



Kathleen Folbigg Procedural History

Content Warning: The following case note includes potentially distressing material such as discussions of murder. Teachers and students must be prepared before proceeding.

Table of Contents

<i>Application for Individual Trials: R v Folbigg [2003] NSWCCA 17</i>	1
<i>Murder Trial at First Instance: R v Folbigg [2003] NSWSC 895</i>	1
<i>Appeal #1: R v Folbigg [2005] NSWCCA 23</i>	4
<i>Special Leave Application to the High Court in 2005</i>	5
<i>Appeal #2: Folbigg v R [2007] NSWCCA 371</i>	5
<i>2015 Petition for an Inquiry into Folbigg’s Convictions</i>	5
<i>2019 Judicial Inquiry</i>	6
<i>Application Seeking Judicial Review of the Determination in the 2019 Inquiry: Folbigg v Attorney-General of NSW [2021] NSWCA 44</i>	7
<i>2021 Petition for Pardon</i>	8
<i>2022 Judicial Inquiry</i>	8
<i>2023 Folbigg’s Unconditional Pardon</i>	9
<i>Potential Next steps</i> Error! Bookmark not defined.	

Application for Individual Trials: R v Folbigg [2003] NSWCCA 17

Before her murder charges went to trial, Folbigg applied for an order that the counts relating to the alleged murders of her four children be heard individually and separately from the counts relating to Patrick. This was because the evidence concerning the other counts and other children

would not be admissible as coincidence or tendency evidence. However, the application was dismissed and all counts were to be heard together in the same trial.

Murder Trial at First Instance: R v Folbigg [2003] NSWSC 895

This was a trial by jury in the Supreme Court of NSW overseen by Justice Barr. The Crown’s case was that Folbigg murdered her four children by smothering. The defence submitted that Folbigg was a caring mother and there were natural explanations for the deaths of her children. The issue at trial was therefore whether Folbigg was guilty of murdering her four children.

Medical Expert Evidence:

A number of medical experts were called by the Crown and the defence to provide their opinion on the causes of death of Folbigg’s four children.

The medical experts called by the Crown considered that each child’s death had been caused by acute asphyxiation, pointing to smothering. The medical evidence given at trial also ‘showed that natural but unexplained death was rare in the community and that there was no



demonstrated genetic link to explain multiple deaths in a single family' [33]. The Crown put forward that successive, unexplained deaths in the one family was unlikely to be natural.

Medical experts called by the defence gave natural explanations for the deaths of the children. These included:

- Caleb: SIDS,
- Patrick: Apparent Life Threatening Event ('ALTE') or spontaneously occurring epilepsy;
- Sarah: unexplained natural causes;
- Laura: myocarditis (inflammatory condition of the heart).

Diary and Psychologist Evidence:

One of the most incriminating pieces of Crown evidence at trial was Folbigg's diaries. The Crown submitted that Folbigg's diaries were an expression of her guilt.

There was no evidence to show when Folbigg first began keeping a diary. However, the earliest surviving entries were made from Patrick's birth on 3 June 1990 and continued throughout the births of Folbigg's subsequent children. Some of the entries that were submitted into Crown evidence included the following entries:

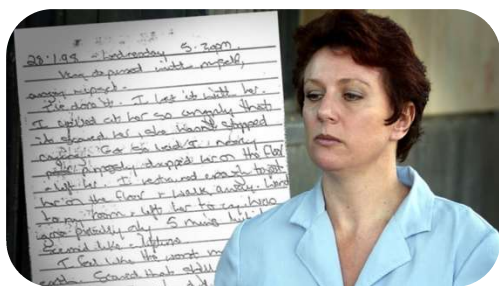
3 June 1990: *This was the day that Patrick Allan David Folbigg was born. I had mixed feelings this day. Wether or not I was going to cope as a mother*

or wether I was going to get stressed out like I did last time. I often regret Caleb & Patrick, only because your life changes so much, and maybe I'm not a person that likes change. But we will see?

