Inquiry into Convictions of Kathleen Folbigg

Submissions on behalf of Kathleen Folbigg

PART E

Coincidence – Legal Considerations

1. The issue of the coincidence notice and coincidence evidence is an important one in two respects:

   (a) In assessing the cogency of the evidence at trial without it;

   (b) In assessing whether it would be admissible after the evidence at this Inquiry and, if admissible, whether that has any impact on:

      (i) Assessing the evidence as if in a joint trial or alternatively, would it have to be assessed as if in a separate trial for each charge and;

      (ii) The assessment of any doubt about the guilt of the accused.

Coincidence Folbigg

2. The notice served by the Crown that it intended to adduce coincidence evidence was reproduced by the Court of Criminal Appeal[1] as follows:

   "*Notice is given that the Prosecution presently intends to adduce 'coincidence' evidence pursuant to the coincidence rule in sub-section 98(1) of the Evidence Act 1995, ie. Evidence that 2 or more related events occurred to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.*

   1. The 'person' referred to in the proceeding (sic) paragraph is Kathleen Megan FOLBIGG.

   2. The substance of evidence of the occurrence of the related events is contained within the following documents which previously have been served upon you. The Crown alleges that the coincidence evidence establishes:

[1] *R v Folbigg* [2003] NSWCCA 17 at [10].

(i) that each of the accused's children died/had an ALTE (Apparent Life Threatening Event) in a similar way

(ii) that each of the accused's children died/had an ALTE from the same cause

(iii) that the accused killed/caused an ALTE to each of the four children by asphyxiating them with the intent to kill or do GRIEVOUS BODILY HARM to them.

(iv) that the accused's four children did not die from Sudden Infant Death Syndrome or any other illness, disease or syndrome."[2]

3. The admission of coincidence evidence needs to be considered in the light of the decision of the Court of Criminal Appeal in *R v Folbigg* [2003] NSWCCA 17. The Defence applied to have the counts relating to the alleged murders of Caleb, Sarah and Laura Folbigg heard separately from the counts relating to Patrick Folbigg. The initial application for a separate trial was dismissed by Wood CJ at CL on 29 November 2002. The Court of Criminal Appeal also dismissed that application.

4. On the hearing of the application for separate trials, the primary judge was presented with expert material. Importantly, for the purpose of these submissions, the primary judge had before him the following reports that contained opinions from the following experts who did not give evidence at trial:

(a) Professor Ouvrier (neurologist) who gave an opinion regarding Patrick. His report is to be found at Exh H Tab 68;

(b) Dr Ophoven (forensic pathologist) who gave an opinion of the cause of death of each child in the light of Meadow's Law. She opined the cause of

[2] It is clear that after the evidence at this Inquiry, the Crown's point 2(iv) is a claim without appropriate evidentiary foundation. Both Caleb and Sarah Folbigg fit into the category of SIDS, in circumstances where there is a very real possibility that Caleb died of laryngomalacia and Sarah died of displaced uvula or infection or as a result of bedsharing. Patrick Folbigg death can be found to have been the result of epilepsy, and Australia's leading forensic pathologists attribute Laura Folbigg's death to myocarditis or arrythmia triggered by myocarditis. This will be developed later in these submissions.

death for Patrick, Sarah and Laura was homicide.[3] In this Inquiry, the submission made by Counsel Assisting is that the opinions of Dr Ophoven should be rejected. Dr Ophoven's statement dated 6 October 2010 is to be found at Tab 63, page 220. The report is to be found in Exh H Tab 63.. (There was a second report dated 27 March 2003 (Exh H Tab 72) but this was not before Justice Wood. It was prepared later in relation to the IL-10 issue.)

2. Given the submission of Counsel Assisting, a critically important piece of evidence that was before Wood CJ and the Court of Appeal should be ignored. This being the case, this Inquiry should start from the assumption that the basis for refusing the joint trial and relying on coincidence evidence is already vulnerable.

5. Dr Ophoven purported to analyse the records provided by police and prepared a report on cause of death. While it is not to be relied upon at this Inquiry, in the light of the evidence at this Inquiry, it was likely to be highly misleading on the application for separate trials and the resistance to that application on the basis of coincidence. Putting aside the author's lack of attention to detail and the failure to consider laryngomalacia and Sarah's uvula as a potential cause of death, it relied on outmoded reasoning. Importantly it had the following statements contained within it:[4]

Summary Opinions

It is my opinion, to a reasonable degree of medical certainty, that the four Folbigg children were all the victims of homicidal assaults that resulted in their suffocation. The process of suffocation will take 4 to 5 minutes to complete. During the first 1.5 to 2 minutes, while they are still fully conscious, the child will fight aggressively for their life. In small infants, this typically does not result in any external signs or physical evidence.

Important facts in this case that lead to the conclusion of homicidal suffocation include the following:

[3] Exh H page 230.
[4] Exh H pages 271-272.

- *The autopsy fails to identify any known natural disease or disease process that could explain the sudden deaths of these infants. All four children were growing and developing normally for their age and circumstance. Despite Patrick's handicaps he was advancing well.*
- *The autopsy findings in these babies are all consistent with death by suffocation.*
- *The infants were all in the care of the same person at the time of their death, their mother, and she was the last person to see each of them alive.*
- *None of the deaths in this case can be attributed to SIDS [Sudden Infant Death syndrome]. It is well recognized (sic) that the SIDS process is not a hereditary problem and the statistical likelihood that 4 children could die from SIDS is in excess of 1 in a trillion.*
- *The diagnosis of SIDS requires that the following a complete investigation and autopsy no other cause of death is identified. Forensic standards of practice would not allow for consideration of a second diagnosis of SIDS after a second sudden death and by the time a third child has died, the death must be investigated as a homicide.*
- *Patrick's sudden, profound and irreversible brain damage is consistent with and diagnosed as a hypoxic episode. Hypoxia in this case is synonymous with asphyxia and unfortunately heralds the fatal event in retrospect. No natural disease or process has been identified to explain this event. In my opinion, the cause of Patrick's cardio-respiratory arrest is the same process that killed him and his siblings.*

The medical literature from the 70s and 80s that supported multiple cases of SIDS in one family have come under dispute because many if not all of the cases could have been homicides. There are no verified or substantiated cases of 3 or more SIDS deaths in one family. The current epidemiology of SIDS has been revised and there is no hereditary risk for the event. (Emphasis added.)

6. This opinion was highly influential and wrong in several respects that are the subject of evidence at this Inquiry. However, it formed the central basis of the Crown's coincidence reasoning. Had the evidence been such as it is at the Inquiry, it is highly unlikely that application for separate trials would have been refused. The coincidence notice itself will be dealt with later in these submissions.

7. We do not submit that the decision taken by the Court of Criminal Appeal was wrong on the information it had before it. The submissions are brought on the basis of how the trial unfolded and the evidence heard by the Inquiry that has undermined many of the central Crown postulates presented on that application. On this basis, it is submitted that, had the information that is now

available been before the Court on the application for separate trials, the charges would have been separated into separate trials. As a consequence with the assistance of hindsight, Kathleen Folbigg did not have a fair trial and a miscarriage of justice occurred. This is particularly the case because the Crown had no evidence of smothering. If there had been evidence of smothering or other cause of homicidal death, then the coincidence evidence could have been used to:

(a) To rebut a defence of innocent association; or

(b) To establish system; or

(c) Identify the offender as Ms Folbigg.

