

Epiq:DAT

D13

SPECIAL INQUIRY

THE HONOURABLE THOMAS BATHURST AC KC

5 THIRTEENTH DAY: THURSDAY 27 APRIL 2023

INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

10

JUDICIAL OFFICER: Dr Woods.

WOODS: Thank you, your Honour. Your Honour, further to what Dr Cavanagh put to you, we generally rely on our written submissions as supplied. I've got some brief observations to make about Counsel Assisting's written submissions, if I may. We broadly adopt the conclusions and thrust of those submissions and we submit that the Inquiry, not only can, but should find that there is reasonable doubt as to guilt and we specifically ask that the Inquiry report as we identify in Chapter Six of our written submissions.

20

I just have a couple of points to make about the Counsel Assisting's submissions. At paragraph 960 of those written submissions, Counsel Assisting says, "The evidence about the diaries may be seen as neutral, neither exculpatory, nor incriminatory." Our submission would be that the Inquirer not only can, but should accept Ms Folbigg's explanations about the diaries as plausible and, indeed, substantially true. They, apparently, persuaded the three highly qualified forensic psychologists and psychiatrists chosen by the Inquiry that there is--

25

30 JUDICIAL OFFICER: That would merely make them neutral, wouldn't it?

WOODS: Well, your Honour, there's a question about the test in relation to the diaries, which I'll come to in a moment, if I may.

35 JUDICIAL OFFICER: Yes. Just assume--

WOODS: No, your Honour is quite right, they are neutral in the sense that if they're rejected, there wouldn't be any evidence against her.

40 JUDICIAL OFFICER: No, they're neutral in the sense that if they were found not to be admissions, they would neither go to prove nor disprove her guilt. I think that's right, isn't it?

WOODS: Can I return to that?

45

JUDICIAL OFFICER: Yes, sure.

50 WOODS: Yes. We accept the concluding paragraphs from 961 onwards in the written submissions of Counsel Assisting and that they generally provide a strong basis for saying that there should be a finding of reasonable doubt

overall as to the five convictions and that is our submission.

5 As to the expert evidence regarding the diaries, we note that Counsel
Assisting says, in our view correctly, that Associate Professor Butt does not
technically qualify as an expert, but, nonetheless, he has said things in his
report which we adopt in our argument as argument, in particular, his
emphasis on the absence of words of positive agency in the diary entries.

10 Arising out of an exchange yesterday between your Honour and Ms Callan, a
question arises about the proof or the non-proof of what the diaries mean and
we, I've prepared a brief summary of some points. Does your Honour have a
copy of that? It's an email which I sent early this morning.

15 JUDICIAL OFFICER: No, I don't.

WOODS: I'll hand it, if I may hand it up?

JUDICIAL OFFICER: Has this been circulated to the parties?

20 WOODS: No, no, it hasn't, your Honour, no.

JUDICIAL OFFICER: If it's given to me, it should--

25 WOODS: It has been circulated to the DPP, but not extensively - not further.

JUDICIAL OFFICER: I think, possibly, Mr Folbigg's Counsel may have an
interest in it.

30 CALLAN: Your Honour, it may be my misunderstanding. I hadn't appreciated
this was a form of a written submission to be provided either to your Honour or
the other parties.

JUDICIAL OFFICER: Yes. No, I understand.

35 CALLAN: We can have copies made and I do appreciate that Dr Woods is
seeking to reduce his submissions in clear terms in writing, but, perhaps, that
could occur.

40 JUDICIAL OFFICER: Yes, I've read that. Perhaps, we should wait for a
moment until other people have the benefit of it.

WOODS: Yes, yes.

45 JUDICIAL OFFICER: Unless you want to deal with it orally by reference--

WOODS: I will deal with it orally, your Honour, yes. Your Honour, we accept
that the normal rule in a circumstantial case is the argument that there are
strands of a rope, but we say that this case can be seen or should be seen as
a links in a chain situation, attracting the reasoning of Shepherd's case. Now,
50 on the evidence as it stands, proof that the diary entries and the explanations

by Ms Folbigg relating thereto amount to admissions of the alleged criminal conduct, would, in our submission, be an indispensable intermediate step in proof of the circumstantial case presented by the Crown.

5 JUDICIAL OFFICER: This is all very hypothetical, isn't it, because if you deal
with it in the context of a trial, having regard to the evidence which existed at
the trial, it's possible - I emphasise that word - sorry - dealing with the question
of whether the matter should be left to the jury, it's possible that the
10 circumstantial evidence, coupled with the evidence that existed at the time of
the trial, would be enough for a jury to convict, irrespective of whether or not
diaries were considered as admissions and I emphasise I'm talking about the
position of the trial. The more there is evidence to rebut what I might call the
purely coincidence evidence, the four children died in the manner that they did,
15 and the other evidence supporting it, taking it at its highest, Mr Folbigg's
complaints about her treatment of the children and whatnot, it doesn't matter
very much, there would be a nice question of whether the matter would be
allowed to go to a jury.

