind necessary to be proved here as well. It is the same as the second of those three alternative states of minds that is sufficient for murder: an intention to cause grievous bodily harm. The expression is the same expression. It has the same meaning. It means really serious bodily injury.

If you are asking yourselves that second question you will be satisfied that the accused smothered Patrick and caused him really serious bodily injury. The question is whether when she did that act the accused intended to cause Patrick really serious bodily injury.

Now, the Crown only has to prove that the accused intended to cause some really serious bodily injury. It does not have to prove that she intended to cause the precise injuries that in fact resulted.

I have finished dealing now with the second count and I shall go on and deal with the third count, which deals with the death of Patrick. As with the death of Caleb, this is a charge of murder. I will not need to give you the detail of what the Crown must prove before you may

properly find the accused guilty of the murder of Patrick. The elements are precisely the same as they were in the charge which concerned Caleb, but you will see that in the list of questions I have repeated them all for you, on page 3 of the document, and, for that matter, I have repeated them again on page 4 for Sarah and on page 5 for Laura.

In the third count the Crown charges that on 13 February 1991 at Mayfield the accused murdered Patrick. The elements of the offence are identical to those I have already dealt with. There is no doubt that Patrick died on 13 February 1991. Again, the Crown must prove that he died by the hand of the accused and not from natural causes. It is the Crown case that the accused smothered him on that day and that his death was the direct result of that act of smothering.

If you are satisfied beyond reasonable doubt that that is what happened and that when the accused smothered Patrick she intended to kill him or do him really serious bodily injury or was recklessly indifferent to his life, which means that she fully realised that if she went on with the act of smothering Patrick would probably die but carried out the act just the same and took the risk, if you find those proved your duty will be to find the accused guilty of murder.

The defence case is that Patrick died from natural causes. It points to the undisputed fact that by February

1991 Patrick was a brain-damaged child who was blind and prone to epileptic seizures. The accused points to the possibility, consistently with the defence arguments on the second count, that those seizures arose naturally and not in consequence of any act of the accused and that they might have produced a final seizure which resulted in death. Of course, the accused does not abandon the possibility of death from any other natural cause. The Crown must disprove any reasonable possibility of death by natural cause.

I have already told you that the Crown will have proved the first element of murder if an act of the accused caused death, even though it might not be the only cause. When I spoke to you about this before, I mentioned the accused's act and some natural process combining to cause death. What I said to you then applies equally to any child whose death you are considering.

As for Patrick, it seems possible that you may take the view that his epileptic condition may have played a part in his death or rendered his death easier or swifter at the hands of the accused. If you do you may still convict the accused of the murder or manslaughter of Patrick.

I do not know what your verdict will be on the second count, the malicious infliction upon Patrick of grievous bodily harm, but if you accept the Crown's submissions about that you will conclude that Patrick's blindness and

epilepsy ensued because the accused smothered him on 18 October 1990. So it is possible that you will conclude that the accused's act of smothering on 18 October 1990 played a part in Patrick's death on 13 February 1991.

In order to find the accused responsible for the death of Patrick under the third count you must all be satisfied that the accused smothered him on the day of his death, 13 February 1991, and that that act of smothering was a substantial cause of death. So long as you are satisfied about that, all of you, and provided the Crown proves the other necessary element for conviction, you may convict the accused, whether or not some or all of you have come to the view that she also smothered him on 18 October 1990.

Now will you please go to the third page of the questions? I want you to add something to question 7 in order to reinforce in your minds what I have just told you. Between the last two words of the first line of question 7 I want you to insert this: If you put a little caret down below to show something is to be inserted and over the top write "on 13 February 1991". Would you please do that now?

Question 7 will then say:

Are you satisfied beyond reasonable doubt that the accused did an act on 13 February 1991 that caused the death of Patrick?

I want you all to be clear that, whatever you think about the result of anything the accused might have done

earlier on, you must be unanimous, before you can convict for the murder or manslaughter of Patrick, that it resulted from an act of smothering on the day of death and that that smothering, on the day of death, was a substantial cause of the death.

Now the facts concerning Patrick's death are set out for you in the document marked 40 for identification. You can read them for yourselves. You are well familiar with those facts now.

The medical evidence in the Crown case is summarised for you at pages 3 and 4 of the resume which is marked 39 for identification. I think the medical arguments are clear to you by now. The natural causes pointed to by the defence as possibilities have already been rehearsed in dealing with Patrick's ALTE.

The Crown submits to you that notwithstanding his serious problems his blindness and his proneness to epilepsy Patrick was doing well. His sleep studies were successful. The evidence to that effect comes from Dr Cooper. There was evidence from Mr Folbigg that his seizures were coming under control.

Dealing with the death itself, the Crown submits to you again that the accused did not render any assistance to Patrick or let Mrs Newitt pick him up. Mrs Newitt gave evidence about that as well, and said that the accused said to her, when she went to pick up Patrick, "Don't" or "No". At any rate, it put her off from picking up the

child. That is her evidence here.

Mr Zahra criticises Mrs Newitt, and submits to you that she made a statement about this for the police and did not include in it any statement to that effect.

The contrary argument is that Mrs Newitt believed at the time that the police were gunning for the accused and held that back. At least that is a possible understanding of her evidence. They are all matters for you, ladies and gentlemen.

The Crown says, not only did the accused not go to the assistance of Patrick, but she made four telephone calls. It shows, the Crown says, that she knew that Patrick was dead and intended him to be dead.

The Crown points out the evidence of Mr Folbigg that by this time the accused was growling daily, that she realised the child was in danger. She intended to leave and that was how it came about that Mrs Carol Newitt came to assist her. The Crown relies on the diary entries as well.

Mr Zahra says to you, well, the explanation for not picking up the child or not assisting is as before. It can be attributed to panic. So can the four telephone calls. There was no sign of abuse on the child. Others thought that the accused was a good and diligent mother, including Dr Marley, the general practitioner.

As to the proposition that the accused found Patrick dead very soon after his death, the Crown relies on the

fact that his body was warm. Again, Mr Zahra points out to you that there is no evidence to say how long it will take a child to go cold after death.

There was evidence from Mr Folbigg, upon which the Crown relies, about the accused's attitude to death and her recovery from the shock of death which might lead one to the belief that it was not something ultimately that troubled her a lot.

Mr Zahra says two things about that. First of all, different people deal with emergencies and tragedies in different ways, and you should not be too ready to draw any conclusions about the behaviour of the accused in the circumstances. You never know how you will react until it happens to you. That is the kind of argument that was put.

The second one was that, to the extent that Mr Folbigg told you about the accused growling and the accused recovering suspiciously quickly from the shock of an unexpected death, he was colouring his evidence.

I will deal in more detail with this topic when I deal with the death of Sarah, because it came squarely into focus there, but while Mr Zahra by no means attacks everything Mr Craig Folbigg has said what he does submit to you is that Mr Folbigg is in a sense being wise after the event and reconstructing events to suit a point of view that he wants to put forward. He is colouring his evidence. That is what Mr Zahra says. You should take

that submission into account also.

What does seem clear is that a husband and a wife who lose a child unexpectedly may well react in different ways. That certainly happened here. Mr Zahra points to an explanation of the accused's attitude that she was asked about in cross-examination to the effect that really the accused did not think she was good enough, and Mr Zahra says that you should take that into account generally and particularly in giving meaning to the diary entries.

We will take just a five minute adjournment, ladies and gentlemen.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Zahra, there are not many real issues of fact in this case. One of them is concerning Sarah's death when Mr Folbigg woke, and there is the question of what he said from time to time about whether Sarah was in the room with him.

ZAHRA: Yes.

HIS HONOUR: Or out of the room, presumably with the accused.

ZAHRA: Yes.

HIS HONOUR: I understand how you wish to use that in dealing with the evidence generally of Mr Folbigg. I was not sure whether your submission also was that the accused was less likely to have smothered Patrick if he was in the room with Mr Folbigg.

ZAHRA: Sarah, do you mean?

HIS HONOUR: I am sorry. Yes, Sarah. Is that so? I am not sure you made that submission.

ZAHRA: No. It follows.

I notice my friend's reaction. It is implicit in what the argument is. Obviously there was less opportunity for

that to happen. I do not think it is suggested that the Crown case is, in the alternative, that she could otherwise have done it in the room.

HIS HONOUR: Are there any other matters so far?

ZAHRA: Only a minor matter.

Your Honour had indicated my argument in relation to Mrs Newitt; that, in fact, she believed the police were out to get the accused. I think it was in relation to Lea Bown that that submission was made. She was the person who thought that, not Mrs Newitt.

CROWN PROSECUTOR: Yes. At page 903 Mrs Newitt gave evidence that her explanation for it not being in her statement was that it was a day that she never wanted to revisit and, through all of this, she said, "I've had to revisit it, and I suppose your memory becomes clearer as you keep revisiting the event".

HIS HONOUR: I have confused the two witnesses. I am sorry about that.

ZAHRA: Yes.

The other significant thing is, I think, Mrs Newitt said: "No, don't pick him up". I do not think it was the whole sentence, but merely "Don't" or "No".

CROWN PROSECUTOR: I agree with that.

HIS HONOUR: That is what I said. It was simply "Don't" or "No".

SHORT ADJOURNMENT

RESUMPTION

IN THE PRESENCE OF THE JURY

HIS HONOUR: Ladies and gentlemen, before I leave the murder charge concerning Patrick, I want to say something to you about the third element for murder. This is dealt with at question 8(c) in the questions: whether the accused fully realised that if she did the act death would probably follow but went on with the act and took the risk.

I do not know what your verdict will be on the first count, the one concerning the murder of Caleb, but if you are satisfied beyond reasonable doubt that the accused smothered Caleb, thereby killing him, then that is a matter which you can take into account in considering whether the accused realised that if she went on with the act of smothering Patrick he would probably die, because you would be satisfied, of course, that it was something she had done to a child on a previous occasion, and her realisation might be informed by what happened before. That is not to say that if you convict the accused on the first count you must therefore convict her on the third count. You must consider them separately.

Well, the fourth count charges the accused with the murder of Sarah on 30 August 1993 at Thornton. As with the other children there is no doubt that this child died at the time and place named in the charge. The issues are as with the other murder counts. The Crown says that the

accused suffocated Sarah and that as she did so she had any of the states of mind necessary for murder.