General Principles – Separate Trials

8. There is no limit at common law to the number of counts that may be included in an indictment.[5] Section 20 of the *Criminal Procedure Act 1986* governs the presentation and amendment of an indictment Section 21 of the *Act* allows for the amendment of an indictment whether to sever counts or for separate trials for co-accused. In *Phillips v The Queen*, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ, confirmed the need for a stringent test for admissibility if multiple victims are involved. They stated, *inter alia*:

> *It can be appreciated that separate trials of the several complaints by different complainants adds to the cost of the prosecutions and the defence of the accused. However, the dangers, in the trial of the appellant, of admitting the evidence relevant to all of the several allegations against him, was very great.*[6]

9. The very great danger to an accused, as highlight in *Phillips*, is to be ameliorated by the requirement that tendency and coincidence needs to be admissible before trials can be joined. The difficulty arises where the evidence considered before trial is significantly different to that brought at trial and

[5] *R v Quinn* (1991) 55 A Crim R 435.
[6] [2006] HCA 4, [78].

where evidence is later found that in inconsistent with a finding of admissibility.

10. The New South Wales Bench Book outlines the directions that need to be given to the jury. It states, *inter alia*:

> *That evidence is before you because sometimes there may be such a strong similarity between two different acts and the circumstances in which they occur that a jury would be satisfied that the person who did one act (or set of acts) must have done the other/s. That is to say, there is such a significant similarity between the acts, and the circumstances in which they occurred, that it is highly improbably that the events occurred simply by chance, that is, by coincidence. The improbability of two or more events occurring by chance, or coincidently, may lead to a conclusion that an accused person committed the act (or had the state of mind) that is the subject of the charges.*[7]

11. The act(s) the subject of the charge(s) was murder. The murders were said to have been committed by smothering. Evidence of smothering needed to be firmly established by the Crown to the exclusion of a reasonably available natural cause. The absence of evidence of smothering was not a sound basis to introduce the coincidence evidence. Put another way the postulate of murder needed support before it could be used to introduce coincidence evidence. That support cannot properly be found in evidence which permits impermissible speculation about the cause of death even on the balance of probabilities.[8]

12. The first consideration of the Court of Criminal Appeal was at paragraph 8 where it listed the diary entries considered by the primary judge.[9] The selection considered by the primary judge were those that the Crown considered the most inculpatory. There was no context evidence before the primary judge or the Court of Appeal. Reliance was placed on those diary

[7] https://www.judcom.nsw.gov.au/publications/benchbks/criminal/tendency_and_coincidence_evidence.html
[8] *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152; *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 at [8]; *Bendix Mintex Pty Ltd v Baines* (1997) 42 NSWLR 307 at [90].
[9] The diary entries in their entirety are addressed elsewhere in these submissions.

entries as part of the circumstantial case, without which coincidence evidence would not have been admissible, because most of the points of coincidence were without striking similarity when considered in the context of a family environment. The points of coincidence did not fall within any easily identifiable categories as described in leading cases. Furthermore, if the cases were separated any relevant diary entries could have been considered in each case.

13. At trial, the Crown in the end was prepared to not even rely on the diaries to prove the case, he relied on medical evidence and the coincidence evidence. He stated in his closing address:

> *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. (T 13/5/2003, 1359.35)*

14. The Court of Criminal Appeal considered the evidence of a number of medical witnesses (Ophoven and Ouvrier were not called at trial), and also some experts who relied on the now discredited Meadow's Law. In giving those opinions, some of those experts also relied on the presence of haemosiderin in the lungs of Caleb Folbigg as raising the possibility of imposed airways obstruction [9]. In fact, as the evidence haemosiderin is a finding that is not unusual in SIDS cases and it is non-specific for smothering.

15. In ordering a joint trial, the primary judge and the Court of Appeal relied on untested medical evidence, a significant portion of which was not used at trial. The evidence adduced at this Inquiry undermines the use of coincidence evidence to allow the joining of the trials.

16. An example of the Court of Criminal Appeal relying on the evidence of witnesses not called at trial is when it referred to the evidence of Dr Ophoven. At [9] the following extract of the primary judge's decision is included:

Dr Ophoven, a paediatric forensic pathologist said, in her report:

"*It is my opinion to a reasonable degree of medical certainty* [an expression which she equated to proof beyond reasonable doubt] *that Caleb Folbigg did not die of the condition known as Sudden Infant Death Syndrome. It is also my opinion that Caleb's death is most consistent with death by suffocation*."

17. Dr Ophoven provided no reasonable basis for opinion did not adequately disclose the reasons for her opinion in her report and is a proponent of (the now discredited) Meadow's Law. Her evidence was not deployed at the trial. There is in fact no medical evidence that Caleb Folbigg was suffocated.

18. The primary judge's reasons were also set out at [11] as:

> *62 The material relied upon by the Crown as coincidence evidence is that which relates to similarities in the circumstances concerning the death or ALTE of each child, as identified in a chart prepared by it, namely that:*
>
> *(i) each child was under 2 years of age at the time of death or ALTE (and it may be noted, additionally, that three such deaths and one ALTE occurred in the first year of life);*
>
> *(ii) each death occurred at a time which is unusual for a SIDS event;*
>
> *(iii) each death occurred in the child's own cot or bed;*
>
> *(iv) each death or ALTE occurred during a sleep period;*
>
> *(v) each child was last seen alive by the accused;*
>
> *(vi) each child was found not breathing by the accused, and in relation to those who died in the night, she claimed to have observed from a distance, and in the dark, that they had stopped breathing;*
>
> *(vii) only the accused was awake or present at the time when each child was found dead or not breathing;*

(viii) there was, in each case, a short interval between the time when the child was last claimed to have been seen alive by the accused, and the time when he or she was found lifeless or not breathing properly;

(ix) in relation to the children who died in their cots or had an ALTE in the night, the accused had got up to go to the toilet, and in some cases had returned to bed, before getting up again and sounding the alarm;

(x) the accused had failed to pick up or attempt to resuscitate any of the children after the discovery of his or her death or cessation of breathing (subject to her claim to have done so in relation to Laura);

(xi) when each child was found he or she was warm to the touch;

(xii) there were no signs of any injury found on any child;

(xiii) no major illness preceded the death or the ALTE in any of the cases;

(xiv) each of Caleb, Sarah and Laura gave every appearance of being normal and healthy before his or her death, as had Patrick before his ALTE;

(xv) the sleep studies for each child were normal (save for Caleb, who by reason of being the first born was not the subject of any such study);

(xvi) the tests for any inherited and/or biochemical disorder or metabolic abnormality were negative in each case;

(xvii) the death or ALTE in each case, arose from an hypoxic event;

(xviii) the sleep monitors, which had been provided following the earlier deaths and ALTE, were not in use at the time of death in the case of Sarah and Laura; and

(xix) the accused had shown acute irritation in relation to each child, or appeared to have been in a condition of stress, before the death or ALTE.