20 WOODS: Yes, just so.

JUDICIAL OFFICER: But, in the present case, aren't I confronted with this
situation: there is a significant body of evidence now to suggest reasonable
possibilities of identifiable natural causes of death? That wasn't there at the
trial. In that case, in a practical sense, the diaries loom larger and larger in the
25 scenario and I wonder - and you point this out in paragraph six of your
submission - that, really, in the present, for my purposes, it would make very
little practical difference, because I have to be satisfied - if I have a reasonable
doubt, if I reject the diaries as admissions, there is, in a practical sense, very
little to go on. I don't know if it's a real issue in this Inquiry, Dr Woods.

30 WOODS: Your honour, can I say, the only reason why I was stimulated to this
exercise of reducing the points on the document is that yesterday your Honour
made a reference to the formula "comfortable satisfaction" which rang alarm
bells with me.

35 JUDICIAL OFFICER: That, I think, was in the context of how I dealt with the
dispute, the evidence in dispute between Ms Folbigg and Mr Folbigg as to the
circumstance of the death of Sarah.

40 WOODS: Very well. I misunderstood that, your Honour.

JUDICIAL OFFICER: But equally, having said that, just going back to what I
was saying before, whilst I'm, in one sense a tribunal of fact in this Inquiry, I'm
not a jury and no one really has to worry about if, in the particular
45 circumstances of this case, in relation to trial, it would be necessary to give a
jury a direction as to how they deal with it.

WOODS: Your Honour, I understand that entirely. That's quite right.

50 JUDICIAL OFFICER: It might be the Director's problem in some future case--

WOODS: That's right.

JUDICIAL OFFICER: --but I don't think it is here.

5 WOODS: It would be an issue in some other place, but not here. No, I accept that, but I just want to make it plain, my concern with the formula "comfortable satisfaction" was a formula used in England to qualify, for many years, in the mid-20th century to qualify the test of beyond reasonable doubt, an approach which has never been followed in Australia--

10 JUDICIAL OFFICER: No, no, no, no, but it was used in *HML* in the context of intermediate facts.

15 WOODS: Your Honour, we say that the, my submission, well maybe that's an argument for another date. The overall situation that you're confronted with is: is there overall a reasonable doubt and we say that whether you take the links in the chain approach or the *Shepherd* approach, the significance of the diary entries is so substantial that it would be, as I say at point 7, "It would be an error to apply the test of comfortable satisfaction to the question of whether the

20 diary entries and explanations represent admissions of criminal guilt." I have probably said enough on that subject, your Honour.

Can I just make some observations about the written submissions by the Director? We note the written submissions of the Director of Public

25 Prosecutions and note that the DPP has indicated a concern to make submissions focusing on the evidence before this Inquiry. The DPP has participated in these proceedings without taking a partisan position, but we've expressed concern for the interests of justice. There is an acknowledgment in the written submissions at paragraph 18 that on the evidence now before the

30 Inquiry, it would, subject to certain limited qualifications, be open to you to report that there is a reasonable doubt as to the convictions.

I might explain briefly, your Honour, some aspects of the very extensive Chapter Five of our written submissions which deals with the trial and related

35 matters. That was prepared before we were aware of what other parties would be putting forward in their written submissions and since the evidence before this Inquiry incorporates the transcript and the evidence of the entire 2003 trial, as well as various appeal reports and the entirety of the proceedings of the 2019 Inquiry, we could not necessarily make assumptions about what we

40 would need to address.

JUDICIAL OFFICER: I'm not criticising you at all for dealing with these matters.

45 WOODS: Thank you, your Honour. Well I don't need to say any more about that.

I will make some observations about the written submissions prepared for Mr Craig Folbigg. I'll make some general observations and then refer to the

50 specific paragraphs upon which I will comment.

5 Firstly, it's important to bear in mind that, although the representations by Mr Folbigg in writing proclaim initially his objectivity, he is an interested party, he was a witness in the trial and he's been an active participant all through. Now, by contrast, the DPP, through Senior Counsel, has not taken this approach, but has focused on the evidence before the present Inquiry.

10 JUDICIAL OFFICER: I must say, it probably doesn't matter very much at the present time, but I was somewhat concerned that Ms Folbigg was cross-examined not only extensively by Mr Maxwell on behalf of the Director during the course of the Blanch Inquiry, but after that was finished, Ms Cunneen, on behalf of Mr Folbigg, was allowed to have another go. That seemed to have taken place without any objection, but whether it was entirely fair to Ms Folbigg is another question.

15 WOODS: Your Honour, I'll just conclude on that point your Honour by saying that there's a well-known history of the English criminal law by Sir Leon Radzinowicz - five volumes - and he devotes an entire volume to the saga involved in converting the English criminal law system from one initiated by private party to one where an independent public authority started and
20 conducted prosecutions.

JUDICIAL OFFICER: I know the history. Probably not as well as you.