The Crown must satisfy you beyond reasonable doubt about those two things, that she did the act causing death and that she did so with the necessary intention or with the full realisation that if she went on with the act Sarah would probably die.

The facts concerning Sarah are summarised for you on page 4 of the document marked 40 for identification and I do not need to read them to you.

The medical evidence is summarised for you on pages 5 and 6 of the document marked 39 for identification. The evidence of Dr Marley was that Sarah was a normal, healthy child. According to Dr Cooper her sleep was normal. In the very early days there was a little central apnoea but that did not concern anybody, and it seems to be accepted now that apnoea and SIDS have no connection.

The Crown submits to you that the sleep monitor was used up until one to two days before Sarah's death. That was because Craig Folbigg insisted. The accused did not want to use the monitor.

There is evidence from Mr Folbigg of differences in their approach to Sarah. The accused, being what Mr Folbigg might have considered an over-regimented person, requiring that the child eat at meal times and sleep at sleeping times, whereas he took a more relaxed approach. What I say is not intended to suggest any opinion I might

have about such matters. It is simply that according to Mr Folbigg the two did have these different approaches.

Again, look at exhibit AM. The Crown says that it shows that the accused was contemplating leaving Mr Folbigg and that, the Crown submits, was because she knew the danger that Sarah was in.

Now, the day before her death, Sarah was apparently not very well. She had a runny nose and she was whingy. That might account for the reddened uvula which was later found on the autopsy.

Mr Folbigg described an incident in which the accused pinned Sarah to her in a bear hug, and was slapping her on the bottom, and there was that difference of opinion expressed between her and Mr Folbigg, which ended when she, as he put it, threw the child, at any rate delivered the child, to him.

There is an issue about the intensity of that matter because Mr Zahra submits to you that Mr Folbigg is exaggerating, and I will come back to that. But one of the few issues of fact in the case concerns the state of affairs when Mr Folbigg was woken out of his sleep.

He woke at around 1 o'clock or 10 past 1 in the morning. He said that the accused was not in bed. She was out of the room. He could see the outline of light around the door. He said that there was a street light outside which was casting some light into the room. The light in the room was off, of course.

He said to you in his evidence that Sarah was not in her bed. Now, you have a plan of the room, exhibit B, and there is also a sketch which the accused drew for the police officers. That is with the transcript of the interview. It shows that the accused and Mr Folbigg's bedroom was at one end of the house and was divided by a wall from the room called Sarah's room, but at the time Sarah was sleeping in a bed in her parents' room, separated but a little way from the foot of the bed against the wall opposite the bedhead wall, according to the sketches.

Mr Folbigg said that he woke up at 1.10 by the digital clock in the bedroom. The accused was not in the bed. Sarah was not in her bed. He assumed that the accused was in another room attending to Sarah, who was still being fed at night. He could see the light around the closed door. He assumed that the light was the hallway light or the vanity light. He could see reasonably well, because of the street light. He went back to sleep.

At 1.34 he was woken by a scream, and he saw the accused at the door and Sarah on her bed. He went and attended to Sarah.

Several days later he said he tried to discuss with the accused why they had both been out of the room, but she would say nothing more than that she had been to the toilet and had seen Sarah not breathing on her return.

That must be on her return to the bedroom, which implies that Sarah was in the bed, at least when the accused returned.

On 19 May 1999 Mr Folbigg told Detective Senior Constable Ryan that he had woken up at 1.10am and that Sarah was not in her bed. That, he says, is the truth.

At some stage he told Mrs Bown that he had told some lies to Detective Senior Constable Ryan, and he says to you that that was a lie; it was a lie that he had told some lies.

Between 19 and 23 May 1999 Mr Folbigg and the accused talked about his discussions with Detective Senior Constable Ryan. You remember he went to the police station on 19 May, and they completed the first part of an interview, which went over two days.

Between those two days Mr Folbigg and the accused spoke about what he had said to the police. The accused told him to tell the truth to the police, and Mr Folbigg told you that that meant her truth, Kathy's truth.

The statement was concluded on 23 May. At paragraph 44 Craig Folbigg said that when he woke up the clock displayed approximately 1am, that the accused was not in the room, but Sarah was in her bed, the street light was shining into the room, the door was closed but there was light coming through at the bottom of the door. Mr Folbigg now tells you that that was a lie.

On 19 April 2001, almost two years later, Mr Folbigg

was arrested and he underwent an electronically recorded interview, much in the manner that Mrs Folbigg was interviewed. At that time he and the accused had been separated for some time.

In the interview he said that he could not be sure that Sarah was in her bed, that he could not see Sarah in the bed in the dark, and that he assumed she was with Kathy in another room. He said he did not believe she was in the bed.

In evidence he said that his recollection at the time was as strong as it is now, that he had not said categorically that Sarah was in the bed as he was concerned that it would be bad for the accused and because he was emotionally confused. He said in that interview he told the truth as best he could.

Detective Senior Constable Ryan gave evidence about the interviews with the accused including the two day interview of 19 and 23 May 1999. He said that it was not completed on the first day.

On those occasions Mr Folbigg gave details of Sarah's death. He informed the police that he had woken at around 1 or 1.10 and had noticed that Kathy and Sarah were not in the bedroom.

He returned on 23 May to complete the statement. He told Detective Ryan that he had not told the truth in a number of respects during their earlier session. He changed some information that he had told him previously

but which had not yet been recorded. That included the details of Sarah's death. Detective Senior Constable Ryan believes that they did not get up to typing the details of Sarah's death in the first session. That means, if it is true, that paragraph 44 was written on 23 May, the second occasion.

Detective Senior Constable Ryan told you that he did not go back on that second day and alter any of the statement that had been written on the first day.

There are two other small pieces of evidence that might be relevant. In a transcript of an intercepted telephone call on 26 July 1999 between the accused and Mr Folbigg he is recorded as essentially saying that the police belief that the accused killed Sarah and the others was preposterous, and he related an equally ridiculous story whereby he woke at 1am, the accused was out of the room and he killed Sarah in the bed.

Mrs Bown gave evidence that on the night of Sarah's death the accused told her that she had woken up and had got out of bed to go to the toilet. She had put on a light, and Mrs Bown could not remember whether that was the hall or the toilet light, and that from the toilet the accused could see that something was wrong with Sarah, and she then screamed and woke Craig.

Mr Zahra points to what he says are inconsistent versions given by Mr Folbigg from time to time about this matter and invites you, if you accept that there is the

inconsistency contended for, to place less reliance on the evidence of Mr Folbigg.

This seems to have two possible consequences. The first concerns, directly, the manner in which Sarah met her death, and the argument would go that if Mr Folbigg were in the room and Sarah were in the room as well it would be much less likely that the accused would smother Sarah, she would not do it in the room with her husband, even though he was a heavy sleeper.

The second consequence is the effect upon his evidence generally. Mr Zahra has attacked the reliability of Mr Folbigg's evidence and he says that Mr Folbigg is exaggerating. He sees things his way, of course, but he is biased, in effect. He is downplaying favourable matters. He is playing up matters which probably took place, but putting a sinister edge on them, for example, the difference of opinion, which everybody agrees arose between the accused and him, about the management of Sarah. You remember Mr Folbigg describing it in very graphic terms, he spoke about World War III, and things of that kind. Mr Zahra says that is exaggerating. There were differences, of course, as there would be in any family, and there were difficulties with managing children, as there are in any family. Here they have been blown out of proportion, so be careful if you are relying on the evidence of Mr Folbigg.

The Crown relies as confirmation of Mr Folbigg's

account on a diary entry of 16 May 1997 which you have - I will not read it for you - to the effect that the accused really needed Mr Folbigg to wake and take over from her that night.

In her answers to Detective Senior Constable Ryan's questions in the record of interview she confirmed that that entry related to Sarah's death. The Crown says that generally, though, the accused is being evasive in the answers that she gives, as recorded in the interview.

The Crown relies on Mrs Bown as supporting Mr Folbigg, to the effect that the accused was outside the bedroom, with the door closed and the light on outside the bedroom.

Incidentally, I made a mistake earlier on when referring to the evidence of Mrs Newitt. I told you that Mrs Newitt explained an answer of hers as having been given to the police at a time when she believed that the police were unfairly pointing the finger at the accused. It was Mrs Bown who gave that evidence, not Mrs Newitt. I am sorry for my mistake.

The Crown submits that you will understand why Mr Folbigg gave inconsistent stories to the police. You will understand the difficulty that the marriage was in at those times. You will understand, and there is no reason why you should not accept, the Crown says, his explanation that in between 19 and 23 May he and the accused were once again trying to get back together again, and that he would

want to go back and temper his story a little so as not to put too sharp an edge on the facts.

The Crown made a submission to you about why Mr Folbigg would agree to have more children. The Crown says that the accused did not attempt to assist Sarah when she could not have been sure whether she was breathing or not. He points again to the coincidence that the accused was, once again, on a trip to the toilet, and that the body of the child was still warm.

The Crown relies on exhibit H, which is a calendar entry recording the time of death as 1am and not, as you might expect, 1.30am, if she were telling the truth in her account.

The Crown relies on a diary entry of 9 November 1997 about wanting Sarah "to shut up and she did", and on 28 January 1998 that Sarah left "with a bit of help".

The Crown submits to you that Professor Hilton was wrong in his designation of this death as a SIDS death, and the Crown relied on various other diary entries, of which you have notes, and, of course, you have the entries themselves.

Mr Zahra submits to you that the accused and Mr Folbigg wanted more children. They thought they were necessary to a marriage. You should regard that evidence as inconsistent with the Crown case, inconsistent with the submission of the Crown, that really the accused was resenting the inroads into her life that the children were

making and wanting to pursue her own social affairs, going out, going to the gym. Why would she have another child if that was really what she wanted? Why would they keep using the apnoea blanket, if it was harrowing and waking the child?

I have dealt, I think, with the submissions about growling, and any frustration indicated in the diary entries, by reference to the views of people commended by Mr Zahra that the accused was a good mother and a careful mother, and, again, Mr Zahra would say that there were no marks of abuse on Sarah.

Mr Zahra says that the Crown's argument that frustration led the accused to kill Sarah is not enough to prove murder. It is understandable. She was a difficult child.