19. While trying to avoid overlap with later submissions relating to the manner in which coincidence evidence was adduced at trial, it is appropriate to point out some of the obvious problems with the list of coincidences provided above, especially in the light of the evidence at this Inquiry:

(a) Point (i) is a matter of fact and requires Meadow's Law for coincidence support. This theory has now been discredited;

(b) Point (ii) is factually wrong for several reasons;

(i) Two of the children were not SIDS category deaths;

(ii) There was evidence that cortisol levels drop at night, which can trigger an inflammatory response and could cause death at night in the face of infection. Sarah had infection at the time of her death;

(iii) There were alterative natural causes of death for each of the children. These submissions are addressed elsewhere and are adopted for the purpose of this submission;

(c) Points (iii) and (iv) SIDS deaths occur during sleep and therefore in at least two of the deaths it was highly likely that they would die where they slept. It is not a probative point;

(b) Point (v), the mother was the primary carer in a traditionally organised family. This is not a probative point. Further, in the event of the mother killing four children on a repetitive and deliberate basis, the likelihood of her finding each child and not having her husband find at least one of them is odd;

(c) Point (vi) does not apply to Laura Folbigg. Laura died during the day;

(d) Point (vii), the Crown case was that Craig Folbigg was a heavy sleeper. That does not mean he was asleep when Ms Folbigg was asleep;

(e) Point (viii) The finding of the children could be expected by the primary carer. The basis of this submission with respect to all four children is based on an assessment of body temperature, which has now been discredited at this Inquiry. With respect to Laura, it is based on the identification of agonal rhythm. This has been dealt with elsewhere in these submissions and those submissions are repeated for the purpose of this submission;

(f) Point (ix) not applicable in the case of Laura Folbigg;

(g) Point (x) not applicable in the case of Laura Folbigg. Ms Folbigg commenced CPR and this was observed by the ambulance officers who arrived on the scene. In this context, the point of coincidence is simply unfair and unfairly prejudicial;

(h) Point (xi) (warmth of bodies) This is a point which has been discredited by evidence at this Inquiry dealt with in detail elsewhere in these submissions. It is not a relevant or probative point and should never have been included;

(i) Point (xii) The fact that there were no injuries on the children points away from the involvement of the mother in their deaths who was postulated to be in a blind rage at the time of the killings. In the case of Laura Folbigg, if smothered as alleged, the likelihood was that there should have been an injury of one form or another, or prior evidence of abuse found in at least one of the children.[10] This is not a probative point for coincidence;

(j) Point (xiii) and (xiv) This demonstrates the confusion by the Crown with respect to the cause of sudden death. If there had been a prodrome of serious illness, then the death would neither be "sudden" nor would it be "unexpected". There is no requirement for a major illness in a SIDS category case, otherwise it would probably not be a SIDS death. Second, evidence at this Inquiry demonstrated there were identified medical

[10] T 246.30-T 249.24.

conditions that were capable of causing death – laryngomalacia in Caleb, encephalopathy in Patrick, displaced uvula or laryngomalacia or infection in Sarah, myocarditis in Laura. This was not recognised at trial. In the face of the evidence adduced at this Inquiry, the point put forward by the Crown would be considered wrong or misleading or, at best, incomplete. As such, it could not ground a point of coincidence either for the purpose of a joint trial or the adducing of coincidence evidence;

(k) Point (xv) The sleep studies reflect the theory at the time that SIDS was caused by some respiratory anomaly that could be identified and treated. The evidence at this Inquiry demonstrated that scientific theory has advanced since that time and that respiration is only one possible factor that can trigger sudden death in infancy.[11] As such, normal sleep results do not link the children in a coincidence way and are not applicable to Caleb Folbigg;

(l) Point (xvi) is not a coincidence point. It suggests a metabolic, inherited or biochemical disorder needed to be found when all relevant test still have not been done, and all those available at the time of trial were not done. The point is suggestive of a reversal of the onus of proof. Evidence at this Inquiry has established that in about 30 per cent of sudden cardiac deaths, no relevant genetic cause can be identified. In 70 per cent of children with neurological disorders, no genetic cause can be identified.[12] Fifty per cent of SIDS victims have a minor infection in the days before their death. At this inquiry, there was a dispute about the pathogenicity of monogenetic causes and no consideration of digenetic causes or the interrelationship between genes and exogenous cause (including infection). This point of coincidence could not have been made on the evidence adduced at this Inquiry to justify a joint trial or the use of coincidence reasoning;

[11] See Exh 4 Byard's book
[12] Ryan T 583.47-T 584.08, T 606.42, Fahey T 606.46-T 607.14.

(m) Point (xviii) are not relevant to Caleb and Patrick and on the evidence available not probative in respect of Sarah and Laura;

(n) Point (xix) acute irritation with the children is an inaccurate description and is not a relevant coincidence point. Furthermore, it could not possibly apply to Caleb Folbigg or to Patrick Folbigg.

20. It is striking that the points raised by the Crown are significantly undermined after the evidence given at this Inquiry or could not relate to all the children. Where the point could not relate to a child it should not have been merged through the process of a joint trial to allow its consideration.

21. The Court of Criminal Appeal further noted that the primary judge had:

> *At par.[81] of the judgment, the primary judge accepted the proposition that co-incidence evidence must be excluded unless, taken in conjunction with the other evidence, its only rational explanation was the inculpation of the accused in the offence in question, having referred inter alia to Pfennig v. The Queen (1995) 182 CLR 461, R v. WRC [2002] NSWCCA 210 and R v. Joiner [2002] NSWCCA 354.*

22. The acceptance by the primary judge that co-incidence evidence must be excluded unless, taken with other evidence it is the only rational explanation is correct and in the light of the medical evidence there are rational explanations for the deaths that are not subsumed by other evidence.

23. This test could not have been met by the Crown on the evidence adduce at this Inquiry.

24. Further, even if the diary evidence is taken into account, the few words that are used to inculpate Kathleen Folbigg are not confessions. At best, there are entries from which inferences can be drawn in the light of other evidence. Moreover, because there are clear causes of death in Patrick (encephalopathy) and Laura Folbigg's (myocarditis) cases and clearly available alternative natural causes of death identified in Caleb and Sarah the diary entries are not

properly admissible, they are no longer relevant, because the reasonable natural cause of death cannot be excluded.[13]

25. For completeness the listing of the primary judge's findings should be included. They are found at [14] of the Court of Criminal Appeal decision, as follows:

> *106 When considered in the context of the remaining circumstantial evidence, and particularly the diary extracts, which I have highlighted, it is my view that the requirements of ss 98 and 101(2), as noted above, have been met in the present case.*
>
> *107 What is critical, it seems to me, is that the medical evidence is part of a circumstantial case, in which the jury might properly take into account the following:*
>
> *(a) The infrequent incidence of SIDS;*
>
> *(b) The rarity of repeat incidents of SIDS and of unexplained infant deaths or ALTE's (sic) within one family;*
>
> *(c) The absence of any metabolic abnormality in any of the children, let alone a common abnormality;*
>
> *(d) The fact that each was a healthy child and that such physical or medical conditions, as were observed post mortem, were unlikely causes of death;*
>
> *(e) The absence of any sleeping abnormality in the three children who were tested and/or monitored;*
>
> *(f) The fact that monitoring was provided but then ceased in relation to Sarah and Laura – a matter of some importance in view of the diary entry of 25 August 1997;*
>
> *(g) The fact that two of the children were found by the accused within the very brief window between a child being found moribund and dead;*

[13] The price the Crown pays in consolidating the charges for each child into a joint trial is that if one of the deaths is capable of a medical explanation, then all of the charges should be referred to the Court of Appeal.