25 WOODS: Well anyway, your Honour, I've made the point there. In paragraph four of Mr Folbigg's written submissions, there's an argument for the "fundamental implausibility" of the hypothesis that four children in one family died of natural causes. I make two points about this. Firstly, it doesn't come to grips with a discrediting of Meadow's Law. Secondly, but equally importantly, it doesn't take into account the countervailing and even greater improbability, we
30 say, that four children in one family would be murdered by the mother. As to paragraphs seven to 11 of Mr Hastings' written submissions on behalf of Mr Folbigg, Mr Hastings has drawn on the Court of Appeal decision at [2021] NSWCA 44 and sought to apply it, in effect, to bind this Inquiry. We submit that the law cited is not applicable to this Inquiry in the fashion submitted by
35 Mr Hastings. It is clear that the test to be considered -

JUDICIAL OFFICER: That was dicta by the Court of Appeal. It was an initial
40 summary. There are ultimate conclusions on this exercise from paragraphs 98 and 99 which don't suggest any test other than the well-established test as far as dealing with cases of this nature are concerned.

WOODS: Your Honour, I don't need to make any further point on that.

45 JUDICIAL OFFICER: I don't think you need trouble yourself with that.

WOODS: There is an assertion at paragraph eight of the written submissions that "there has been little change in the substance of the evidence relating to the causes of death." That proposition could be true only if we ignore the very
50 substantial body of new evidence in this Inquiry, evidence concerning pathology, epilepsy, cardiology, genetics, and the diaries. There is indeed -

JUDICIAL OFFICER: I suppose it's true in one sense that no-one's been able to establish on the balance of probabilities any particular cause of death for any of the children. I know there's some submissions that they did, but that's not the question that I have to deal with.

5

WOODS: No, of course not. No. That's so. There's some overlap but it's wrong to say there's been little change. There's very significant change, we submit. From paragraph 12 onwards in the written submissions prepared by Mr Hastings, that material flies in the face, we say, of the fact that the three
10 psychological and psychiatric forensic experts called by the Inquiry were independent and highly experienced within the criminal justice system and the prison system. At least two of them have often been briefed by the Crown in prosecutions, and all are highly respected in their fields. The submissions made in the written document prepared by Mr Hastings - paragraphs 14, 18,
15 35 and 36 - ascribe to Kathleen Folbigg at all relevant times a personality disorder which explains the commission of the offence, according to that argument. Yet, this general issue was addressed in detail by the various key psychological witnesses who did not make any such diagnosis. The evidence of those witnesses is to the contrary effect, and we refer to this in Chapter
20 Four of our submissions, and we adopt what Counsel Assisting says on this point.

At paragraph 14, Mr Folbigg's written submissions say that little reference has been made to the personal history of Ms Folbigg. That is, with respect, quite
25 wrong, and that personal history is detailed extensively in Chapters Four and Five of our written submissions. All of the key psychological experts dealt with it in detail. At paragraph 15, Mr Folbigg's written submissions contend that a focus should be on what Mr Justice Barr said in his sentence remarks in 2003. However, that context is quite misleading. In the light of what your
30 Honour said yesterday, I hardly need to expand on this with any great effect, but briefly, it's obvious that sentence proceedings following a jury verdict automatically and inevitably assume the fact of guilt. The judge is required to accept what the jury has done. Judicial observations and expert evidence provided in that situation is not applicable where, as here, it is the very
35 question of guilt which is in issue. In that connection also, while it's accepted that Kathleen Folbigg did have a traumatic early childhood, it should be noted that she overcame early problems to become a normal adult with a range of friends, a marriage with ups and downs but which lasted for a decade, a good employment record, no criminal history, no record of public or private
40 misbehaviour, and no history of drug or alcohol abuse. We would invite -

JUDICIAL OFFICER: Dr Woods, whatever findings I ultimately make, I'm not going to make a finding that Ms Folbigg's childhood history - and tragic
45 childhood history - predisposed her to kill children.

45

WOODS: Thank you, your Honour.

JUDICIAL OFFICER: For no better reason than there's not the slightest
50 evidence to suggest it.

50

WOODS: Exactly so. Exactly so. Now, as to the diary entries, we rely generally on our written submissions in Chapter 4. At paragraph 22 of his written submissions, Craig Folbigg - through Mr Hastings - relies on a plain English interpretation of the diaries which - for reasons we explain in Chapter Four and for reasons presented by my learned friend, Ms Callan, which we adopt - is very misleading and should not be adopted. Your Honour referred yesterday to the obvious principle that context matters. From paragraphs 22 to 25, Mr Hastings has written about the diaries without reference to either (a) the absence of any direct words in the diaries admitting guilt, or (b) the substantial evidence before the Inquiry from Dr Eagle, Dr Dhansay, and Mr Sheehan. At paragraph 24, the written submissions suggest that these psychiatrists and psychologist have, in effect, attempt to "neutralise" the meaning of diary entries.

15 JUDICIAL OFFICER: Would you accept what the Court of Appeal said in *Folbigg* at paragraph 103:

20 "An understanding of the meaning of the diary entries is not to be taken on a day-to-day basis but having regard to the knowledge of the applicant and her personal history and circumstances, and the explanations of them advanced by the applicant in her oral evidence to the Inquiry."