He drew attention to the different parenting attitudes of the accused and Mr Folbigg. He referred to the tension on the night before the death, but submitted to you that that could not be elevated to prove that the accused murdered Sarah. It was the sort of tension one finds in the best of families from time to time and Mr Zahra pointed out to you that the grieving processes of different people will be different. He pointed out that the accused did not start going out again until after she and Mr Folbigg separated after the death of Sarah. He submitted to you that you must look beyond Mr Folbigg's evidence and the diaries about Sarah.

Just coming back to the medical evidence briefly. The Crown submitted to you, particularly in his attack on Professor Hilton, that the punctate abrasions ought to have put him on the alert and ought to have been followed up, investigated.

Mr Zahra says that is only a distraction and that in the absence of photographs and in the absence of any precise description of what these abrasions were like, except that they were punctate, which I take to mean pointed - and that suggests that they were small - one has no idea what they were like and is left speculating. That is one thing that you ought not to do.

He says that there is no positive indication of smothering. He points out that Professor Hilton still prefers SIDS to smothering.

The Crown says he has tried to defend a position that he has held for a few years now.

None of the experts seems to think that the uvula could possibly explain the death, so this is put forward as a SIDS death. Not that the defence has to prove that it was a SIDS death, but that is what is suggested should be seen as the reasonable natural cause, a cause which is natural but which cannot be identified.

The other two factors that might make an expert doubt that this was a SIDS death is the age of Sarah. She was, I think, ten and a half months old. You will remember the classic, if I can put it that way, age range is two to six

months, although that does not mean that it could not have been properly called a SIDS death, and the fact that Sarah was on her back and not her front. Now, they seem to be the arguments concerning the death of Sarah.

I am going to go on and deal with Laura now. It will take me more than five minutes, so I think I will continue that at 10 o'clock tomorrow morning, ladies and gentlemen. I will invite you to go now with the sheriff's officer and we will see you here at 10 o'clock tomorrow morning.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr Crown, any matters?

CROWN PROSECUTOR: No, nothing further.

HIS HONOUR: Mr Zahra?

ZAHRA: Thank you, your Honour.

Your Honour has given directions to the jury in relation to how they could view Craig Folbigg's evidence in the light of, obviously, my arguments to them. Does your Honour intend to give them a direction under 165; in other words, quite apart from referring to it as my submissions, but, if they find as a fact that there was bias, and if, for example, they were satisfied that there were inconsistencies?

HIS HONOUR: I was aware, when I used the word "bias" that it was one that you had not used - at least I do not think you used it. I had not thought of a section 165 direction.

ZAHRA: I had emphasised, not using the word "bias", but particularly in relation to the use of the listening devices, that it showed an underlying attitude of vengeance or revenge.

HIS HONOUR: It came through fairly clearly in your address.

ZAHRA: It is just a matter where your Honour would need to go on further from just referring to it as my arguments; that, if they obviously find as a fact that

there were those inconsistencies, your Honour might need to give a direction under section 165.

HIS HONOUR: Are you asking me to make that direction?

ZAHRA: I am asking you to.

HIS HONOUR: I will have a think about that. What do you say about that, Mr Crown?

CROWN PROSECUTOR: Bias is not under one of the categories in section 165, although subsection (1) does not limit it.

HIS HONOUR: No, it is not a closed--

CROWN PROSECUTOR: It is not a closed list of categories, by any means. I would have no objection, if your Honour did think it was appropriate, to give the jury a warning that if they did come to the conclusion that he was biased, that that was a matter that may affect his reliability and, although, really, your Honour has gone some good measure along that line already, I do not know that there is really that much--

HIS HONOUR: That was not coming from me. I was merely summarising the submissions.

CROWN PROSECUTOR: Yes. I suppose that really would take the matter further, if your Honour gave a warning, with the weight of your Honour's judicial authority.

HIS HONOUR: All right. Yes, I will say something about that.

ZAHRA: Two other minor matters, your Honour. When your Honour referred to the diary entry about 1.30, the calendar entry of 1.30--

HIS HONOUR: Yes.

ZAHRA: I would ask your Honour to refer also to the other findings of fact here - it is in relation to exhibit W - about 1.24 being when the ambulance was called out. So, if one would take into account also that there were two other steps before that, that it does not necessarily follow that rigidly that we have these parameters of 1 and 1.30 but, in fact, 1 o'clock may be, in fact, in the circumstances, a reasonable statement on the facts. Also the punctate marks. I think there was some evidence from Professor--

HIS HONOUR: Let me make a note of that, Mr Zahra. Exhibit H.

ZAHRA: And exhibit W. I think it is officially referred

to in the Crown's chronology.

HIS HONOUR: Yes, I will go back to that, Mr Zahra.

ZAHRA: Lastly, when your Honour referred to the punctate abrasions, would your Honour also remind the jury of the evidence that has also come from Professor Berry, Professor Hilton, Professor Byard, that they cannot exclude punctate marks as a result of the resuscitation; in other words, I think Professor Berry indicated, in his experience, that these type of occurrences could be occasioned by CPR, or attempted CPR.

HIS HONOUR: I think one of the witnesses would not have that. Was that Professor Hilton?

ZAHRA: Professor Herdson.

HIS HONOUR: One of them was not interested but the others generally said so.

ZAHRA: Yes.

HIS HONOUR: Yes. I will deal with that too. Very well then, 10 o'clock tomorrow morning.

ADJOURNED PART-HEARD TO TUESDAY 20 MAY 2003

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

BARR J
AND A JURY OF TWELVE

SECOND DAY: TUESDAY 20 MAY 2003

70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

SUMMING-UP CONTINUED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Are you ready for the jury?

CROWN PROSECUTOR: No. Just one quick submission I would like to make, your Honour, in relation to the warning that your Honour is proposing to give under section 165.

HIS HONOUR: Yes?

CROWN PROSECUTOR: Whilst we agree that it is a situation where your Honour would be entitled to give a warning, although not obliged to, we would submit that the warning that your Honour should give should be to this effect, that if they come to the view that Mr Folbigg is biased, and that that is a matter for them, that they ought to view his evidence with great scrutiny, and that your Honour ought not to give a direction, or any other direction to the jury, or any other warning to the jury in relation to his evidence.

Traditionally, when a warning such as that is given, a trial judge also reminds the jury not only what the attack is against him, but also what the confirmatory evidence is in relation to his evidence. Your Honour has already done that in terms, but we would submit that your Honour should just very briefly remind the jury of both what attack has been made and what confirmatory evidence the Crown has pointed to to support his evidence, just to put it into context.

HIS HONOUR: Mr Zahra?

ZAHRA: Your Honour, section 165 sets out under subsection 2 the nature of the direction. Your Honour, in terms of that direction, which is mandatory, I would ask if, obviously the direction is to be given, it would be given it in terms of subsection 2.

HIS HONOUR: I suppose that a response to that might be that sections 165 does not require me, in terms, to give a direction here.

ZAHRA: Yes.

HIS HONOUR: It is a matter for my discretion.

ZAHRA: Yes, your Honour.

HIS HONOUR: Then we have general considerations, such as have been spoken about by the High Court about giving a direction which is appropriate in the circumstances.

ZAHRA: Yes.

CROWN PROSECUTOR: I would also remind your Honour that subsection 3 says the judge need not comply with subsection 2 if there are good reasons for not doing so.

HIS HONOUR: Yes. I have read that.

CROWN PROSECUTOR: And subsection 4.

HIS HONOUR: Mr Zahra, the thing you point to, which you submit make his evidence unreliable, are his change of story to the police.

ZAHRA: Yes.

HIS HONOUR: His admitted lies to the police on a solemn occasion.

ZAHRA: Yes.

HIS HONOUR: And if it is the fact, his different versions from time to time about whether Sarah was in bed.

ZAHRA: Yes.

HIS HONOUR: They are the two things you point to.

ZAHRA: Yes. There is also the material in the listening device where he is indicated to his wife that he has since been motivated by revenge.

HIS HONOUR: I am not following that one.

ZAHRA: Your Honour may recall those expressions, "You fuck my life I will fuck yours", those excerpts from the listening device. I can take your Honour to the detail of those. Transcript 243, the following statement, this is a listening device of 23 July; particularly at 244 line 23 and also line 41. It starts at 243 line 39 to page 244.

HIS HONOUR: Where is the evidence that he said this? These are questions put to him and he does not remember saying

those things. Are the listening device tapes in evidence? I know the answer to that. They are not.

ZAHRA: Yes.

HIS HONOUR: Does he acknowledge that he says that?

ZAHRA: Your Honour, there had been discussions with my friend about the necessity to prove these tapes. There was some correspondence as to whether that would require proof. Certainly we proceeded on the basis that we would not be put to proof of actually proving that at the time. There was certainly address to these without objection.

HIS HONOUR: What do you say about this, Mr Crown? The defence says that it has gone along on the assumption that it is regarded as proved between you and the defence that Mr Folbigg said these things that were put to him in the conversation that was recorded in the listening device tape.

CROWN PROSECUTOR: I do not think that is entirely right, your Honour. I indicated to my learned friend that he did not require formal proof of those tapes. I would acknowledge their authenticity, but if he chose not to put them into evidence they cannot suddenly become evidence.

HIS HONOUR: The thing is that I do not see any acknowledgement by Mr Folbigg that he did say those things. He did not deny it, but he simply did not remember it. He says at line 33 on page 244, "I don't recall actually saying those things, no". That is where the evidence stands.

CROWN PROSECUTOR: I think that is right. I mean my friend could have tendered that tape, or that part of that tape if he had chosen to. In the absence of any evidence, I think that page 244 is the end of the matter.

HIS HONOUR: Very well. Yes, Mr Crown.

CROWN PROSECUTOR: Just one further matter. My learned junior has reminded me that if your Honour does depart apart from 165(2), your Honour should state the reasons why.

HIS HONOUR: Thank you. Now, I shall give a warning in accordance with section 165. The wording of it will not precisely follow the content of subsection 2.

CROWN PROSECUTOR: Does your Honour propose to state why, just briefly?

HIS HONOUR: I do not think that the circumstances strictly

call for a warning under section 165 of the Evidence Act, but I am of the view that I should give the jury a warning, not unlike the kind of warning contemplated by that section.

May we have the jury please.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Good morning ladies and gentlemen. At last.