(h) *The fact that all children were found by the accused while they were still warm, even though in four of the five relevant instances this occurred at night;*

(i) *The unexplained absence of Sarah and the accused at about 1 am, shortly before she was found dead;*

(j) *The unusual behaviour of the accused in getting up from bed, leaving the room, returning, and then getting up again only to discover, in the case of some of the children, that they were moribund or lifeless;*

(k) *The fact that she claimed to have observed, in the dark and from some distance away, that some of them were not breathing;*

(l) *The stress and anger which the accused had expressed toward the children;*

(m) *The fact that the accused would not nurse or endeavour to resuscitate the children when they were found; and*

(n) *The diary entries including, in particular, the sections which I have emphasised in the extracts set out earlier in these reasons, so far as they may reveal an absence of love for, or a bond with, the children, an acceptance by the accused of her hand in their deaths, her black moods and stress, her fears as to the way she behaved when stressed, and any resentment which she may have held in relation to the curtailment of her outside activities by reason of the need to care for Laura.*

26. The primary judge's listing is basically an acceptance of the Crown points and with it, the deficiencies the Crown case and evidence at trial that has been demonstrated at this Inquiry. These submissions equally pertain to those reasons.

27. Finally, the Court noted at [15] the primary judge's reasoning about tendency evidence:

The primary judge then considered whether the evidence on each count was admissible in relation to other counts as tendency and/or relationship evidence. He noted that its use as tendency evidence, though not as co-incidence evidence, would pre-suppose that a decision was first made that the applicant was responsible for one of the deaths of ALTE, and then that that decision would be relied on as supporting a decision that she was responsible for other deaths. The primary judge concluded that evidence of the applicant's conduct and attitude with and towards each child would be admitted into evidence as tendency evidence in relation to each count.

28. The fact that the Court of Criminal Appeal approved the use of tendency and coincidence evidence is highly significant in the context of the trial procedure. The purpose of allowing the evidence, as noted above, was to avoid the separation of the trials. However, after the evidence adduced at this Inquiry, its abundantly clear the joint trial would not have been ordered. This demonstrates the fundamental procedural unfairness inflicted upon Ms Folbigg that was caused by the deficient medical evidence on this application and at the trial. This procedural unfairness raises a definite doubt regarding the conviction of Ms Folbigg and her guilt. Findings should be made to this effect.

29. If each case was considered separately the chance of obtaining a conviction was remote and the likelihood of a directed verdict high. It is submitted this Inquiry needs to proceed on the basis of separate trials.

Coincidence and Tendency Evidence

30. The *Evidence Act 1995* replaced 'similar fact' evidence with the tendency rule and the coincidence rule. These rules, like similar fact evidence, are exceptions to the general principle that evidence of other alleged criminal offending by an accused cannot be introduced in a trial. The case of *Makin v The Attorney General for New South Wales*[14] embodies the approach. Lord Herchell LC stated the principle of exclusion.

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person

[14] [1894] AC 57.

likely from his criminal conduct or character to have committed the offence for which he is being tried.[15]

31. He then stated the exception:

On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[16]

Statutory Provisions

32. Section 97 of the *Evidence Act 1995* deals with tendency evidence. It states:

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

[15] Ibid 65.
[16] Ibid.

Note: *The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.*

33. Section 98 of the *Evidence Act* deals with the coincidence rule. It provides:

> ***98 The coincidence rule***
>
> *(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:*
>
> *(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and*
>
> *(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.*
>
> ***Note:*** *One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.*
>
> *(2) Subsection (1) (a) does not apply if:*
>
> *(a) the evidence is adduced in accordance with any directions made by the court under section 100, or*
>
> *(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.*
>
> ***Note:*** *Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.*

34. Both the Court of Criminal Appeal and the primary judge considered that the evidence had significant probative value pursuant to sections 97 and 98. This is unsurprising given the evidence adduced before them. The evidence given at this Inquiry has demonstrated the confusion in the Crown case and the

deficiencies in the scientific evidence and has substantially eroded the basis for the admission of that evidence. Findings should be made to this effect.

35. The use of coincidence evidence was highly prejudicial because it allowed according to the Crown Prosecutor the evidence in each case to be joined and considered as one. It permitted the jury to address the changes *in globo* rather than as individual counts for which a finding must be made on each charge, beyond reasonable doubt. It allowed the blurring of coincidence and tendency which can give rise to significant prejudice.

36. The distinction between tendency and coincidence evidence can in practice be blurred. In *R v Nassif,*[17] Simpson J describes how they can overlap, but that there will be cases where tendency evidence and coincidence evidence are not interlinked. She stated:

> *Tendency and coincidence evidence are frequently referred to in the same breath, as though they were conjoined twins. However, they are not necessarily so interlinked, and there will be cases where evidence of tendency will be admissible when evidence of coincidence is not, and vice versa. In some cases, the sections may be used interdependently, or as the obverse of one another. For example, in a case such as the present, the Crown may wish to proceed by arguing that, if a jury found the applicant guilty of any one count, they could use his guilt of that offence in considering his guilt of any other offence, as evidence of his tendency to commit such crimes: and successive findings of guilt as accumulating or strengthening evidence of such a tendency. That would be true tendency reasoning. The more numerous the claims of tendency evidence, and the more specific, the stronger the probative value, and thus the more likely the admission of the evidence.*
>
> *Alternatively, the Crown might argue, in terms of s98, that the applicant was guilty of all offences because of the improbability of the events occurring coincidentally. In this respect the Crown would be entitled, under subs(2), to point to the similarities of the events, and the similarities of the circumstances in which they occurred. Again, the more numerous the items of similarity, and the more precise, the stronger the inference of improbability and the more likely the admission of the evidence.*[18]

37. The variety of tendency and coincidence evidence scenarios is considerable. So far as a distinction can be drawn between the types of evidence, it should be

[17] [2004] NSWCCA 433.
[18] Ibid [51], [52].

borne in mind that coincidence evidence requires two or more events. In the case of Laura and Caleb Folbigg the finding of two or more events of coincidence, other than that Kathleen Folbigg was the mother and primary carer is not possible.

38. As noted in *R v Nassif* the '*more numerous the items of similarity, and the more precise, the stronger the inference of improbability and the more likely the admission of the evidence*'. This is particularly important in the Kathleen Folbigg case because the points of similarity have been expunged in some parts and significantly eroded in other as a result of evidence received at the Inquiry. The other points are simply pedestrian and do not have any significant probative value.

Examples of Tendency and Coincidence Evidence

39. These situations can overlap, for example, an accused may have engaged in a type of behaviour in previous offending that shows a system; that is, behaviour that is similar to that of the offender in the case being determined. This can then be used to prove the identity of the offender. In the Folbigg case coincidence evidence was being used to rebut a defence of innocent association. There was in fact an innocent association because she was the mother.

40. The identification of cogent reasons for the introduction of the evidence is essential, otherwise it may fall under the category of bad character, or simply provide evidence of a common trait.

Admissibility of Tendency and Coincidence Evidence

Relevance

41. When considering the admissibility of tendency or coincidence evidence, the first consideration is whether the evidence is relevant. Section 55 of the *Evidence Act 1995* states:

55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness, or

(b) the admissibility of other evidence, or

(c) a failure to adduce evidence.

42. Relevance is a fundamental requirement for admissibility of evidence as made clear in s 56 of the *Evidence Act,* which provides:

56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

43. In *Smith v R,*[19] Gleeson CJ, stresses the foundational place of relevance when considering the admissibility of evidence. In this regard he notes that if evidence is not relevant, no question of admissibility arises, and that it is fundamentally important to identify the ultimate issues in the trial by consideration of the facts which constitute the elements of the offence.

44. The trial judge when determining the threshold question of relevance does not consider the truthfulness, the weight a jury might give the evidence or its reliability. However, as found by French CJ, Kiefel J, Bell J and Keane J, in

[19] [2001] HCA 50; 206 CLR 650.