25 When I say, "to the Inquiry", it was to Detective Ryan in her interview and in the Blanch Inquiry.

WOODS: The answer is yes, but part of that context is the additional material presented to this Inquiry.

30 JUDICIAL OFFICER: Yes, that's part of the circumstance.

35 WOODS: The Court there clearly was recognising context. In a similar vein, at paragraph 26, my learned friend, Mr Hastings for Mr Folbigg, refers under a heading, "Lack of curiosity concerning the deaths of her children", to an argument adverse to Ms Folbigg. This was essentially an adaptation of various arguments presented at the trial in 2003 by the Crown Prosecutor.

40 JUDICIAL OFFICER: I think Mr Jordan cross-examined one of the experts here on this issue, did he not? Or am I wrong about that?

45 WOODS: Your Honour, I'll invite Mr Jordan to deal with that point. I can't recall. But in any event, your Honour, we say that the point which Mr Hastings seeks to make about lack of curiosity concerning the deaths of the children as reflected in the diaries is not a valid point. At paragraph 29, the argument is headed, "Absence of expression of grief over the deaths of her children." As we said, Mr Folbigg is condemning Ms Folbigg over how her grief was or was not expressed. Australians of a certain age will remember the case of Lindy Chamberlain, who was widely and publicly condemned over her manifestations of grief or, rather, her non-manifestations of grief after her child had supposedly been taken by a dingo which, of course, it turned out ultimately

50

had been the case. I invite your Honour not to let your reasoning be affected by any concern as to expressions or non-expressions of grief. In our written submissions, we have detailed extensively her repeated expressions of grief, not necessarily in the diaries, about the loss of her children. Mr Folbigg's
5 Counsel, Mr Hastings, made extensive oral submissions yesterday about the various diary entries, or some of them, and argued that they hadn't been given sufficient attention in this Inquiry. I remind your Honour that all the three selected experts - Dr Eagle, Dr Dhansay, and Mr Sheehan, we exhaustively
10 briefed with everything to do with the diaries, and were able to and did analyse that material. The submissions about the diaries and the entries in the diaries have been answered by us in Chapter Four in extensive detail, and we rely on that material. We rely also on and adopt the submissions of Senior Counsel Assisting on that subject.

15 JUDICIAL OFFICER: And presumably, when you say you adopt them, you're adopting not only the oral submissions made yesterday, but the written submissions.

WOODS: Yes, indeed. Can I turn to paragraph 32 of Mr Folbigg's written
20 submissions. Mr Hastings has relied strongly on the argument at paragraph 32 that "Many eminent jurists" have over the years seen this case a certain way. That argument should not sway this Inquiry. The whole rationale for the very legislation upon which post-conviction inquiries take place in this State is that occasionally, for one reason or another, there will be cases where
25 decision makers get it wrong at the primary level, and error is perpetuated upwards within the hierarchy of appeals, most famously in the Lindy Chamberlain case of 1984. Some very eminent jurists in the High Court reached a view adverse to that appellant and her appeal was rejected. Considerable public agitation followed. It took the Morling Inquiry to
30 point out, respectfully, in 1987 that the many eminent jurists who had dealt with the Chamberlain case beforehand, and particularly in 1984, had been wrong. There was new evidence before Mr Justice Morling's Inquiry that made it clear that Mrs Chamberlain had been wrongly convicted and imprisoned, and she was released. And after that more evidence exonerating the
35 Chamberlains turned up, and in 2012 a fresh coronial inquest definitively decided that the dingo had indeed taken the baby as Mrs Chamberlain had said all along.

40 In our submission, it depends on what evidence is before which court, or which inquiry, and at what time. The evidence before the Morling Inquiry, where Mrs Chamberlain was vindicated, was significantly different from the evidence previously available to the High Court in 1984, and such is the case here. Those involved at earlier stages of the Folbigg case, however eminent, did not have all the evidence which this Inquiry has now.

45 Your Honour, those are our submissions.

JUDICIAL OFFICER: Thank you, Dr Woods. Yes, Mr Jordan.

50 JORDAN: Thank you, your Honour. Your Honour, the Director of Public

Prosecutions has been an active participant in this second Inquiry into the convictions of Ms Folbigg. Throughout the Inquiry, the Director has sought to maintain a position of independence and objectivity in accordance with her prosecutorial function, to assist the Inquiry in obtaining, reviewing and testing the substantial body of evidence that is now available pursuant to this Inquiry.

From the early stages of the Inquiry and in light of the long preceding history, the Director has endorsed the importance of ensuring that new evidence to be received by the Inquiry is obtained from independent and reliable sources. In particular, the Director has endorsed the engagement by the Inquiry of the eminent and world-leading expert scientific witnesses called to give evidence for the first time, on the centrally important doubt or question concerning the CALM2-G114R genetic variant affecting Sarah and Laura Folbigg, as well as specifically identified in the Governor's direction that this second Inquiry be undertaken. That evidence from these eminent expert witnesses in relation to the CALM2-G114R genetic variant is only now available as a result of this Inquiry. This is a critical and new development.