Let me explain to you why we have a change of scene. Just before ten this morning the air conditioning was turned on in Court 2, the one that we have been using, and the courtroom became filled with fumes, and quite what the problem is nobody knows. There is no way of clearing the courtroom except by use of the air conditioner and it is the air conditioner that is causing the problem, it seems. The only thing to do is to wait for the air conditioning engineer to arrive, and of course the court authorities could not advise me how long that might take. That is why we made a run for it and came to this court. Whether we remain in this court for the rest of the trial, I shall find out and let you know. At any rate, we will not return to Court 2 unless it is safe to do so. A suggestion was made to me that the fumes in the courtroom might be toxic, and it is better to be safe about these things.

Yesterday when telling you, reminding you of the events of Sarah's death I referred you to the diary entry relied on by the Crown recording Sarah's death at 1.00am, that is exhibit H. I should also have referred you to exhibit W, the ambulance report. Now that states that the

time was booked at 1.24, so the events must have happened before 1.24. In fact you will see these things gathered together in the Crown chronology, MFI 40, at page 4. So the argument would be that lam might be pretty close to the time at which Sarah did die, or at least to the time that the accused believed that fact and had reason to believe that Sarah died then.

I mentioned the punctate abrasions. What I did not mention was the argument put by the defence that there is a possibility, a realistic possibility, that they were caused by resuscitation attempts. Now this proposition was put to a number of the experts. Professor Hilton was not having any of it, he would not agree that that was likely to happen, but the other experts seemed to accept that the marks might have come about in that way.

When I was summarising counsel's arguments yesterday, I drew attention to Mr Zahra's criticism of the evidence of Mr Folbigg.

Mr Zahra had addressed you on the lies which Mr Folbigg admitted he told to the police and on what Mr Zahra called the inconsistent statements of Mr Folbigg about whether Sarah was or was not in bed, or whether he was sure about it, at the time he awoke around 1 or 1.10am.

Mr Folbigg admitted to you that he told lies to the police on the second day of the interview. You will recall the interview went over two days, 19 and 23 May 1999.

He told you that he changed things that he had previously said to Detective Senior Constable Ryan, and he said that that was to soften the impact on the accused of what he had said on the first occasion. By that time he and the accused were communicating once again, and he says that he had hopes that the relationship might be saved or renewed. Of course he knew that the police suspected the accused of killing the children, and he knew that the things that he was speaking about were material to the investigation. I won't detail for you again, as I did yesterday, the accounts Mr Folbigg gave from time to time about whether Sarah was in her bed in his and the accused's room when he awoke at about 1 or 1.10am.

Neither will I rehearse for you again the arguments both ways about whether you should regard either of these matters as affecting the reliability of Mr Folbigg's evidence, but you remember counsel's submissions both ways about that, the fact that Mr Folbigg was prepared to lie on an important occasion and, if you think that that is what happened, the fact that he said inconsistent things from time to time about whether Sarah was in bed, may make his evidence before you unreliable. I have no view about the matter, and I am not telling you that his evidence is unreliable, merely that these matters may make it unreliable and, because it may be unreliable, I should give you a warning.

Whether his evidence is unreliable depends on your

view of Mr Folbigg as a whole. If you accept Mr Zahra's submissions and come to the view that Mr Folbigg is biased, I direct you that you should scrutinise his evidence very carefully before deciding whether to act on it and, if so, what weight to put on it.

Now this warning applies to the whole of Mr Folbigg's evidence, not merely to the two parts of it to which I have just drawn your attention. It also applies, for example, to his evidence of the accused's behaviour during disagreements which took place shortly before the death of Sarah and Laura.

I will move now to deal with the death of Laura. The main body of the facts is summarised for you in the Crown's chronology, MFI 40, on pages 5 and 6, so I am saved the need to repeat that material for you.

The medical evidence is summarised in the document which was provided for you, which is marked 39 for identification at pages 7 and 8. You should bear in mind, of course, that that summary covers only the Crown witnesses, and that they were two witnesses for the defence, Professor Byard and Dr Jones.

As with all the deaths, there is no suggestion of accidental suffocation. This is not a death in which the defence suggests that there is a reasonable possibility that it is a SIDS death, a death occurring from some natural but unidentifiable process. There are two only possibilities on the evidence and one is a deliberate

smothering, contended for by the Crown. The other is myocarditis.

As you are aware, myocarditis was detected throughout the heart on the autopsy carried out by Dr Cala. Dr Cala came to the view that it was an incidental finding and not the cause of death. I think it fair to say that none of the experts was prepared to say that myocarditis could be absolutely excluded as a cause of death and indeed there is evidence to the effect that if an expert knew nothing else about the case, nothing else about the other deaths, he or she might well ascribe death to myocarditis. All the experts, I think, also agree that the condition in which Laura was found is consistent with death by asphyxiation. So nobody says it could not have happened that way.

The views of the Crown witnesses are summarised for you, as I have said, and I do not need to read those to you.

Professor Byard pointed out, and I think so did one of the other witnesses, that apparently healthy people, in fact fit people, can die of myocarditis without exhibiting any particular sign of illness beforehand. Whether those situations that were described are appropriate to apply to the conditions that applied to Laura is a matter entirely for you, but the kinds of examples that were given were when people were under stress, when athletes, who were very fit and exercised vigorously and then relaxed, they might die of myocarditis. Those were the sort of examples

given of deaths from myocarditis with no apparent ill effects beforehand.

You have the video of Laura in the swimming pool taken on the day before she died. Pretty obviously she does not display any sign of any disability. She appears to be moving freely and easily and voluntarily. That is a matter that you can take into account.

Dr Cala said that he could use that view of Laura to come to the view that she probably did not have myocarditis, at least not to any degree that would affect her and be likely to cause her death, and having seen that video he confirmed his view that myocarditis was an incidental finding. It did not play a part in the causation of her death.

At the other end of the scale, there was Professor Byard, who said that it was inappropriate to give an expert opinion merely by looking at a video tape in that way.

There is another subissue, if I can call it that, in this question of myocarditis or not. Myocarditis, of course, is a disease of the heart, an inflammation of the heart. It is believed that many people have it and recover from it. Of course, it is never established that such people have it, because they are not examined. You do not look at their hearts. That seems to be the belief of experts in the field.

If you do die of myocarditis, of course, the first thing that will happen will be that your heart will cease to function properly. You will remember the questions asked by Mr Zahra whether the myocarditis was in the conduction system of the heart, the parts of the heart that transmit the electrical current that make the muscles move, and the answer was that if it is established in the conductive system that is likely to lead to an arrhythmia of the heart; that is, the heart beat getting out of kilter and the heart losing its ordinary function to beat in the way that it must do regularly in order to supply the muscles with oxygen. If a person dies of myocarditis, the heart stops. That is the first thing that happens, because the heart is the first organ that is affected. Everything else follows.

On the other hand, if the person is suffocated, the

breathing might stop first and the heart might continue to beat for some little time after breathing has stopped. That is the point of the evidence about what was called the agonal heart beat. You will remember, when the ambulance officers attended, a test was done that showed that Laura's heart was still exhibiting some electrical signs. It was not beating normally. In fact I do not know that one can say that the heart was beating in the sense of an ordinary heart beating, but there was still electrical activity in the heart. The evidence was that that electrical activity might continue for some time after a person had stopped breathing for some minutes. I think up to twenty-four minutes one of the experts said.

Well, which order did things happen in? Professor Berry looked at the tracings of the electrocardiogram and thought it a reasonable conclusion that here the heart was continuing to try to beat, electrical signals were continuing in the heart, after breathing had stopped. The evidence was, you see, from the ambulance officers, that there was no breathing.

Other experts strongly disagree with that, particularly Professor Byard, who says you cannot, it is just not an appropriate exercise to, try and use a tracing in that way. He says it cannot be done, and it should not be done.

The other evidence is summarised for you. That, I think, is the medical evidence concerning Laura's death.

The Crown submits, I think, that you can accept the evidence of Professor Berry, a highly qualified expert in the field. The defence says you should not accept that. You should not go down that path.

The Crown points to events during the life of Laura which combine to show that the accused was losing her temper, losing her control more and more as Laura got older.

The Crown also points to the fact that, if it is a fact, if you accept it as a fact, the accused was not interested in using the monitor. You will remember Mrs Bown was visiting. She is the accused's foster sister. When Laura was five months old, the alarm was going off and Mrs Bown was, of course, concerned. She knew the history of the family and was surprised that this did not seem to bother the accused.

The Crown says that the accused did not bother about taking any notice of the monitor, even though it was being used, because she knew that, every time it went off, it was a false alarm. She knew it was a false alarm because she knew the real cause of the deaths of the previous children, and there was no natural risk to any of them.

The Crown pointed to the accused's diary entry when Laura was six weeks old on 20 September 1997 in which she mentioned punishment for the others and false alarms. The Crown says that that means that the accused was acknowledging to herself that she was having to go through

this facade of having the monitor there, going off all the time and disturbing the child and her, because of what she had done to the other children.

At that time, when Laura was eleven months old, the relationship between the accused and Mr Folbigg deteriorated and the accused began going to the gym and making friends there. According to Mr Folbigg she was making that growling sound daily.

About two months before Laura's death the accused and Laura were visiting Mrs Bown at her house in Melbourne, and staying with her, and Mrs Bown described an incident in which the accused yanked Laura by one arm out of the high chair when she would not feed as required by the accused.

The Crown points you to exhibit 1 and says that the relationship some two weeks before Laura died was very poor, that is, the relationship between her and Mr Folbigg. She wanted to leave and she wanted to take Laura with her. However, in answer 795 of her interview with Detective Senior Constable Ryan, she admitted that she would have left her with Mr Folbigg. The submission is that Laura would be better off without her.

Laura died on 1 March; that is, early on the Monday morning. On the Saturday she was not allowed to go to the car show with Mr Folbigg. He got back by himself some time during the evening before Laura's usual bed time, he said, and he was surprised to find that Laura had been put

to bed early.

There was the barbecue on the Sunday, when the video tape was made, exhibit K. Mr Folbigg noticed that Laura was clingy and avoiding the accused, and she told him that she had lost it with Laura. She turned round and knocked her over and screamed at her.

Now, let me mention it now. There is a challenge by the defence to this evidence, not that such an incident happened, or that the accused told Mr Folbigg that it happened - that is all accepted. What is suggested here is that the accused was telling Mr Folbigg about something that had happened accidentally. The Crown says the words "lost it" speak for themselves. Here was another example of violence by the accused towards Laura.

On the day of her death, Mr Folbigg says the accused lost it again and pinned Laura's hands to the chair and force fed her, growling.