IMM v The Queen[20] if the evidence is preposterous, the probability that it could rationally affect a fact in issue would be nil:

> *There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.*[21]

45. The evidence only needs slight probative value to be admissible,[22] and how the evidence might be used is to be taken at its highest.[23]

46. If the court finds that the evidence is relevant, the next requirement is to determine if it has significant probative value. In Kathleen Folbigg's case it is not being suggested that much of the evidence, other than speculative Meadows Law type evidence, is not relevant in each case.

Significant Probative Value sections 97 and 98

47. Sections 97(b) and 98(b) require, for tendency and coincidence evidence to be admitted that '*the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value*'.

48. In *R v Fletcher*[24] Simpson J, for the majority, outlined the steps that should be taken when reaching a decision to admit or reject tendency evidence.[25]

49. When referring to Hunt CJ at CL *in Lockyer* as to the meaning of '*significant probative value*', her Honour is simply agreeing that '*significant probative value*' means more than '*relevance*' and further that '*substantial*' means more that '*significant*'. Her Honour's reference in (ii) above should not be taken to mean that the determination of admissibility should be left to the end of a trial rather than determined by *voir dire*.

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[20] [2016] HCA 14.
[21] Ibid [39].
[22] Ibid [40]; see also *Festa v The Queen* (2001) 208 CLR 593, 599 [14]; [2001] HCA 72.
[23] Ibid [44].
[24] [2005] NSWCCA 338; 156 A Crim R 308.
[25] Ibid [33].

50. The definition of probative value is found in the Dictionary of the *Evidence Act 1995*.

> ***"probative value"*** *of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.*

51. When determining the probative value of evidence, the court in *R v Shamouil*[26] took a restrictive approach to the factors that could be taken into account when determining probative value, largely removing from consideration issues of weight, reliability and credibility. The coincidence evidence in the Folbigg case did not rely of witness evidence but primarily her presence and propositions.

52. The cases require that a judge, when considering probative value, should take the Crown case at its highest: see also *R v Carusi*.[27] A problem with a strict application of this approach is that credibility can be inextricably entwined as noted by Simpson J, in *R v Cook*:

> *Whatever the prevailing regime was in South Australia in 1980, I am satisfied that it is not the role of a trial judge in NSW, under the Evidence Act, to make a finding of fact about the actual reasons for flight where such evidence is given on behalf of the Crown. That remains the province of the jury. The role of the judge in NSW, at least post-1995, is merely to determine the relative probative value against the danger of unfair prejudice that might result. In saying this, I do not mean to lay down a blanket rule that, in considering evidence on a voir dire in which the issue is the admissibility of evidence having regard to s137, there is never any room for findings concerning credibility.* ***There will be occasions when an assessment of the credibility of the evidence will be inextricably entwined with the balancing process. That means that particular caution must be exercised to ensure that the balancing exercise is not confused with the assessment of credibility, a task committed to the jury.*** *There may, for example, be occasions on which the accused's response is so preposterous as to give rise to the conclusion that it could be accepted by no reasonable jury. The credibility exercise, in those circumstances, is to determine whether the evidence given by (or on behalf of) the accused is capable of belief by the jury. If it is, then its prejudicial effect must be considered. If it is not, then the balancing exercise may well result in an answer favourable to the Crown. That is essentially because any prejudice arising to an accused from putting a preposterous explanation to the jury would not be unfair prejudice.*[28] *(emphasis added)*

[26] [2006] NSWCCA 112.
[27] (1997) 92 A Crim R 52, 66, [43].
[28] [2004] NSWCCA 52.

53. Consideration of credibility in the Folbigg case arises when considering the significant probative value of the alleged irritability of Kathleen Folbigg towards her children. The probative of evidence of Craig Folbigg and Lea Brown, so far as it relates to coincidence and tendency evidence, is both limited and lacking credibility for the purpose of admitting highly prejudicial evidence.

54. The approach to consideration of probative value was considered by Bathurst CJ, Allsop P, Whealy JA, McClellan CJ at CL and McCallum J in *DSJ v R; NS v R* Whealy JA, with others agreeing followed previous decisions on how significant probative value should be considered. He stated, *inter alia*:

The trial Judge considering probative value has to make his own estimate or assessment of probative value predicated upon the assumption that the jury will accept the evidence. See also Lodhi v R [2007] NSWCCA 360 at [174]-[177]; R v Mundine [2008] NSWCCA 55 at [33].[29]

55. The approach in *Lockyer* appears to be also confirmed in the High Court Case of *Stubley v Western Australia* where Gummow, Crennan, Kiefel and Bell JJ provided the following assistance for determining significant probative value:

Before evidence can have significant probative value it must be such as 'could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent: ie more is required than mere ... relevance': Zaknic Pty Ltd v Svelte Corporation Pty Ltd. Heydon suggests that significant probative value is something more than mere relevance but something less than a 'substantial' degree of relevance and that it is a probative value which is 'important' or 'of consequence'. He makes the point that the significance of the probative value of tendency evidence must depend on the nature of the facts in issue to which it is relevant and the significance or importance which that evidence may have in establishing the fact". (citations omitted)[30]

56. It is important not to confuse consideration of significant probative value with consideration of substantial probative value. Although in *Stubley's case* the

[29] [2012] NSWCCA 9, 56-60.
[30] [2011] HCA 7; (2011) 85 ALJR 435, 11.

High Court found that the evidence admitted at trial did not have significant probative value.

57. If there was any doubt about how significant probative value is to be determined it appears to have been removed in the High Court case of *IMM v The Queen* where the majority found that: based on the assumption that the evidence is accepted 'the determination of probative value is a matter for the judge';[31] the '*evidence must be influential in the context of fact-finding*';[32] the evidence is to be taken at its highest;[33] and whether the evidence is credible or reliable are not considerations.[34] None of the coincidence points raised by the Crown in the Folbigg case could reasonably be influential in fact finding in regard to cause of death, even if the evidence is taken at its highest.

58. In *Hughes v The Queen*,[35] a sexual assault case involving the admission of tendency evidence that showed the accused as having a sexual interest in underage girls and that he used his relationships to gain access to them to engage in sexual activities, the majority Kiefel CJ, Bell, Keane and Edelman JJ, found that similarity in conduct will often be useful in determining whether tendency evidence is admissible, particularly in cases where identity is an issue; but that s 97(1) does not require similarity.

Substantial Probative Value – s 101 - The Threshold Test

59. Where tendency or coincidence is sought to be introduced in criminal proceedings, the evidence is not admissible unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused. Section 101 of the *Evidence Act 1995* states:

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

[31] [2016] HCA 14, [45].
[32] Ibid [46].
[33] Ibid [47]
[34] Ibid [48].
[35] [2017] HCA 20, [39].

(1) *This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.*

(2) *Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.*

(3) *This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.*

(4) *This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence* evidence adduced by the defendant.

60. The wording of sub-sections 101(3) and (4) removes the requirement for the evidence to substantially outweigh its prejudicial effect if it is introduced by a defendant.

61. The "no other rational explanation" test used no longer applies. In *R v Ellis* the New South Wales Court of Criminal Appeal, comprising five judges, found that the common law test that there be 'no rational explanation' before the evidence could be admitted, no longer applied. They found that s 101(2) of the *Evidence Act 1995* set the required test. Spigelman CJ, stated:

As finally enacted in the Evidence Acts of both the Commonwealth and New South Wales, there are a number of indications in the regime for tendency and coincidence evidence, found in Pt 3.6, that the Parliaments intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously applicable.