What we now know about this rare genetic variant fundamentally changes our understanding of the circumstances leading to the deaths of Sarah and Laura Folbigg. This evidence concerning the genetic variant has been supplemented in this Inquiry by significant new evidence on other issues. Those issues include pathology evidence which is relevant to each of the Folbigg children; neurology evidence in relation to Patrick Folbigg, and expert psychiatric and psychological evidence concerning the interpretation of Ms Folbigg's diaries. This substantial and extensive body of new evidence was unknown at the time of Ms Folbigg's trial which occurred some 20 years ago. Indeed, the most critical new evidence concerning the CALM2-G114R genetic variant was even beyond the contemplation of science when the trial was conducted in 2003.

JUDICIAL OFFICER: I recall, I think it was Dr Wickenden or Professor Wickenden, who gave evidence about the extensive tests that were taken having regard to knowledge at that stage, and nothing was revealed.

JORDAN: That's so, your Honour. Similarly, the new evidence which is now before this Inquiry was not available to the appellate courts that dismissed various challenges to Ms Folbigg's convictions in 2005 and 2007. Your Honour, it is important to keep in mind the historical context of what was not known in 2003 at the time of Ms Folbigg's trial.

The written submissions provided on behalf of Ms Folbigg include criticism of the conduct of Ms Folbigg's trial back in 2003. Much of that criticism is directed towards the conduct of the trial by the Crown Prosecutor, but that criticism also extends in varying degrees to pre-trial rulings made by--

JUDICIAL OFFICER: Let me say this about this, Mr Jordan. There are a number of - how can I put it neutrally - provocative comments made by the Crown Prosecutor during the course of his address concerning the unlikelihood of four children dying at that time of unknown natural causes. It's not my role

5 in this Inquiry at all to conduct a review of how the trial was conducted. It is, however, relevant to the extent to which those comments made, probably consistently with Meadow's Law, influenced the jury and is one of the matters which will affect the extent that I'll pay regard to the jury's verdict in this case. I will be putting in my report, as I presently perceive it, a reference to a couple of those remarks, but I'll be making clear it's done for that purpose, and that purpose alone.

10 JORDAN: Yes. Your Honour, we do appreciate that. However, I do need to say something about it, because it's very important, particularly given the public nature of what is occurring, that the contextual importance of those matters is fully understood, particularly in the circumstances where, quite appropriately, all of the written submissions are going to be publicly available, as we understand it; and within those written submissions there are - to be blunt - highly critical and repetitive statements as to the conduct of the trial by the Crown Prosecutor.

20 And not only that, there's criticism directed towards the Chief Judge at Common Law, in terms of his pre-trial rulings. There are criticisms directed towards the trial judge; there are criticisms directed towards the appeal courts post-conviction. Indeed, there is even some criticism, at least implicitly, of the defence team led by the Senior Public Defender. But can I just say this, your Honour --

25 JUDICIAL OFFICER: Can you just refer me in general terms to what part of the submissions that you're referring to?

30 JORDAN: Yes. So, there is criticism, at least implicit, of the Chief Judge at Common Law at paragraph 184. Would it assist your Honour if I gave the other paragraph references at this point?

JUDICIAL OFFICER: Yes, thank you.

35 JORDAN: There are criticisms in relation to the trial judge, for example, at paragraph 283 and paragraph 397. There is at least an implicit criticism directed towards the appeal courts, for example, at paragraph 167 and 169; and although clearly implicit, there is at least that level of criticism towards the defence team at the trial, led by the Senior Public Defender, and that's at paragraph 269.

40 Now, if I could just be clear about why it's necessary, in our submission, that these matters are properly canvassed. Essentially our submission is that these various complaints directed towards various players, the Crown Prosecutor, the trial judge, the appeal courts, for example; these criticisms are made now, and are to a significant degree made with the considerable benefit of hindsight. And our ultimate submission is that the criticisms that are put, and certainly the way that they are put, is not something that should be accepted at this point in time.

50 JUDICIAL OFFICER: You ask me to expressly deal with them then, do you?

JORDAN: Well, your Honour, if I could, I don't think it's necessary.

5 JUDICIAL OFFICER: I said to you a moment ago what I was proposing to do. I think it's necessary to demonstrate that the trial, to a large extent,
was - whilst not directly referred to Meadow's Law - profoundly influenced by
the fact that the only explanation for four children dying was murder. Indeed,
you've noted that not only were some of the experts who were called, whilst
they didn't say it in their evidence, they said it in the statements previously
provided, and a number of experts who weren't called were even more
10 definitive about that. I mean, Meadow's Law was full blown at that time, if I can
use that expression. I think I need to probably point that out in my report. It's
a necessary concomitant of it being full blown that people can't be
excused - people can't be criticised for relying on it. That's where I draw it.