Look at question and answer 813 of the record of interview for what the accused says about that.

Some other criticisms were levelled by the Crown at the accused in her account of what happened. She said that she heard Laura coughing in order to justify having gone to see her, but later forgot to say so to Detective Senior Constable Ryan. It shows, the Crown says, that she was not telling the truth.

Again, the Crown points to what it says is an inappropriate reaction to the death of Laura.

Mr Zahra says to you, well, why would the accused agree to have a fourth child if she was so concerned about the others, if she was unable to cope with the others, if she was growling all the time? You would think, if that were true that she would not have another child because by that time surely she would understand that she could not handle a child. Yet she was happy at having the child.

As to the monitoring, she filled in the records, and the child always stirred. That is how she knew there were false alarms. Monitoring was continued even though it used to wake the child.

He says, as he submitted to you concerning the death of Sarah, that Mr Folbigg's description of events is exaggerated. He may use real events, but he blows them out of proportion.

Mr Zahra says that the Crown's assertion that Mrs Folbigg wanted to get away from the family was wrong, because she wanted to take, she intended to take, Laura.

The events on the morning of the death Mr Zahra says do not prove that the accused smothered Laura. You have to consider Mr Folbigg's credibility.

Kerrie Anderson gave evidence that she knew the accused from the gym, and she said that there was nothing that she noticed on the morning to suggest any frustration in the accused or any tension between her and Laura. Mr Zahra points to the draft letter that Mr Folbigg prepared, but never sent to the accused. He says it demonstrates

his pride in the accused as a mother.

Mr Zahra says that Mrs Bown is exaggerating in the descriptions that she has given. He says that there was nothing inappropriate about the way that the accused managed the children normally. He referred to the evidence of Mrs Smith, Mrs Grace and Mrs Unicomb, who occasionally looked after the children, or saw the accused with Laura. I am sorry, when I say "the children", I mean Laura.

Mrs Hall looked after Laura rather more often, and she said the monitor was used.

Mr Zahra invites you to listen to the tape of the 000 call. He says it is the genuine call of a frantic mother, not the call of a person who has just deliberately smothered a child.

Mr Crown and Mr Zahra, I am about to pass from the facts of Laura. Is there anything you would like me to add to what I have said, or anything you would like me to change?

CROWN PROSECUTOR: One very minor matter. I think it was Dr Cala who said that, in his view, the punctate abrasions on Sarah were not due to resuscitation.

HIS HONOUR: Thank you.

I defamed Professor Hilton. It was Dr Cala who was not having that. As I said before, I think, the other doctors were prepared to accept that as a reasonable way in which the punctate abrasions might have come about.

CROWN PROSECUTOR: Nothing else.

ZAHRA: Dr Hilton, who carried out the autopsy, did, in fact, consider the question of whether they were resuscitation marks. That is at page 652.

HIS HONOUR: He was happy to go along with that as a reasonable possibility.

ZAHRA: The other aspect about the order, of whether cardiac arrest follows breathing loss, was not a matter that Professor Berry was taken to at all. He did not give an opinion about the order. It was Dr Bailey who looked at the process.

HIS HONOUR: I am mixing my witnesses. It was Dr Bailey who gave that evidence.

ZAHRA: Ultimately, Dr Bailey's evidence on this point, at page 1104, line 24, would have been "I would not exclude that possibility, but would think it is less likely". In other words, he did not exclude the possibility that the order was cardiac arrest first.

HIS HONOUR: Yes.

I think, when I said Professor Berry, I should have said Dr Bailey. I said to you, at another time, none of the experts excludes myocarditis as a possible cause of death.

ZAHRA: Also Dr Jones, and Dr Byard also.

HIS HONOUR: Yes.

Dr Byard and Dr Jones were of the same view.

ZAHRA: Lastly, in relation to my submissions on Mrs Bown, it was not in the sense that she was exaggerating, but the jury would need to take into account the statements she made earlier on, which she was cross-examined about, that it was not to the extent that she had given evidence on.

HIS HONOUR: You hear what Mr Zahra says, and you will take those matters to heart, ladies and gentlemen.

CROWN PROSECUTOR: There is one further point in relation to what Mr Zahra raised. Dr Beal also gave evidence about the significance of the breathing stopping before the heart stopping at page 1143:

"It makes more sense clinically that the breathing stopped before the heart. It is not what you would expect from myocarditis."

ZAHRA: She goes on to say that it is inconclusive.

HIS HONOUR: Yes.

You appreciate, ladies and gentlemen, the respective approaches taken by counsel. The Crown urges you to take an overall view of these five events which gave rise to the charges. The Crown does not ask you to put out of your minds the facts directly relating to each of them, but the Crown ultimately says that you cannot get a proper understanding of what happened if you confine yourselves to those facts. You must look at the facts and circumstances attending each of the other events giving rise to the other charges, the other four, and you must look at the diaries, in order to give meaning to what was happening.

The Crown says that the diaries give you a real insight. The first thing he says about the diaries is that they are obviously not intended to be read by anybody else. They deal with personal matters and personal thoughts; some of them intimate. They are obviously not intended to be read by anybody but the accused herself, so you can rely on them as being a reliable pointer to what she was thinking from time to time.

The Crown says that there is nowhere in any of the entries any statement that you might expect an innocent mother to make who nevertheless blamed herself for the death: "If only I had been there five minutes earlier. If only I had done that." There is no discussion about cruel fate, things of that kind.

He drew your attention in particular to the entry of 15 December 1997 and her belief that the other three had told Laura "to behave and not be a bad or sickly kid".

On 31 December 1997, there is a reference to the battle of wills, and to Laura's good nature that might save her, a reference to her having been warned, Laura having been warned, that is.

On 26 August 1996: "I'm responsible. It's all right. She accepts."

"She", there, the accused told Detective Senior Constable Ryan, was Sarah.

Now, the accused gave explanations of the meanings of the diary entries. I am not going to take you through them in detail, but the Crown's submission about them is that they are facile and unbelievable.

The Crown draws your attention also to the entry of 4 December 1996, referring to the battle of the wills and to sleep deprivation; to the entry of 1 January 1997, in which the accused told herself that she was confident this time, referred to stress in the past that had made her do terrible things. That is inconsistent, the Crown says, with any view that the accused might have had that she was innocent.

17 February 1997: The others left. This will not in the same fashion. Prepared for mood and for signals now.

The accused explained that, and her explanation is submitted to be unacceptable.

On 6 July 1997: Help will be the key to this baby's survival, and a reference to stress.

On 25 October 1997: Laura saved her life by being different.

On 8 December 1997: Lost it with Laura. Must release stress somehow. Mr Zahra submits about these diary entries that they do not amount to proof that the accused regarded herself as a guilty person. They can be read, and they should be read, in the terms that he has put to you, that they are the sort of things said by a mother not responsible for the deaths who is torturing herself - they are my words, I do not think that that was his submission - but who is examining herself to ask whether she could have done anything. Mr Zahra says to you they are "what if" entries.

He commends to you the explanations given by the accused in the interview with Detective Senior Constable Ryan, and he listed the questions and answers for you. I assume that you have a record of those, but in case you do not, I will read the numbers of the questions to you, and one of you might care to make a note of them. They are: 459; 480; 517; 596; 604; 661; 662; 677-681; 700; 704-710; 717; 719; 723; 726.

As important as the words said, Mr Zahra submits, is the way that the accused said them, and he invites you to look at the videotape, at least insofar as it covers those questions and answers. He submits to you that it is important to regard the demeanour of the accused when she is giving those answers, and that will be a clue for you whether she is being straight with the police or whether she is giving a facile answer.

Mr Zahra's submission is that the explanations are credible and that the accused's demeanour shows it, and that you should accept it. He says that you cannot understand the deaths of the children by reference to the diary entries.

Ladies and gentlemen, that is virtually all I want to say to you about the matter.

You should, as Mr Zahra has submitted, look very carefully at the detail of the circumstances attending each of the five events. You should also, as the Crown has submitted to you, look at the picture overall, as shown by the other events and as explained, if you think that they do provide explanation, by the diary entries.

Now, the Crown has submitted to you that the evidence shows that the accused had a tendency to become stressed and lose her temper and control with each of the children and to react to it by smothering. I won't summarise for you again the evidence upon which the Crown makes that submission, but I want to give you a direction about how you can use evidence of what is called tendency. Both counsel have referred to this during their addresses to you.

If you are satisfied beyond reasonable doubt that on any of the five occasions giving rise to the charges the accused became stressed, lost her temper and control and smothered her child, then provided certain conditions are fulfilled you may take that conduct into account when you

consider whether she is guilty on any other count.

I said provided certain circumstances are fulfilled, because you need to take care in employing this kind of reasoning. Inherent in the Crown submission is the proposition that if a person behaves in a particular way in a given set of circumstances on one occasion the person will tend to behave in the same way if similar circumstances exist on another occasion.

First, and obviously, you have to be satisfied about the features and circumstances of the accused's behaviour on the first occasion that you are thinking about. That does not need to be the occasion giving rise to the first charge in time. It can be the occasion of any of the events, but you need to have a clear understanding of exactly what circumstances the accused was in and exactly how she behaved.

Secondly, you need to be sure that the circumstances repeated themselves on the occasion of the events giving rise to any other charge. You need to be satisfied that on such an occasion, there is a similarity of circumstances, a similarity or pattern of behaviour.

When considering this kind of evidence you are entitled to give consideration to the extent, if any, to which the relevant conduct may have been unusual or unique, since that may reinforce the inference contended for by the Crown, and you need to apply your common sense, because the mere fact that a person has behaved in a

particular way on one occasion does not necessarily mean that they will repeat that conduct if the surrounding circumstances are replicated.

So it is important for you to take into account the nature of any prior behaviour relied on by the Crown, the frequency of its repetition and the extent of its similarity to or dissimilarity from the facts with which you are comparing it. This is the only way in which you can use evidence of any tendency that you find the accused had. You may not say just because you are satisfied that she smothered one of her babies she must or is more likely to have smothered the others.

Now there will be any questions of law, Mr Crown?

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: Mr Zahra?

ZAHRA: Just two, briefly.

HIS HONOUR: Ladies and gentlemen, I have almost finished my summing up, but I have to give counsel an opportunity to submit to me that I should add something or take away something that I have said, or change something that I have said, so, obviously that has to take place in your absence. So would you mind going back to the juryroom now. I will call you back as soon as possible.