. . . .

These various provisions indicate an overall intention to cover the relevant field in a comprehensive manner.

Of particular importance, however, is the formulation adopted in s101(2) requiring the probative value of tendency or coincidence evidence to "substantially outweigh" its prejudicial effect. The use of the word "substantially" is a legislative formulation, not derived from prior case law. Most significantly, it introduces a legislative formulation into the very territory which the majority judgment in Pfennig said was the function of the formulation adopted in that case. In the overall context of the significant changes made to the pre-existing common law to which I have referred above, I find this last consideration determinative.[36]

62. The court found that the use of the 'no rational view' test rather than applying the words of the statute, 'substantially outweigh' could result in a trial judge not giving sufficient consideration to the actual prejudice in the case, and with the requirement for high probative value. Spigelman CJ stated:

The continued application of a "no rational view" test is not, in my opinion, consistent with a statutory test which expressly requires a balancing process and tilts that process in the same direction as that which the joint judgment in Pfennig suggested, but by the use of different terminology, i.e. "substantially".

The reasoning in Pfennig applied the "no rational explanation" test to a common law principle that probative value outweighs prejudicial effect. That reasoning is, in my opinion, inapplicable to a statutory test that probative value substantially outweighs prejudicial effect.

. . . .

The words "substantially outweigh" in a statute cannot, in my opinion, be construed to have the meaning which the majority in Pfennig determined was the way in which the common law balancing exercise should be conducted. The "no rational explanation" test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.

Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case. It requires the Court to make a judgment, rather than to exercise a discretion. (See R v Blick [2000] NSWCCA 61; (2000) 111 A Crim R 326 at [20] per Sheller JA; F Bennion "Distinguishing Judgment and Discretion" [2000] Public Law 368.) The "no rational explanation" test focuses on one only of the two matters to be balanced – by requiring a high test of probative value – thereby averting any balancing process. I am unable to construe s101(2) to that effect.[37]

[36] [2003] NSWCCA 319, [74], [83], [84].
[37] Ibid [88], [89], [94], [95].

63. The situation in New South Wales, because of the finding in *Ellis* is that the 'no other rational explanation' test is to be replaced by the court considering 'the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh'. The decision in *Ellis* does not remove consideration of 'no other rational explanation', if it is a factor, but consideration of admissibility is not restricted to the test.

64. *Ellis* was considered by the High Court and the application for special leave to appeal was refused with Gleeson CJ in his final comment stating: 'We would add that we agree with the decision of Chief Justice Spigelman on the construction of the *Evidence Act* 1995 (NSW).[38]

65. Simpson J, in *R v Fletcher* acknowledged that the common law position had changed since *Ellis*, but that the courts could be guided by approach adopted in *Hoch v The Queen* for the purpose determining the significant probative value of evidence. In *Hoch*, emphasis was placed on the need for striking similarities, unusual features, underlying unity, system or pattern for the evidence to have significant probative value. Simpson J stated:

> *But this is where caution needs to be exercised. While it may be tempting to think, for example, that evidence of a sexual attraction to male adolescents has probative value in a case where the allegations are, as here, of sexual misconduct with a male adolescent, an examination must be made of the nature of the sexual misconduct alleged and the degree to which it has similarities with the tendency evidence proffered. There will be cases where the similarities are so overwhelming as to amount to what, in pre-Evidence Act days was called "similar fact" evidence, showing "a striking similarity" between the acts alleged; and there will be cases where the similarities are of so little moment as to render the evidence probative of nothing. And there will be cases where reasonable minds may differ as to the extent to which proof of one fact or circumstance may rationally affect the assessment of the probability of the existence of another fact.*
>
> . . . .
>
> *It is true that in the determination of criminal charges, for policy reasons, the common law steadfastly resisted, except in rare instances, the use of evidence of criminal acts other than the acts the subject of the charges. For example, in Hoch v The Queen [1988] HCA 50; 165 CLR 292, the majority of the High Court held:*

[38] *Ellis v The Queen* [2004] HCA Trans 488.

> *"Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force: ... that strength lies in the fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution." (pp 294 – 295)*

While the concluding words of that passage are not entirely apposite to the present issue (being more apposite to a consideration of what is now called coincidence evidence), the substance of the passage is. The strength of the evidence tendered by the prosecution as tendency evidence lay in its capacity to establish the objective probability of the truth of the complainant's account of the appellant's conduct. The evidence of GG was capable of lending support to the allegations made by the complainant by reason of striking similarities, underlying unity, system or pattern. Of course, decisions such as Hoch no longer govern the admissibility of evidence of tendency (see Ellis). But that does not necessarily render cases such as Hoch irrelevant. There is no reason why the reasoning that led the High Court to accept the admissibility of similar fact evidence in appropriate cases before the enactment of the Evidence Act should not guide the reasoning process in the evaluation of whether tendered evidence is capable of having, or would have, significant probative value.[39]

66. Interpolating for a moment, in Folbigg's case there is nothing striking about the actions of the mother. There are no unusual patterns. Kathleen Folbigg led a suburban life with all its travails, the search for more should have led nowhere.

67. The Crown Prosecutor did not significantly add to what the primary judge and the Court of Criminal Appeal considered but a careful reading of his addresses to the jury is necessary to confirm the point. However, his addresses are riddled with misleading comments.

[39] [2005] NSWCCA 338, [50], [59], [60]; 156 A Crim R 308; see also *R v Milton* [2004] NSWCCA 195 and *R v Harker* [2004] NSWCCA 427, Howie J., '52 Clearly the simple fact, if it were the fact, that the respondent was indecently assaulting DE or engaging in homosexual intercourse with him would not be admissible as proof that he was engaged in similar conduct with the complainant. As Hidden J observed in *R v Milton* [2004] NSWCCA 195: "31 True it is that evidence that the appellant had sexual contact with two boys in their early teens would not, of itself, be sufficient. However, that is not the only common thread in their evidence. What emerges from the testimony of each of them is an attempt by the appellant to foster a relationship with them conducive to sexual contact despite their youth and immaturity. This arises not just from his employing each of them. It is to be found in his encouraging them to drink and use drugs in a manner entirely inappropriate for boys of their age, and in his efforts, by word and deed, to loosen their natural sexual inhibitions. It is also to be noted that, on the account of both complainants, he was prepared to impose his will upon them in the teeth of their resistance."

68. As an encore the Crown Prosecutor added that similar facts could be applied to the deaths of just Sarah and Laura.

> *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.*
>
> *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.*[40] *So those are similarities that are not in all five events but just in several of them*.[41]

69. When linked with the use of Meadows Law, which the Crown Prosecutor did most effectively throughout the trial and in his final address,[42] coincidence and tendency evidence took on a persuasive quality that put it into the highly prejudicial category well beyond what has been acknowledged by the High Court,[43] and he fell foul of s 101. However, after the evidence at this Inquiry, the coincidence has been substantially undermined, such that the degree of prejudice has escalated significantly.

70. The Crown Prosecutor promoted striking similarity to support the use of coincidence evidence. However, his approach was not supported by complainant evidence. This further weakens the admissibility of coincidence and tendency evidence.