22 June 1996: *...I watched a movie today about schizophrenia, wonder if I have a mild curse of that. I change moods really quickly. In my most dangerous mood I'm not nice to be around & always want to be anywhere, but where I am.*

14 October 1996: *...Children thing still isn't happening. Thinking of forgetting the idea. Nature, fate & the man upstairs have decided I don't get a 4th chance. And rightly so I suppose. I would like to make all my mistakes & terrible thinking be converted and mean something though. Plus I'm ready to continue my family time now. Obviously I am my father's daughter. But I think losing my temper stage & being frustrated with everything has passed. I now just let things happen & go with the flow. An attitude I should of had with all my children if given the chance I'll have it with the next one.*

9 November 1997: *...Think I handle her fits of crying better than I did with Sarah. I've learnt to, (?) ace getting to me, to walk away & breathe in for a while myself. It helps me cope & figure out how to help her. With Sarah all I wanted was her to shut up. And one day she did.*



Pictured above: Kathleen Folbigg in 2003. Photo Credit: Sydney Morning Herald

Evidence given by psychologist Dr Giuffrida at trial was that the diary entries revealed a 'greatly tormented and exceedingly disturbed woman' which demonstrated that she 'suffered intense feelings of shame and guilt over the death of her children' [61]. When speaking with Folbigg, Dr Giuffrida noted that 'there was a remarkable inertness of emotional response' and only brief sadness when Folbigg discussed their deaths.

Another psychologist, Dr Westmore, observed that the diaries were an 'outlet' for Folbigg to 'express internal feelings of anger, frustration and perhaps homicidal impulses and thoughts' [69]. His opinion was that Folbigg's ability to control her behaviour and emotions was likely impaired at the time of her children's deaths due to her depression.

Decision:

On 24 October 2003, the jury found Folbigg guilty of the manslaughter of Caleb; the intentional infliction of grievous bodily harm upon Patrick (relating to the reason he was taken to the hospital with respiratory problems prior to his death) and the murders of Patrick, Sarah, Laura.

Barr J held that:

- the attacks upon the children were not premediated.
- Caleb's death 'resulted from an act of smothering...carried out in the heat of uncontrollable anger by a young and inexperienced woman of prior good character'
- When Folbigg attacked Patrick for the second time, she had intended to kill him; "she decided to rid herself of the child whose presence she could no longer tolerate."
- There was 'no room for doubt' that when Folbigg killed Sarah and Laura by asphyxiation and suffocation respectively, 'she intended to do so'.

Barr J sentenced Folbigg to an effective head sentence of 40 years imprisonment and a non-parole period of 30 years. His Honour's sentence was a partial accumulation of the following sentences:

- For the manslaughter of Caleb: 10 years imprisonment.
- For the intentional infliction of grievous bodily harm upon Patrick: 14 years imprisonment.
- For the murder of Patrick: 18 years imprisonment.



- For the murder of Sarah: 20 years imprisonment.
- For the murder of Laura: 22 years imprisonment.

Appeal #1: *R v Folbigg* [2005] NSWCCA 23

This appeal took place in the NSW Court of Criminal Appeal before Justices Sully, Dunford and Hidden. Folbigg appealed against all 5 of her convictions and applied for leave to appeal against her sentences. Folbigg's grounds of appeal were as follows:

- Ground 1: The evidence available was insufficient to establish guilt beyond reasonable doubt,
- Ground 2: The Crown presented Folbigg's diary entries with the impression that they were virtual admissions of guilt, which was unfair.
- Ground 3: The Crown relied on expert witnesses who stated that they had never seen a case of consecutive infant mortality to this degree. Though this was true, this argument hid from the jury the fact that such cases had in fact occurred – they just were not known to the expert witnesses.
- Ground 4: 'The Crown case at trial relied in part upon coincidence and tendency evidence' [46]. Was the trial Judge correct in his directions to the jury on those topics?

A single judgment was given by Sully J (Dunford and Hidden JJ agreeing). In relation Ground 1, it was held that the jury was justified in determining that the evidence they were provided with ruled out the possibility that the children died of natural causes

Their Honours also commented on the diary entries that formed part of Folbigg's grounds of appeal. It was held that because they were serious and authentic diary reflections, which was not disputed, the evidence possessed a great amount of probative value [132]. It was therefore held that the diary 'entries were clearly admissible' [132].

Given these findings, Folbigg's convictions appeal was dismissed. However, leave was granted to appeal against the sentences she was handed for the murders of Sarah and Laura. Those sentences were found to be manifestly excessive, and their honours resented Folbigg to a 30-year sentence with a 25-year non-parole period.



Pictured above: Folbigg at her appeal hearing. Photo Credit: BBC News.



Special Leave Application to the High Court in 2005

In 2005, a special leave application was made by Folbigg to the High Court to appeal her convictions. However, the application was refused. In dismissing the application, McHugh ACJ emphasised the strength of the similarities between the deaths of the four children:

‘You have to look at the positive similarities. Two deaths occurred during the day, two deaths and the acute life-threatening event occurred in the early hours of the morning. In each case the applicant was alone with the child, the child ceased breathing, the husband was either absent or asleep and there was no clear, natural cause of death and all the children showed signs that were consistent with smothering with a pillow.’