JURY EXCUSED

IN THE ABSENCE OF THE JURY

HIS HONOUR: Yes, Mr Crown?

CROWN PROSECUTOR: Firstly, I do not know whether your Honour has given the traditional direction of "beyond

reasonable doubt", that it has its ordinary English meaning. Your Honour certainly included those words in the written directions, but do I not know that your Honour has given the normal full direction.

ZAHRA: That was one of my points.

HIS HONOUR: Thank you, I will say it. It is curious though. I will have to tell them that they are three words they understand, otherwise they won't understand them, is that it?

CROWN PROSECUTOR: That is the sum of it, your Honour.

HIS HONOUR: All right. I will say that. Next?

CROWN PROSECUTOR: Your Honour, in relation to the record of interview, it is commonly done that a trial judge will give a direction about the answers given by an accused in a record of interview similar to what was the old dock statement direction, namely, that although they are answers of the accused, that they should take into account that they are not the same as sworn evidence and not subject to cross-examination. That is an approach which was sanctioned in the case of Kovac in the Court of Criminal Appeal.

The third area is that there is one area of the interview, series of answers given by the accused in her interview, where I submitted to the jury that they were lies which she said in a consciousness of guilt.

HIS HONOUR: I made a note some days about that. You said "why would she lie to the police?"

CROWN PROSECUTOR: It was in relation to her explanation for the entry in the diary concerning Sarah's death and her wish that Craig had woken up.

HIS HONOUR: Can you take me to the relevant part?

CROWN PROSECUTOR: It starts at page 1333 and goes on to page 1335. Page 1332 about line 22 is where I first mention to the jury the diary entry for 16 May 1997 where she wrote that she needed Craig to wake up that morning and take over from her. At some stage I had referred the jury to the fact that she had admitted that that was a reference to Sarah's death.

Then I refer, on page 1333 line 14, to question 755, which is a lengthy answer, but I only read part of it, the relevant part. Then on the same page, at line 34, I referred to question 758.

Over the page, page 1334 line 5, I refer to question 759.

Then at line 25 on that page I submitted to the jury that they were deliberate lies told by the accused to try and convey the clear meaning of the diary entry. First she says it is not Sarah, and then she says "Oh, yes, it is Sarah but I was just referring to him doing the usual night time routine", and then finally, when she is pressed more, she says that, "Well, he would have been the one to get up and find her". Then I refer to the fact that the diary entry and Lea Bown's evidence, confirmatory of Craig Folbigg, that starts at line 45, the only area where I made a submission in relation to lies showing the consciousness of guilt.

HIS HONOUR: You want to rely on those answers as another circumstance in your circumstantial case then as lies, evidence of consciousness of guilt?

CROWN PROSECUTOR: What we submit to your Honour is that your Honour should tell the jury that if they come to the conclusion that the diary entry was written with the meaning that the Crown ascribes to it, then they could come to the conclusion that the accused's answer in her interview about that entry were lies, however they could be satisfied of the area's criteria, the applied lies, and in that case if they were of the view that it was said in the consciousness of guilt, they could use it as a piece of circumstantial evidence against her to that.

HIS HONOUR: I understand that.

CROWN PROSECUTOR: There was one piece of evidence given concerning the statistics for SIDS. I did not refer to it at all. It was quite deliberate.

HIS HONOUR: It was not referred to, and it seemed to me best just to say nothing about it.

CROWN PROSECUTOR: Perhaps my friend would just indicate that he agrees.

HIS HONOUR: Do you agree with that, Mr Zahra?

ZAHRA: Yes.

CROWN PROSECUTOR: The only other area is that there was a considerable amount of evidence given about certain symptoms never having caused death, and there being no record of it in the literature et cetera. Your Honour has already said to the jury that that does not mean that it could not happen - I think, on reflection, that probably covers the situation.

HIS HONOUR: Very well then, thank you. Mr Zahra?

ZAHRA: Yes, thank you, your Honour. Your Honour, I am concerned with my friend's request that your Honour direct the jury in relation to the record of interview, and that such direction might somewhat go against what your Honour has said about how the jury could look at, examine, the accused's decision not to give evidence. The direction that my friend suggests, might suggest that the failure to give evidence could be used in these circumstances. I am concerned about that direction that my friend seeks.

With relation to my friend's directions about lies. Your Honour would need to give a full direction in the terms of Edwards. That would no doubt contain such things that need to be firstly satisfied, that they were deliberate lies; there was no other explanation, and, in this particular case that, no doubt, there is quite some time between the incident and the time that she is asked to relate it from May 1997 to 1999 when the record of interview was undertaken. So those factors need to be also indicated to the jury; so, on all fours, an Edwards direction.

In relation to my friend's request generally in relation to the lies in the diary, that if they do not accept the belief that she was telling the truth then they could use that as a lie as part of a circumstantial evidence.

HIS HONOUR: Would you mind saying that again.

ZAHRA: In relation to my friend's request that your Honour would also give a lies direction in relation to the diaries, that if they were of the view--

HIS HONOUR: The lies direction asked for relates to the explanation of the diary entries, not the diary entries themselves.

ZAHRA: Yes. There is, in a sense, some circularity about those submissions. In fact some boot strapping. I do not know whether in fact the jury would be confused by that mechanism, whether there in fact is any utility giving such a direction. The issue about whether they can accept her explanation or not is a matter that has been fully put to them, and that is obviously the appropriate reasoning. The use that they could make of that further, your Honour, is my concern. It does have a circularity or boot strapping about it, and I ask your Honour to consider not giving that direction in the terms sought.

The last matter - in fact I indicated there were two matters; the first matter that my friend has already indicated, in relation to your Honour's general directions on proof, in particular the beyond reasonable doubt direction. The other was in relation to the circumstantial

direction.

Your Honour gave quite a full direction in relation to inferences and then went on to refer to circumstantial evidence. Would your Honour consider giving the jury a circumstantial direction which also includes that if, obviously this is, as it has been indicated, a circumstantial case, that they must exclude any rational hypothesis consistent with innocence as part of the general directions in relation to circumstantial evidence. They are the matters.

CROWN PROSECUTOR: Just one further matter that occurs to me. In your Honour's directions on the use of tendency evidence, your Honour quite correctly told the jury before they could use tendency evidence they would have to have a starting point of being satisfied that she had committed one of the offences.

Your Honour did not add the requirement they must be satisfied beyond a reasonable doubt of her commission of the starting point offence; and for abundant caution, we would suggest that your Honour ought to add those words, otherwise they might think that there is some lesser standard required for the use of tendency.

HIS HONOUR: I said this:

"I direct you that if you are satisfied beyond reasonable doubt that on any of the five occasions giving rise to the charges the accused became stressed, lost her temper and control and smothered her child, then provided certain conditions are fulfilled you may take that conduct into account when you consider whether she is guilty on any other count."

CROWN PROSECUTOR: I obviously missed those words "beyond a reasonable doubt".

HIS HONOUR: I will just check with the reporter.

ZAHRA: I remember your Honour saying it.

HIS HONOUR: Mr Crown, what do you say about Mr Zahra's request for an addition to the circumstantial case direction, that the Crown must exclude any rational hypothesis consistent with innocence? It is unexceptionable, of course, provided it is put in language the jury understand, but what do you say about that?

CROWN PROSECUTOR: Your Honour, it is often said in a circumstantial case - this is a partial circumstantial case. I do not think it is really required, but perhaps for abundant caution, your Honour might give it in

association with some other explanation, so that it does not loom too large and be given a prominence that it does not deserve.

HIS HONOUR: I am going to leave the bench for a couple of minutes. What I might do is have a message sent to the jury, they can have their morning tea now, and we will resume in half an hour, and I will conclude the summing up then.

Mr Crown, some papers were left out of exhibit J. The jury have copies of all the documents, the official exhibit is not complete. After I have gone off the bench, would you mind have having a look at that.

CROWN PROSECUTOR: Yes, your Honour.

SHORT ADJOURNMENT

RESUMPTION

CROWN PROSECUTOR: In relation to exhibit J, there are now two parts of exhibit J. There is the original diary, which is from 1997 to 1998, and then we have a folder, which has the extracts from both diaries and photocopies of the 1996/1997 diary, as edited.

HIS HONOUR: So, the official exhibit is now complete.

CROWN PROSECUTOR: The exhibit is really in two parts. Perhaps, for more abundant caution, it might be better to have exhibit J1 and exhibit J2.

There is also this (indicated folder). The folder that went to the jury was all of this, plus a photocopy of that one (indicated exhibit J). So, if your Honour would like, we can add a photocopy of the 1997/1998 diary to this folder, so then it will be exactly the same as what went to the jury.

There will be a duplication between the original and the photocopy.

HIS HONOUR: Do you want to say anything about that, Mr Zahra?

ZAHRA: No.

HIS HONOUR: I think that is appropriate.

There is no reason why the jury should not have this, is there (indicated exhibit J)?

CROWN PROSECUTOR: No. That is fine.

I now hand up the folder, which should be in exactly the same form as what the jury has.

(The aforementioned folder was handed to his Honour by the Crown Prosecutor.)

HIS HONOUR: In relation to the submissions for further directions, I will take them in order. I will tell the jury that the words "beyond reasonable doubt" need no further explanation, and that juries know what they mean.

I will not give the jury any direction about the quality of the evidence insofar as it comprises answers in the record of interview.

I will give the jury an Edwards direction on lies, arising out of the accused's explanations of the diary entry of 16 May 1997.

Mr Zahra, I just want to make sure I understand what you submitted about that. I did not have a complete record of everything that was said, but you asked me to draw attention, in the event that I gave a direction, to the time that went by, was it?

ZAHRA: Yes.

HIS HONOUR: This is between May 1997 and July 1999?

ZAHRA: Yes.

HIS HONOUR: I will do that.

Is there anything else?

ZAHRA: No.

HIS HONOUR: I will hark back to the circumstantial evidence direction and tell the jury that circumstantial evidence may prove the case, but that the Crown has to exclude any rational explanation of the evidence which is consistent with innocence.

Mr Crown, I did have the Court reporters read back to me what I said about tendency evidence. I was working from a typed direction which was prepared, and I did read the script straight. I did say "beyond reasonable doubt". I think that was Mr Zahra's statement.

ZAHRA: Yes. That was my recollection.

There was one other matter in relation to that record of interview entry. This also is a very long record of interview. I think those questions were in the latter half. Some hours had passed. It was a very long record of interview.