Coincidence Notice at Trial

71. The coincidence notice was MFI 43 and is to be found at Exh AR (whole exhibit).

72. The coincidence evidence adduced before the jury and the manner in which it was raised by the Crown Prosecutor was highly potent. We submit these are

[40] This submission does not support coincidence reasoning and should not have been used.
[41] T 13/5/2003, 1365.55)
[42] T 13/5/2003.30.
[43] *Pfennig v R*, [1995] HCA 7, [60]-[62]; (1995) 182 CLR 461; (1995) 127 ALR 99; (1995) 69 ALJR 147, per Mason CJ, Deane and Dawson JJ.

two issues arising from the Crown address that raise a considerable doubt about the conviction and when applied to the evidence at this Inquiry, about Ms Folbigg's conviction and her guilt.

Crown Address

73. The Crown Prosecutor in his closing address to the jury said about how tendency and coincidence evidence should apply, the following:

> *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.*[44] *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*

[44] This comment is meaningless and certainly does not summarise coincidence evidence.

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.

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.[45]

. . . .

74. He then went on to address specific aspects of the coincidence evidence with respect to this there are a number of matters that require consideration.

75. First, in his address to the jury, the Crown Prosecutor overstated the evidence, made certain claims that demonstrated confusion or made clear factual errors. These do not appear to have been recognised by the defence counsel nor addressed by the trial judge.

76. Second, in the light of the evidence given at the Inquiry, many of the matters addressed upon by the Crown Prosecutor have been the subject of further evidence (in the light of development of scientific knowledge) and seen in the light of this evidence, the allegations have been superseded by subsequent events.

77. The Crown opened on the specific items of coincidence evidence in the following terms:[46]

The Crown alleges that there are some common features to 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.

[45] T 13/5/2003, 1356-1357
[46] Exh F T 44.59-T 46.12.

In other words, the Crown points to these common factors to disprove that these children all died by sheer coincidence of natural diseases.

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.

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

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.

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.

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.

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.

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.

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.

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.

The proposition by the Crown that the coincidence evidence showed *'these common factors . . . disprove that these children all died by sheer coincidence of natural diseases'* is an impermissible use of the evidence. It could not properly be used for this purpose. This has been previously considered at paragraph [11]. Moreover, the factors do not relate to the proposition.

First and Seconds of Coincidence

78. As to the first and second points of coincidence, the Crown described then as having "ten remarkable features in common and addressed as follows:[47]

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 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

[47] Exh F T 1362.47-T 1363.05.

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. No. These children all died suddenly and unexpectedly.

79. There was no evidence the children died "suddenly" and there is a real question as to what "sudden" means. The fact is, they died. The lack of "lingering illness" does not describe the full extent of physiological causes of death. A person can have an unidentified medical condition that can cause their death without any recognised prodrome. If it can be identified at all, the medical condition can only be identified after the event. Examples of disease or physiological conditions that may not have a recognised prodrome include (without limitation):

    (a) Epilepsy;

    (b) Cardiac arrythmia;

    (c) Airways obstruction due to laryngomalacia;

    (d) Airway obstruction due to laryngospasm;

    (e) Airway obstruction due to a displaced uvula;

    (f) Breathing dysfunction due to delayed development of neurological signalling; and

    (g) Some unidentified encephalopathy.

80. In other words, the absence of "lingering illness" does not exclude a medical cause that triggered the death. The Crown Prosecutor's postulate demonstrated a fundamental flaw in the understanding of the physiological cause of sudden death and as such, it was misleading. A finding should be made to this effect. The defence counsel did not appreciate the physiology of death either.[48] This should not preclude consideration of this important

[48] See T 1398.36-.45.

evidence by this Inquiry, given the expert medical evidence it has received during the hearings.

81. The same can be said for the "second point of coincidence" as to the use of the word "unexpected". A finding should be made to this effect.

Third, Fourth and Fifth Points of Coincidence

82. As to the third, fourth and fifth points of coincidence, the Crown Prosecutor submitted as follows:[49]

Number five, they all occurred when the chilled 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 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.

83. This submission ignores the fact these children were infants and predominantly cared for at home by Kathleen Folbigg. The submission suggests they were capable of playing in the garden or watching television. Caleb was 19 days old. At the time of his ALTE, Patrick was five months old. At the time of his death, he was ten months old but significantly developmentally delayed. This submission failed to align the capacity of the children to engage in their activities with their age. The submission was misleading. Findings should be made to this effect.

84. Further, specifically with respect to Caleb, the unchallenged evidence was that his respiratory stridor was worse when laying on his back. Put another way, his respiratory distress was worse when laying on his back. I other words, the effect of the laryngomalacia was worse when lying on his back. He had not yet grown out of the effect of laryngomalacia as he was too young. This is clear medical evidence pointing to an explanation for his death at night which was not available at time of trial. A finding should be made to this effect.

[49] Exh F T 1363.22-.27.

85. Further, there was clear evidence from Prof Blackwell and Prof Clancy that cortisol levels drop at night which can enhance the effect of infection.

Sixth Point of Coincidence

86. The sixth point of coincidence really related to opportunity. The Crown Prosecutor addressed as follows:[50]

> *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 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 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, 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 (sic) of them was during a normal check of their well-being. Gosh, you would be telling her not to check on them, wouldn't you? What an amazing coincidence, or is it?*

87. It is not a coincidence that Kathleen Folbigg would get up to go to the toilet at night. It is a common human experience. Further, she had delivered her children vaginally and stress incontinence is not unknown.[51] Kathleen Folbigg found two of her children at night. There is not much coincidence in going to the toilet on two occasions. A finding should be made to this effect.

[50] Exh F T 1363.29-.50.
[51] See Exh E – Trial Exh AJ – ERISP page 25 Q 130.

88. It is not a coincidence that when she went to the toilet she would check on the children, especially in circumstances where she had previously lost a child. It would be perfectly natural for her to check on her children. A finding should be made to this effect.

Ninth Point of Coincidence

89. The ninth point of coincidence has been address in Part A of these submissions under the hearing "Body Temperature". Kathleen Folbigg relies on those submissions when dealing with the coincidence evidence.

90. As to the ninth point of coincidence, the Crown Prosecutor addressed as follows:[52]

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.

91. This submission was wrong. Firstly, Kathleen Folbigg rendered assistance by calling her husband. Her husband then rendered assistance to the children to the extent he was able. Neither of them had CPR experience at the time of Caleb's death.[53] It is quite clear that in that emergency, she deferred to him.

92. Secondly, she rendered assistance to Laura. Laura was found in her bed. Kathleen Folbigg telephoned her husband to telephone the ambulance. She rang the ambulance. When ambulance officers arrived, Kathleen Folbigg had Laura on the kitchen bench (near the telephone) and was conducting CPR.[54]

93. The summary of the coincidence evidence is as follows:[55]

[52] Exh F T 1364.16-.21.
[53] . Exh F T 104.40, Exh E (trial Exh AJ page 19 Q 104, page 21 Q 110.
[54] Kathleen Folbigg performing CPR on Laura, Crown opening T 44.24 and T 42.33, Kathleen Folbigg statement Exh E 1 March 1999, ERISP Exh E Q 333 at pages 101-102, Coroner's report Exh E page 133, Wadsworth statement (ambulance officer) Exh E page 133, ambulance report Exh E page 145.
[55] Exh F T 1364.23-.28.

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.

94. This summary demonstrates false logic and is misleading in two respects:

(a) Kathleen Folbigg could have been responsible for each of the children (which she was) without being responsible for each of their deaths. The Crown address does not address this issue; and

(b) The statement "*That is why she [Ms Folbigg] raised the alarm so soon after it happened*" directly cuts across the tenth point of coincidence.