Appeal #2: *Folbigg v R* [2007] NSWCCA 371

In 2007, Folbigg appealed to the NSW Court of Criminal appeal against her convictions. The appeal was heard by McClellan CJ, Simpson and Bell JJ. Folbigg appealed against her conviction on the following grounds:

- Ground 1: ‘The trial miscarried by reason of a juror or jurors obtaining information from the internet, which revealed that the appellant’s father had killed her mother.

- Ground 2: The trial miscarried as a result of a juror or jurors informing themselves, away from the trial, as to the length of time an infant’s body is likely to remain warm to the touch after death’ [4].

Folbigg argued that the jury had therefore engaged in ‘coincidence or tendency reasoning,’ which should not have been allowed.

In their findings, their Honours held that the jury verdicts, as well as a series of notes from the jury to the judge during the trial, indicated that they were actively engaged in, listening to and following the evidence at trial. Overall, whilst their Honours found that these ‘irregularities should not have occurred’, the information was not so prejudicial as to cause a miscarriage of justice [62]. The appeal was dismissed on 21 December 2007

2015 Petition for an Inquiry into Folbigg’s Convictions

On 26 May 2015, a Petition was submitted to the Governor of NSW seeking an inquiry into Folbigg’s convictions. It was led by Folbigg’s team of lawyers and her close friend, Tracy Chapman, who engaged health experts to consider the circumstances of the case and advocate for her innocence. The Petition included fresh evidence, such as that from Professor Cordner, a Forensic Pathologist, who considered there to be ‘no forensic pathology support for the contention that any or all of these



children have been killed let alone smothered.' He held that the lack of external or deeper facial inquiries in all four cases is evidence against the conclusion of smothering as the cause of the four deaths. The inquiry was therefore sought to review the evidence given at Folbigg's murder trial that resulted in her convictions.

2019 Judicial Inquiry

In August 2018, the Governor of NSW granted an inquiry into the convictions of Folbigg pursuant to section 77(1)(a) of the *Crimes (Appeal and Review) Act 2001* (NSW).

The inquiry was held over three weeks in March 2019. Former Chief Justice of the District Court of NSW, Reginald Blanch ('the Commissioner'), was appointed to hear the evidence.

Evidence:

Evidence was heard from forensic pathologists Professor Cordner, Professor Duflou and Professor Hilton. All three Professors held that the children died of natural causes. Notably, Dr Allan Cala, who performed the autopsy of Laura, gave evidence during the inquiry that, although he initially concluded at the time of Laura's death that it was undetermined in light of her siblings' deaths, he could now not exclude myocarditis as the cause of Laura's death.

Evidence was also heard from infection, immunology, neurology, and genetics experts.

Professor Vinuesa and Dr Arsov, who were engaged by Folbigg's lawyers, told the inquiry that there was a mutation in Folbigg's genes that could cause cardiac arrhythmia and heart attacks. They found that Folbigg's two daughters had inherited the fatal genetic mutation which was a likely and possible explanation for their deaths. Although the experts found that Folbigg's two boys did not have the heart gene mutation, they discovered another type of mutation linked to fatal epilepsy in their genes.

Further evidence was given that the jury was misinformed by the Crown at trial who submitted that, before 2003, there had been no reported cases involving the deaths of 3 or more infants in the same family attributed to unidentified natural causes. This evidence, in effect, persuaded the jury to give more weight to the prosecution's theory of smothering.

70 times during cross-examination, Folbigg denied that she had killed one or more of her children.

Findings:

In July 2019, the inquiry handed down its findings. The Commissioner rejected the new scientific evidence submitted by Folbigg's legal team. It was held that those affected by the gene mutations mostly die while awake under exertion, not during their sleep as Sarah and Laura had.

The inquiry also found that there had been known cases around the world of multiple deaths in the



one family that were natural. Therefore, the jury had been misinformed by the Crown. However, the Commissioner concluded that, despite this misinformation, it did not cause a miscarriage of justice.

The Commissioner also rejected Folbigg's explanation of her diary finding that 'the plain meaning interpretation of the diary entries carries the character contended by the Crown at the trial of virtual admissions of guilt...' [68].

Overall, the Commissioner found that there was 'no reasonable doubt' as to Folbigg's guilt of the offences [508].