HIS HONOUR: Yes, that is true. All right. I will say that as well.

CROWN PROSECUTOR: Will your Honour say anything to the jury about court sitting times, if we do not have a verdict by 4 o'clock.?

HIS HONOUR: I will say something to the jury about hours. I will simply say that, provided they are here no later than 10am and leave no earlier than 4pm on any day - I am assuming another day - then they can determine their own hours. They can continue after 4 today, if they wish. In fact, 4 o'clock is about the time that the Sheriff's Officer needs to know if provision is to be made for the jury during the evening. I normally call the jury back at

4 o'clock, anyway, just to ask them that. I will tell them that I am going to do that.

IN THE PRESENCE OF THE JURY

HIS HONOUR: Ladies and gentlemen, as a result of what counsel have said to me, it is necessary for me to say some further things to you. The first is, you are aware, and I have handed you a written direction to that effect, that the Crown has to prove its case on each charge beyond reasonable doubt. In fact, it has to go further than that. It has to prove each element of each charge beyond reasonable doubt.

You understand that there are two elements in each charge of murder, two in each charge of manslaughter, if you come to manslaughter, and two in the malicious infliction charge the subject of the second count. Each of the elements in each count has to be proved beyond reasonable doubt.

Those words "beyond reasonable doubt" are ordinary English words. Juries are reckoned to know what they mean and no explanation of them is required.

I gave you directions about a circumstantial case, and I told you that where the Crown case is a circumstantial case it may be capable of proving the charges beyond reasonable doubt. It follows from what I have said that, in conducting its circumstantial case, the Crown must prove its case beyond reasonable doubt. That means that it must exclude all possible explanations of the evidence which are consistent with the innocence of

the accused.

Now, the Crown Prosecutor made a submission to you about explanations given by the accused in her answers to Detective Senior Constable Ryan about the meaning of the diary entries and he said to you in general that you should not accept her explanations. He made a special submission to you in respect of one of the diary entries and he went further and said not just that her explanation is not acceptable and you should not accept it but that it was a lie.

Just let me remind you of the diary entry that was being referred to. It is the diary entry of 16 May 1997. It says this:

"Mel",
a friend I think,

"that she will be a great help in preventing me from stressing out as much as I've done in the past. Night-time and early mornings such as these will be the worst for me. That's when wishing someone else was awake with me will happen. Purely because of what happened before, Craig says he will stress and worry, but he seems to sleep okay every night, and did with Sarah. I really needed him to wake that morning and take over from me. This time I've already decided, if I ever feel that way again, I'm going to wake him up."

The accused was asked about that entry and in the transcript of the record of interview it is touched upon in part of the answer to question 755, as it appears on page 209. That is one of those answers that goes over more than one page. There is a block in the middle, which the Crown Prosecutor read to you during his closing

address. It says this:

"The bit where I really needed him to wake up that morning and take over from me, that was probably because I had so much trouble waking him up sometimes. It was, you know, third yell, or whatever, before he would sort of wake up. I don't think I was referring to any particular one of the three kids, just that his general lack of stirring when I wanted him to wake up on purpose for something, that's what I was merely referring to."

And then, on page 210, the answers to questions 758 and 761. The Crown Prosecutor read these answers to you as well.

Question 758 was:

"Q. 'This time I have already decided, if I ever feel that way again, I'm going to wake him up.' Feel what way?

A. If I feel like I haven't had enough sleep, or if I felt like - basically if I had felt like I didn't really want to have to get up and feed her, or put her down, if I was too tired, I was just going to wake him up and get him out of bed and tell him to do it, so--."

Then, in question 761, the words are read to her again and she gives this answer:

"I really needed him to wake that morning and take over from me. This time"

- I am sorry, this is the question. The words are read to the accused.

"A. No. They are two separate - the - the bit where I said I wanted him to wake and take over from me, that's Sarah. 'This time I have already decided', that's referring to - to future, as in Laura."

Now, the Crown Prosecutor read the diary entry to you, and those parts from the transcript of the record of interview, and then he made this submission to you -

that these are deliberate lies by the accused to try and evade the clear meaning of the diary entry. First, she says, oh, it wasn't about Laura. And then she says oh - first she says it wasn't about Sarah. Then she says, oh, yes, it was about Sarah. I was just referring to him doing the usual night-time routine. And then finally when she is pressed even more she says, oh, what I meant was if he had been the one to get up he would have been the one to find her dead.

The Crown submitted to you that the true meaning of the diary entry was this -

If only Craig had got up and taken over from me Sarah would not have died.

That is what the diary entry means, the Crown says. Now if the diary entry means what the Crown says it means - and that is a question for you, of course - you can conclude that the answers the accused gave were lies. I do not tell you that you should conclude that her answers were lies. I simply say to you that it is open to you to come to that conclusion if you wish to do so. It is not for me to direct you about what facts you may find, but it is only if you are satisfied that the accused's answers in explaining the diary entries were lies that what I am about to say to you has any application.

Before you can use what the accused said in the way I am about to direct you you must be satisfied that what she said amounts to a deliberate lie or deliberate lies. I do not know what conclusion you will come to about that. I have to assume that you will.

If you are so satisfied you must be satisfied about a number of other things as well. First, that the lie

relates to an issue that is material to the offence charged. Now, of course, the subject-matter was the death of Sarah and the relevant charge is the charge of murdering Sarah. Secondly, you have to be satisfied that the lie reveals a knowledge of the offence of the killing of Sarah or some aspect of it. Thirdly, you have to be satisfied that the accused told the lie or lies because she knew that the truth of the matter about which she told the lie or lies would implicate her in the offence concerned with the killing of Sarah. Or, to put it another way, she said what she said because of a realisation of guilt and a fear of the truth.

I emphasise that you must be satisfied that what was in the accused's mind was guilt of the killing of Sarah and not of some other crime.

You must remember that people do not always act rationally and that conduct of this sort may sometimes be explained in other ways. There may be reasons for telling a lie apart from the realisation of guilt. For example, a lie may be told out of panic, or to escape an unjust accusation.

You must remember that a long time went by between that diary entry - it is May 1997 - and the giving of these answers in the record of interview. That took place in July 1999, twenty-six months later.

You should also take into account the condition in which the accused might have been when she gave those

answers. These answers are well on in the seven hundreds in an interview which went all day. It went for more than nine hours altogether, and this is much closer to the end than the beginning of that interview.

You must take all those matters into account as well as possibly explaining, if you find that what the accused said was a lie, why she said what she said.

If you think that there is a reasonable possibility that the lie was told because of any of those other reasons that I have just encapsulated for you, then you cannot use it for the purpose that I am about to direct you about.

The direction is this. If you are satisfied of these matters to which I have referred, and you are satisfied that what the accused said was a deliberate lie, then you are entitled to use that finding in aid of the other evidence in the Crown case as pointing to the guilt of the accused. In other words, I have told you that this is a circumstantial case. This is another circumstance that you can use in that circumstantial case.

The question that you must ask yourselves is whether the case as a whole, including this circumstance, is sufficient to prove the Crown case on the death of Sarah, and to prove it beyond reasonable doubt, to exclude all reasonable explanations consistent with her innocence on that charge. Standing by itself, a lie cannot prove guilt.

Now, ladies and gentlemen, if any of the directions

or the summaries that I have given to you are not clear, then you must ask me in a note to repeat them or amplify them or explain them in different words. I do encourage you to do that if I have left anything unclear for you. If you are unclear about any aspect of the case, about the evidence, about the submissions, about the law, all you have to do is to write a note, give it to the Sheriff's Officer, it will be brought to me and I will deal with it.

You will remember at the same time the offer to read to you the evidence of any of the witnesses from the transcript.

Just a word about how the verdicts will be taken. You will appreciate that on the four murder counts, counts 1, 3, 4 and 5, there are possible alternative verdicts of not guilty of murder but guilty of manslaughter. So, on those counts only, 1, 3, 4 and 5, the verdict will be taken from your foreperson in one or two stages, according to your answer to the first question.

When you have decided upon your verdicts, you just need to tell the Sheriff's Officer, without telling the officer what the verdicts are. The Court will reassemble. My Associate will ask your foreperson "Have you reached your verdicts?" The answer will be in the affirmative.

The first question will relate to the first count in the indictment. It will be this: "Do you find the accused Kathleen Megan Folbigg guilty or not guilty of the murder of Caleb Gibson Folbigg?", and the answer will be

"Guilty" or "Not guilty". That question is intended to ask you only whether you find the accused guilty of murder. It is not asking you about manslaughter. If the answer is "Guilty" then my Associate will go on to deal with the second count, and there will be no mention of manslaughter.

On the other hand, if your foreperson answers "Not guilty" to the murder of Caleb then, and only then, will my Associate ask about the manslaughter of Caleb, and she will say this: "Do you find the accused Kathleen Megan Folbigg guilty or not guilty of the manslaughter of Caleb Gibson Folbigg?", and the answer will, of course, be "Guilty" or "Not guilty" as you have all decided.

That pattern will be followed for counts 3, 4 and 5.

There is no need for us to do that with count 2, because, as you will appreciate, there is no alternative verdict available. Either you find the accused guilty of the second count, the malicious infliction of grievous bodily harm, or you find her not guilty. They are the only possible results.

When your verdicts have been taken, my Associate will repeat to you the verdicts you have delivered. Then she will say: "So says your foreperson, so say you all." These words do not require any response from any of you, the foreperson or any other member of the jury, but they are deliberately spoken in order to make clear to everybody present - yourselves, the accused, everybody in

the Court - that the verdicts you have delivered are the verdicts of you all. They are unanimous verdicts. That is why those words will be spoken. Those words will be the confirmation of that fact.

Ladies and gentlemen I will invite you now to retire.

Is there anything else, Mr Crown?

CROWN PROSECUTOR: No.

HIS HONOUR: Mr Zahra?

ZAHRA: No.

HIS HONOUR: I will invite you now to retire and consider your verdicts.

The exhibits you will find will be sent in to you. It might take a few minutes to organise that. They will be delivered to the jury room.

I will give you news later on about whether we shall be using this courtroom, or whether we shall be back in Court 2. I would have thought it would be easier if we stayed where we were, now that we have moved, but more of that later if necessary.