95. It is submitted that after the evidence adduced at this Inquiry, its clear many of the underlying assumptions contained in the coincidence notice do not have validity. The Inquiry should make findings to this effect. As such, the further evidence adduced at this Inquiry gives rise to a reasonable doubt.

96. When focusing on tendency evidence the Crown Prosecutor needed tendency evidence to overcome the evidence that Laura Folbigg died of myocarditis. He stated:

Coincidence evidence is the kind of evidence that I have 10 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.*[56]

(emphasis added)

Importance of Coincidence Evidence at Trial

97. This demonstrates the prejudicial nature of the coincidence evidence and why it is that it cannot be overlooked at this Inquiry.

Trial Judge Directions

98. The trial judge gave the following directions:

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.

[56] T 13/5/2003, 1635.10

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.

99. In the Folbigg case it is impossible to see how the use of coincidence evidence to promote a speculative cause of death could possibly have probative value that substantially outweighed its prejudicial effect. Certainly after the evidence adduced at this Inquiry, it is highly unlikely the coincidence evidence could have been deployed.

100. Examples of situations where tendency and coincidence evidence may be admitted include:

(a) To prove identity;

(b) To prove knowledge or intent;

(c) To rebut a defence of mistake or involuntary conduct;

(d) To establish system;

(e) To rebut a defence of innocent association.

101. In having regard to the admissibility of the coincidence notice, Wood CJ in *R v Folbigg* [2002] NSWSC 1127 relied on the following material matters:

(a) The strength of the expert evidence in the expression of their opinion as to cause of death [94]. This evidence at trial is now in considerably different form and different weight, especially having regard to the undermining of the "three or more deaths in one family" argument. In this regard, we rely on our submissions elsewhere in our submissions;

(b) At [108], Wood CJ addressed the fact the diaries had an impact on the assessment of reasonable cause for Patrick's ALTE. Justice Wood did not

have available to him the information regarding laryngomalacia in Caleb, the potential cause of death by reason of the uvula or bed sharing in Sarah or the myocarditis in Laura. Further, it is erroneous to suggest the availability of the diaries necessarily impacts upon the availability of a legitimate or available alternative cause of death;

(c) At [109] Wood CJ, reached his conclusion in the "*absence of any common abnormality, or outward sign of injury or otherwise life threatening disease or condition*". This information was then weighted against "*what appears, prima facie, to be some significant admissions by the accused, in the diaries concerning the deaths of some of the children as well as her moods and irritation, proximate to their deaths …*". There are several points arising from this, set out elsewhere in these submissions. First, the medical evidence adduced at this Inquiry does not exclude a possible genetic basis for the deaths of one or more children. The scientific knowledge about monogenetic causes of disease is still evolving with further literature being published every year in which disease association with known or unknown genes is established. ADAM T 6 is but one example. The scientific understanding of the digenetic causes of disease is in its infancy and has not been addressed by the experts. The association between genes and environment and exogenous stressors such as infection is in its infancy and has not been addressed by the expert at this Inquiry. Given our current state of scientific knowledge, only about a third of cases have a recognised genetic cause. These issues have been address elsewhere. Second, the evidence at this Inquiry has established a potentially life-threatening disease or condition – laryngomalacia with Caleb; an encephalopathic disorder in Patrick; a displaced uvula or laryngospasm or bed sharing in Sarah and myocarditis in Laura. This demonstrates a Crown postulate at trial of a single common cause for all of the deaths demonstrated a lack of understanding of potential alternative causes of death of each of the children. The assessment of this postulate was constrained by the scientific knowledge at the time of trial but has since

been overtaken by the evidence presented at this Inquiry. Alternatively, there is now clear evidence of the association and role of infection in the sudden death of infants that may explain one or any of the deaths of the Folbigg children. Third, the dairies do not contain admissions at all, but one based on interpretation without any context. This has been addressed elsewhere. Fourth, while Kathleen Folbigg did suffer from moods and irritation, there is absolutely no evidence from Craig Folbigg that there was any mood disturbance at all at any time proximate to the death of Caleb. Further, it is to be expected parents may express frustration or anger at times given the pressure of maintaining a house, and maintain duties as a mother and wife, especially if there is a difference in parenting styles. Further, the Crown case was that it was the same loss of temper with each of the children that triggered a murderous range. In the absence of any signs of irritation or anger proximate to the death of Caleb, then the entire Crown postulate falls away. It cannot be revived by the use of the diaries nor can it be revived with the "four deaths in one family" argument.

102. It is clear the coincidence notice was powerful evidence when combined with the medical evidence and the diaries. As to the decision of Justice Sully in *R v Folbigg* [2005] NSWCCA 23, at paragraph 132, it is clear the "*picture painted by the diaries was one that gave terrible credibility and persuasion to the inference, <u>suggested by the overwhelming weight of the medical evidence</u>, that the five incidents had been anything but <u>extraordinary coincidence</u> unrelated to acts done by the appellant*". It is submitted the medical evidence adduced at this Inquiry has cast considerable doubt upon the weight of the medical evidence, for reasons set out elsewhere in these submissions. The observations of Justice Sully could not be made good when one considers the evidence presented at trial and carefully compared with the evidence presented at the Inquiry. A finding should be made to this effect.

103. It is clear from the exchange between counsel and Justice McHugh ACJ in *Folbigg v R* [2005] HCA Trans 657 at pages 3 and 5, that the coincidence evidence and tendency evidence was instrumental in securing the conviction. Central to his postulate is "*what inferences can be drawn from the unexplained deaths*". Thus, given the change in the medical evidence at this Inquiry (which is the subject of submissions elsewhere and upon which we rely), and Kathleen Folbigg's explanation for the dairy entries, that the observations of McHugh ACJ have been subsumed by material at this Inquiry. A genetic cause of death has not been excluded and there is a readily available alternative medical condition in each child capable of causing sudden death without prodrome. This evidence including laryngomalacia with Caleb, displaced uvula or bed sharing with Sarah, an encephalopathic disorder with Patrick and myocarditis in Laura. Further, there is evidence of the association and cause of sudden death by infection. The admission coincidence evidence is now open to considerable doubt. It should not have been admitted into evidence. A finding should be made to this effect and it gives rise to a reasonable doubt.

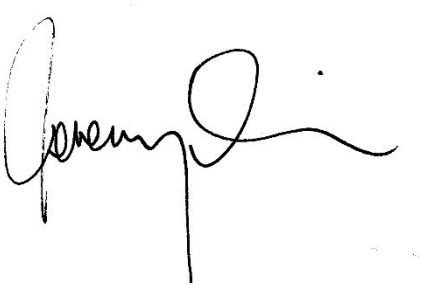
Summary of Coincidence Notice

104. By reason of the evidence adduced at this Inquiry, the underlying factual premises of the coincidence notice have been contradicted or heavily qualified.

105. As such, on the basis of the evidence at this Inquiry, it should never have been admitted into evidence. The assessment of Ms Folbigg's guilt must be undertaken without coincidence reasoning. If that submission is rejected, the guilt of Ms Folbigg needs to be assessed on the basis the coincidence between the events is minimal given the evidence at this Inquiry.

106. Further, on the basis of the evidence at this Inquiry, an assessment of reasonable doubt as to Ms Folbigg's guilt cannot be undertaken on a joint trial basis but needs to be assessed on the basis of each charge.

Dated: 7 June 2019



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