15 JORDAN: Yes, your Honour, but may I make this point - and we would submit
it is an important point that needs to be kept in mind in terms of how, on an
historical basis, what occurred at a trial is properly represented, and that is,
there is a very, very substantial difference between this discrete dogma of
Meadow's Law and what was clearly open and available as at the time of the
20 trial being established principles concerning the availability on the evidence at
trial of coincidence reasoning and there have been, perhaps, it just occurred to
me, but there have been times during some of the submissions, particularly
made on behalf of Ms Folbigg, where the difference between Meadow's Law,
which basically, ultimately, leads to a presumption in favour of guilt, has not
25 been clearly distinguished from coincidence reasoning which, as we all know,
and as was put at trial, goes no higher than allowing a jury to note that a
coincidence of similar events may be less probable and that is an important
point which we respectively submit needs to be kept in mind. And also, in
fairness to the way that the submissions are ultimately put on behalf of
30 Ms Folbigg, it does appear that their position is clarified in the introduction to
Ms Folbigg's written submissions at paragraph 37 and as we understand it, by
that paragraph, Ms Folbigg's representatives are making it clear that their
analysis is really only put as a matter of completeness and in order to provide
context and so understood--

35 JUDICIAL OFFICER: But the importance of it, from my point of view, is to
highlight the difference between the state of knowledge of - and the approach
based on that state of knowledge at the trial and the current state of
knowledge.

40 JORDAN: Your Honour, that's clearly central to this. Indeed, that is the
Director's position.

45 JUDICIAL OFFICER: So, for that reason, I have to say something about how
the trial was conducted.

JORDAN: Yes.

50 JUDICIAL OFFICER: But that does not mean that I'm going to go on a review
of everything that took place in the trial. I've indicated that I am going to show

the extent of - that I think some of the propositions put went beyond simply relying on coincidence evidence and went into the area of Meadow's Law, but it's not my role to be critical of the conduct of any of the particular persons except merely to show the basis on which I think the trial was conducted.

5

JORDAN: Yes. And as your Honour would appreciate, much of what I've just been saying is really directed just to understanding really the context in which the things that are in writing in Ms Folbigg's submissions are really be put, so that that's understood by everybody who may be observing.

10

JUDICIAL OFFICER: Putting it bluntly, leave aside Meadow's Law, there was reliance on coincidence evidence and reliance on the fact that no explanation could be given for the children's death. I understand that.

15

JORDAN: Yes.

JUDICIAL OFFICER: Now, whether that should have led to a conviction or not, that's not a matter for me to decide.

20

JORDAN: Yes, your Honour. All of those observations, if I may say so, with respect, do align with what is really the overarching position of the Director in relation to what has occurred and it is, as I said earlier, what we now have, what your Honour has, on the evidence before you in 2023, is fundamentally different to what was available to those who were involved in the trial, prosecuting, defence and judging. Our task and the Director's objective in accordance with her prosecutorial function is simply to look at the end as it now stands and to try and assist your Honour by making appropriate and objective submissions and participation throughout the Inquiry as to the evidence as it now stands and that's where we are.

25

30

In light of the evidence that is now available to this Inquiry, the Director has carefully reviewed the written submissions provided by Counsel Assisting the Inquiry. With respect, those submissions are comprehensive and they are thorough. In general, the Director does not seek to be heard against the various and detailed submissions made by Counsel Assisting, subject only to some qualifications and observations which we have set out in our written submissions.

35

40

Subject to those limited qualifications and observations, the Director accepts that the analysis which is summarised at the conclusion of the written submissions provided by Counsel Assisting is open on the evidence that has now become available pursuant to this Inquiry. It is on that basis, that the Director accepts that on the evidence now available, it is open to your Honour to conclude that there is reasonable doubt as to the guilt of Ms Folbigg in relation to the offences for which she is previously convicted, arising from the deaths of her children.

45

Subject to any further assistance your Honour might require, those are our submissions.

50

5 JUDICIAL OFFICER: There was some debate concerning the standard of proof that is to be applied to the entries to the diary, if I could put it broadly. The approach I'm going to take is that it's a piece of evidence in a circumstantial case which I can consider in context, having regard to all the other evidence, in determining I have a reasonable doubt.

JORDAN: Your Honour, that approach is entirely open to you, particularly, in this Inquiry. Different considerations may apply if there was a jury trial.

10 JUDICIAL OFFICER: Quite. I think I indicated to Dr Woods, I don't want to get into the question--

JORDAN: Yes.

15 JUDICIAL OFFICER: --whether it would be necessary to give a direction to the jury or how it would be dealt with there.

20 JORDAN: That's right. I mean, those are really - they would be hypothetical situations--

JUDICIAL OFFICER: Quite.

25 JORDAN: --which may or may not assist your Honour. Your Honour's task is not burdened by those various things. You are an inquisitor and you are finding facts.

JUDICIAL OFFICER: Nor am I burdened by the constraints on a judge in a judge alone trial.