As to the time to be taken by you to deliberate, you should understand that there is no artificial time limit placed upon you to come to your verdicts. You must take all the time you need. I am not being presumptuous if I say this. Assuming that you have not reached verdicts this afternoon I shall call you back into court about 4 o'clock, not to ask you how your deliberations are going but to ask you whether you want to continue on after 4pm

today. You see, the hours of jury deliberations are very much a matter for the jury. I do require you to be deliberating on any day by 10 o'clock at the latest, but you can come earlier, if you all agree about that. I require you to continue each day until 4 o'clock, but you may continue after 4 o'clock if that is what you wish to do. I shall need to ask you about that at 4 o'clock today.

If you are going to carry on into this evening, then 4 o'clock is about the time that the Sheriff needs to know because some sustenance, some meal, will be provided for you, if you go on after 4. That will be my purpose in calling you back at 4 o'clock. That is all I want to say now.

Will you please retire and consider your verdicts?

JURY RETIRED TO CONSIDER ITS VERDICTS AT 1.15PM

IN THE ABSENCE OF THE JURY

HIS HONOUR: I must apologise for not having told you directly what you must now have inferred, that is, that I do not intend to sequester the jury.

CROWN PROSECUTOR: I had assumed that some days ago, when your Honour did not give them any advance warning.

HIS HONOUR: I would have given everybody advance warning if I had intended to do that.

Do you, or do you, Mr Zahra, require the jury, assuming that there is no verdict today and the jury comes back tomorrow, to come into court, or is it sufficient if they go to the jury room and I receive a report from the Sheriff's Officer?

ZAHRA: Yes, I would be happy with that.

CROWN PROSECUTOR: I would be too.

HIS HONOUR: There is one outstanding matter. There was a certificate that I said I would give to Mr Folbigg.

CROWN PROSECUTOR: My instructing solicitor has prepared a document with what she thinks are the relevant pages of the transcript. Perhaps she could give that to your Honour's Associate.

There are two matters. The first matter is: Would your Honour permit counsel to return to Chambers? It would mean that it would require a fifteen minute delay between your Honour's Associate contacting us by mobile phone and us actually being here, robed, in Court. I would ask your Honour to consider that.

The second thing is the accused's bail; whether your Honour feels it is appropriate to revoke that, or not.

HIS HONOUR: I will deal with the second matter first. The accused's bail is revoked.

Mr Zahra, would you like also to return to your Chambers?

ZAHRA: No. We can work here. That does not trouble me either way.

Tomorrow afternoon there is another meeting of the Sentencing Council. I ask that probably your Honour consider my friend's request. I think it would only take me ten minutes to get here from the Goodsell building.

CROWN PROSECUTOR: Fifteen would be the maximum.

ZAHRA: I have no problem with my friend's request.

HIS HONOUR: The Crown can go to its Chambers and you can go to the Sentencing Council, Mr Zahra.

Is that all for now?

CROWN PROSECUTOR: Would your Honour not take a verdict or question between 1pm and 2pm.

HIS HONOUR: That is so. I will not take a verdict, or a question, between 1pm and 2pm.

I will ask the Sheriff's Officer, would you mind letting the jury know that I will not entertain any question or verdict before 2 o'clock.

COURT ADJOURNED

RESUMPTION

IN THE ABSENCE OF THE JURY

HIS HONOUR: There is quite a large number of representatives of the news media here. I would be much obliged if none of you would leave until I have discharged the jury, if that is what I am about to do for the day, because there is something I need to say to you about the matter.

JURY RETURNED TO COURT AT 4.10PM

HIS HONOUR: Ladies and gentlemen, I am only calling you back for the reason that I foreshadowed, namely to ask you whether you wish to continue on in your deliberations this afternoon and into the evening so as to see whether the Sheriff needs to make some provision for you. What is the decision of the jury about that Madam Foreman?

FOREPERSON: We are going to leave at 4 o'clock now, if that's okay.

HIS HONOUR: In a moment I will let you go. I just want to say two things to you. It is absolutely crucial that none of you comes under the influence of anyone other than your fellow jurors. You have heard the whole of the case. You have also heard some of your colleagues' views on the case, and you have gone some way along the road towards reaching your verdicts. You are particularly vulnerable now to a word, a suggestion, from the wrong quarter. Please remember what I have said to you now on several occasions. You must not allow yourselves to be influenced.

The second thing is this. There is a great deal of interest in this case by the representatives of the news media. You see a large number of representatives of those

bodies here today. I have told you about the caution, which you need to have attention to, as to the results of their work. It would be helpful to you, I think, if overnight you made a special effort to avoid hearing radio broadcasts looking at television broadcasts and reading newspaper reports of what is happening at this trial, just to guard against the possibility that a word here or there might mislead. Will you all try and remember to do that?

With those remarks, I will let you go now. Please return in time for a start tomorrow morning - are you starting at 10am, or earlier?

FOREPERSON: Yes, your Honour, 10am.

HIS HONOUR: Please be here in time for a start at 10am. I will not require you to come into Court but I will receive a report from the Sheriff's Officer to the effect that you are all present.

Please now go with the Sheriff's Officer.

JURY LEFT COURT AT 4.12PM

IN THE ABSENCE OF THE JURY

HIS HONOUR: I just want to make a couple of remarks to the members of the news media. I know of your great interest in this case. There are more of you here than there have been at any time, I think, except perhaps the first day of the trial. I am not sure. But there may be some among you who are not aware that anything that takes place in the absence of the jury must not be reported on. I merely wanted to remind you of that.

Much material has been discussed in the absence of the jury. Evidence has been taken. Submissions have been made. None of that material may be reported on. That includes any discussion or directions that I may have made about the conditions of bail that the accused has had during the trial.

Now, Mr Crown, do you want to say something?

CROWN PROSECUTOR: Yes.

I just wanted to place on record the enormous degree of assistance that has been given to a wide variety of people associated with this case on both ends of the Bar table by Major Joyce Harmer and her husband, Major Dalton Harmer, both of the Salvation Army, and the incredible gratitude I know a large of number of people associated with them have for them and their assistance.

ZAHRA: I share with those sentiments, and time should not pass without the acknowledgement of their assistance to all concerned.

HIS HONOUR: The comments are well made, I think. The work that Major Harmer and Major Harmer do is well-known and very much appreciated. The Court is grateful to them also.

ADJOURNED PART HEARD TO WEDNESDAY 21 MAY 2003

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

BARR J
AND A JURY OF TWELVE

THIRD DAY: WEDNESDAY 21 MAY 2003

70046/02 - REGINA V KATHLEEN MEGAN FOLBIGG

SUMMING-UP CONTINUED

JURY CONTINUED TO CONSIDER ITS VERDICTS AT 10AM

IN THE ABSENCE OF THE JURY

MFI #43 JURY NOTE

HIS HONOUR: I would like there to be silence in the Court during the whole of the taking of the verdicts. Anyone who interrupts the business of the Court will be removed.

IN THE PRESENCE OF THE JURY

JURY RETURNED TO COURT AT 4.02PM

JURY RETURNED THE FOLLOWING VERDICTS AT 4.03PM:

NOT GUILTY OF MURDER OF CALEB GIBSON FOLBIGG

GUILTY OF MANSLAUGHTER OF CALEB GIBSON FOLBIGG

GUILTY OF MALICIOUSLY INFLICTING GRIEVOUS BODILY HARM WITH INTENT TO DO GRIEVOUS BODILY HARM TO PATRICK ALLAN FOLBIGG

GUILTY OF MURDER OF PATRICK ALLAN FOLBIGG

GUILTY OF MURDER OF SARAH KATHLEEN FOLBIGG

GUILTY OF MURDER OF LAURA ELIZABETH FOLBIGG

HIS HONOUR: Ladies and gentlemen, the Jury Act, which governs the procedure which we now undertake, requires me to discharge you from your duties immediately upon the delivery of your verdicts, and I discharge you from your duties.

The Jury Act also empowers me, if I am of the opinion that any of the jurors attended the trial for a lengthy period, to direct that those jurors shall be entitled to be exempted, as of right, from serving as jurors for a specified period.

Before I let you go, I want to thank you, on behalf of the community, for the admirable way in which you have gone about your duty in this trial. It has not been easy for you. The community is grateful for the service that you have rendered it, and I have the privilege of thanking you on behalf of the community.

I exempt each of you from serving on a jury for five years from today. That exemption means this: The Sheriff will be informed that each of you has been exempted from serving on a jury but, if you do not wish to take advantage of that exemption, you may still serve on a jury, if that is your wish. It leaves the choice up to you.

Ladies and gentlemen, with the thanks of the community then, I discharge you from your duties, and I ask you to go with the Sheriff's Officer. Some administrative arrangements will be made for you to be discharged. I wish you a very good afternoon.

JURY DISCHARGED AT 4.07PM

CROWN PROSECUTOR: The only other further matter for today is the certificate under section 128. My instructing solicitor has prepared a complete copy of Mr Folbigg's transcript and has highlighted, with a yellow sticker, where there is evidence that we feel is suitable for the order to be made by your Honour. I think, in order to

properly decide the matter, your Honour will have to look at the whole transcript, so we have included the whole lot.

HIS HONOUR: I will deal with that then on a later day.

CROWN PROSECUTOR: We have no objection to sentence going over until another day. I think it would be most appropriate.

HIS HONOUR: You do not wish to present any evidence this afternoon?

CROWN PROSECUTOR: No.

HIS HONOUR: Is it desired to fix a date, or do you want me to adjourn the matter to a date to be fixed?

ZAHRA: I ask your Honour to adjourn the matter to a date to be fixed, but we are happy for your Honour to list it for a specific date.

HIS HONOUR: I have some commitments of my own quite soon, which I need to work around. Then I will be away from Sydney for the whole of July, virtually.

ZAHRA: Would your Honour consider listing the matter for a Friday, probably towards the latter part of June?

CROWN PROSECUTOR: The last week is not suitable to me, but in about three weeks would be suitable to me.

HIS HONOUR: Thursday, 26 June 2003, would be suitable.

If the accused wishes to be assisted by Major Harmer, she may be assisted.

May I ask the officers of the Corrective Services Department, is there any difficulty if Major Harmer stays with the accused for the time being?

CORRECTIVE SERVICES OFFICER: Arrangements have been made for her to go down, if she wishes to. There is no problem at all with that.

HIS HONOUR: There is no more to be done today then. The accused may be taken down and is remanded in custody for sentence on Thursday, 26 June 2003.

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