Pictured above: Folbigg at the 2019 Inquiry. Photo Credit: The Australian

Application Seeking Judicial Review of the Determination in the 2019 Inquiry: Folbigg v Attorney-General of NSW [2021] NSWCA 44

In February 2021, Folbigg applied to the NSWCA for a review of the findings handed down in the 2019 Inquiry. The appeal was before Basten JA,

Leeming JA, and Brereton JA. Some of the issues on appeal were whether the judicial officer had failed to apply the correct legal test; and whether any of the following procedural steps involved a denial of procedural fairness:

- failing to consider evidence, including some conversations between Folbigg and her husband, as well as redacting parts of reports made by expert witnesses.
- failing to reopen the inquiry after receipt of material after the evidence had closed from Profs Vinuesa and Schwartz;
- failing to address the applicant's submissions as to the interpretation of her diaries;

In response to each issue, their Honours held that there was no denial of procedural fairness. Their Honours did not consider the evidence that was raised in issue 1 because they did not deem it relevant to do so. They also submitted that if Folbigg intended to object to the redactions, she should have done so before the judgement was made.

Additionally, their Honours stated 'that the function of the inquiry was different from that of a judge and jury in a criminal retrial'. Accordingly, they held that the rules of evidence do not apply to an inquiry in the same way that they do to a trial. For this reason, they were not obligated to follow the procedural steps raised in issues 2 and 3.



The appeal was subsequently dismissed, and Their Honours stated that the inquiry's conclusions were not at odds with the scientific evidence.

2021 Petition for Pardon

On 21 March 2021, a Petition was sent to the Governor of NSW requesting that the Governor pardon Folbigg pursuant to s 76 of the *Crimes (Appeal and Review) Act 2001* (NSW). Over 90 Australian and world-renowned scientists and medical practitioners endorsed the Petition.

The main grounds for the pardon were based on the significant positive evidence of natural causes of death for Caleb, Patrick, Sarah and Laura. These included the gene mutations found in Sarah and Laura and their likely role in the deaths of the girls. In addition, the pardon was premised on evidence from leading scientific experts that Caleb likely died from SIDS whilst Patrick likely died from asphyxia due to airway obstruction as a result of an epileptic fit associated with a disorder caused by blindness.

The Petition submitted that the presumption that the four children died from natural causes 'should only be displaced by overwhelming evidence to the contrary' which they proposed 'there is not.'

2022 Judicial Inquiry

The Governor of NSW, the Honourable Margaret Beazley AC KC, directed that an inquiry be held into

the convictions of Folbigg. The inquiry began on 14 November 2022 and closed on 27 April 2023 before former Chief Justice of the NSW Supreme Court, Tom Bathurst KC.

At the inquiry, Danish Professors Michael Toft Overgaard and Mette Nyegaard presented their research into the mutation gene that they believed was inherited by Sarah and Laura. The Professors outlined that the gene variant had the potential to result in fatal cardiac arrhythmia. Other internationally-renowned cardiologists and geneticists, including Professors Todor Arsov and Matthew Cook, agreed that the gene variant has the potential to be disease-causing.

Expert psychiatrists and psychologists argued that Folbigg's diary entries – an incriminating component which led to her conviction – was a personal outlet for grief and despair, rather than admissions of guilt.

At the conclusion of the inquiry, Counsel Assisting the inquiry submitted that 'on the whole' the evidence presented at the inquiry casts a reasonable doubt over Folbigg's guilt.

In June 2023, Bathurst KC released his summary findings, expressing that he found there to be reasonable doubt as to Folbigg's guilt. At present, Bathurst KC's full report of the inquiry and his findings are yet to be handed down.



2023 Folbigg's Unconditional Pardon

Following the summary findings of the 2022 Inquiry, the NSW Attorney General recommended to the Governor of NSW that Folbigg be unconditionally pardoned. On 5 June 2023, after 20 years of imprisonment, Folbigg received an unconditional pardon by the Governor of NSW and she was immediately released from prison.

Application to have Convictions Quashed and Acquittal Entered on all Charges:

Folbigg v R NSWCCA [2023] 325

Following the findings of the Inquiry held by Bathurst, Folbigg applied to have her convictions quashed and acquittals entered on all charges. The CCA determined that her appeal was successful on December 14, 2023.

As stated in their findings at 29 and 30:

“In these circumstances and as a consequence, it is appropriate that Ms Folbigg’s convictions for:

- (1) the manslaughter of Caleb Folbigg on 20 February 1989;
- (2) maliciously inflicting grievous bodily harm upon Patrick Folbigg on 18 October 1990, with intent to do grievous bodily harm;

- (3) the murder of Patrick Folbigg on 13 February 1991;
 - (4) the murder of Sarah Folbigg on 30 August 1993; and
 - (5) the murder of Laura Folbigg on 1 March 1999
- be quashed.

The Court so orders, and directs the entry of verdicts of acquittal pursuant to s6(2) of the *Criminal Appeal Act 1912* (NSW).”