30 JORDAN: Yes, that's true, your Honour. I don't have anything further to add.

JUDICIAL OFFICER: Thank you, Mr Jordan. Yes, Ms Horvath.

35 HORVATH: Thank you, your Honour. I submitted a brief written submission yesterday.

JUDICIAL OFFICER: Yes, we have that, thank you.

40 HORVATH: Unless there's any assistance I can provide to your Honour, I didn't want to add to it orally.

JUDICIAL OFFICER: Thank you. Is there anyone else? Ms Callan.

45 CALLAN: Your Honour, with the benefit of some communication from those Assisting your Honour to the parties, it is our understanding that there is no objection to the written submissions of all parties being published on the Inquiry's website.

50 JUDICIAL OFFICER: Thank you.

CALLAN: Your Honour, there are a few points that I wish to make in reply to certain matters raised by Mr Hastings in his submissions yesterday afternoon, particularly as pertains to Ms Folbigg's diary entries. The first is Mr Hastings described the diary entries as expressions of Ms Folbigg's current state of mind and her physical inclinations and suggested several times that Counsel Assisting and the psychologists and psychiatrists had incorrectly characterised the diaries as Ms Folbigg's retrospective rationalisation of past behaviour. In our submission, it is self-evident that the entries in the various diaries vary as to their content and purpose. For example, there are diary entries during Caleb's life used to record facts and current events, for instance, sleep and feeding times. It is pertinent to recognise that the diary entries which have been characterised or treated as admissions by Ms Folbigg of harming her children are entries in which she is reflecting or, one might suggest, ruminating on past events. These are, in particular, a number of entries in the second half of 1996 and the first half of 1997 in the lead up to Laura's birth and I addressed several of those in oral submissions yesterday. There are, of course, also, from 7 August 1997 onwards, entries during Laura's life which could be fairly characterised as expressions of a more current state of mind or contemporaneous events. We resist any suggestion that there has been any improper characterisation or broad-brush treatment of these diary entries, but what we do say is this Court now has the considered expert evidence of psychiatrists, Dr Eagle, Dr Dhansay and psychologist Mr Sheehan who were clear in their evidence that they gave to this Inquiry that they were not purporting to interpret or re-interpret the entries, rather, they gave evidence within their areas of expertise pertaining to Ms Folbigg's mental condition at the time that she was writing these diary entries, including some of the well recognised features of matrescence, of major depressive disorder, of maternal bereavement and parental grief.

Now, while I'm on their evidence of those experts, can I also respond to a suggestion Mr Hastings made in submissions yesterday that this is not science, but commonsense. I do not take that to mean Mr Hastings was suggesting the disciplines of psychiatry and psychology are not science. My main point in reply to that contention is that your Honour would be very cautious as to what is conveyed or meant by appealing to "commonsense", given, in my submission, the risk this carries about what is to be regarded as normal behaviour or normal diary entries for a young mother in relation to motherhood, generally, and, specifically, as to what would be regarded as a normal reaction for a mother who'd had successive children die suddenly.

Indeed, in my submission, that risk demonstrates itself when one compares certain of the submissions made by Mr Hastings about what he described as the mortifying prospect of a woman responding with anger and frustration to the behaviour of a young child when that is considered against the evidence of, for instance, Dr Dhansay to which I referred in my oral submissions yesterday.

Finally, your Honour, can I address several themes developed in Mr Hastings' submissions about what he says is missing from the corpus of diaries in evidence before this Inquiry? There was an assertion as to the relevance of

there being an absence of description of medical symptoms in the diaries as to which, can I make the discrete observation, that each child died suddenly and unexpectedly in this case. There was also suggestion by Mr Hastings as to a suggested absence of grief expression.

5

JUDICIAL OFFICER: In relation to the first point, Ms Folbigg knew that the medical practitioners who were involved at the time were unable to describe a cause of death.

10

CALLAN: Your Honour, as I understood it, Mr Hastings was suggesting an absence of description of medical symptoms during the lifetime of each child. A separate point that was developed by Mr Hastings and emphasis placed on a suggested absence of curiosity about why the children died. Overall, in my submission, you'd be cautious in your treatment of such submissions, first, given the implicit assumption about what is asserted would or ought to have been expressed by Ms Folbigg in her personal diaries and, in my respectful submission, it introduces a hypothetical which is entirely unhelpful and, arguably, dangerous about what a particular person would or should do or what a normal grief reaction, how that would be reflected in a diary, but, furthermore, on your Honour's point about the asserted absence of curiosity which Mr Hastings urged gave rise to an inference that she knew very well what it was, that is, because she had murdered the children, it is to be immediately recognised that there is a complete gap in the diary corpus for the period of time covering Patrick's death through to and including Sarah's birth, life and death in August 1993 and the three years thereafter until June 1996.

15

20

25

In terms of your Honour's point as to the medical answers which were furnished, some might regard that as satisfactory and, in a sense, that is a complete answer. But in my submission, the other point to be made is that, on one view, the overall effect of the diaries - and Ms Folbigg's evidence and explanations about certain of those diary entries - is that the medical explanations that she and Mr Folbigg received over the years were, in her mind, insufficient. She sought more by recourse to clairvoyants and the supernatural, and she also blamed herself.

30

35

In that respect, on this topic of self-blame, your Honour may recall the report of Mr Sheehan - the reference is Tab 21-02, page 67 - spoke to the prevalence of expressions of self-blame by individuals who suffer traumatic events, even if irrational, as a way of making sense of the world. Your Honour, there is also a difficulty with that submission made by Mr Hastings in this respect. Even if not expressed in terms in Ms Folbigg's diaries that are before this Inquiry, there is a body of evidence before the Inquiry, in other form, of steps taken after the death of Ms Folbigg's children to seek out medical explanations. There was a particular period of time during which Mr and Mrs Folbigg attended upon Dr Colley after the deaths of Caleb and Patrick which, amongst other things, featured an indication that they were discussing with Dr Colley the likelihood of problems with a possible third child, further investigations which might be conducted, and, according to, for instance, a letter from Dr Colley to Dr Wilcken of 27 February 1992 - which is at Exhibit 2-H, red page 3721 - so Dr Colley says, "Mr and Mrs Folbigg have recently returned to the clinic where

40

45

50

I discussed with them a lack of a diagnosis for both children, but that Patrick's near miss and Caleb's SIDS may be related. As yet, we do not have any evidence for this."

5 There's reference to arrangements which are made for Ms Folbigg to attend
upon a particular GP, Dr Holland, prenatally, and then another doctor to deal
with postnatal care. In that context, there's a diary entry of Ms Folbigg of
17 March 1992 - Tab 18-07, red page 156 - which records, "First appointment
10 with Dr Michael Howard." We think that that's an error in the
transcription. When you look at it, it would appear to actually refer to Holland,
and that fits. She continues, "Craig came too. Seems a very nice, thorough
doctor. Pleased to be getting the attention deserved this time." Your Honour,
there was evidence before your Honour of steps taken to reduce SIDS risks
15 after Caleb's birth and before Patrick's birth. There is evidence before this
Inquiry about purchase of new bedding, of renovating their home to deal with
certain of those risks, and, for instance, with Laura's birth imminent, there's
reference to having repainted the home with lead-free paint, which one might
generally treat, amongst the balance of the evidence, as indications of an
20 interest in the cause of death of each child and a desire to reduce the risk of it
happening again.

Your Honour, my last point is what Mr Hastings contended were inferences to
be drawn from diary entries during Laura's life, in which Ms Folbigg described
occasions of feeling angry and frustrated. Your Honour has already observed
25 in an exchange with Mr Hastings - and I think earlier with me - about the
significant, in my submission, leap in reasoning and logic that would be
required to take such entries to what is urged as the conclusion; namely, that
this was a foretaste or an insight into something much more sinister. But I'd
also make this observation. If your Honour accepts Ms Folbigg's explanations,
30 however irrational as they may have been, that she felt responsible for the
deaths of her children, in the sense that they were somehow connected with
her failings as a mother or her not coping or her stress or frustration, then one
might regard it as of some relevance that Ms Folbigg records in her diary on a
few occasions instances where she felt frustration and not coping whilst Laura
35 was young. In my submission, it is no more or less than that. Your Honour,
unless there's anything further, the topic which remains to be dealt with is as to
the status of certain non-publication orders.

40 JUDICIAL OFFICER: Perhaps we might take the short adjournment now and
then deal with these matters, so people can get organised to deal with them.

SHORT ADJOURNMENT

45 Yes, Ms Wootton.

WOOTTON: Yes, your Honour. The final matter to deal with are some
variations to non-publication orders which Counsel Assisting seeks. That was
notified to the parties yesterday and short minutes of order were circulated to
the parties this morning. No objection has been received, but it might be worth
50 your Honour enquiring with the parties--

JUDICIAL OFFICER: Can I suggest this - sorry - have all parties got a copy of this order?

5 WOOTTON: Yes.

JUDICIAL OFFICER: Is there any objection to the orders?

SPEAKER 1: No.

10 WOODS: No, your Honour.

WOOTTON: Your Honour, I can take your Honour through the orders, but in circumstances where there's no objection--

15 JUDICIAL OFFICER: Just let me read them, if there's no objection. Yes, I'm prepared to make those orders.

WOOTTON: May it please, your Honour, those are, just for the record, the
20 Counsel Assisting's proposed short minutes of order dated 27 April 2023.

JUDICIAL OFFICER: I make the orders contained in the Counsel Assisting's proposed short minutes of order dated 27 April 2023 which have been signed by me.

25 WOOTTON: Thank you, your Honour. Unless there's anything further.

JUDICIAL OFFICER: Thank you. Can I thank all Counsel and those
30 instructing them for the great assistance been provided in this Inquiry. The material is complex, but, if I might say so, it's been handled very well by all parties and, notwithstanding very substantial submissions, that will be of great assistance to me in giving my report to the Governor as soon as possible. We will now adjourn.

ADJOURNED

35