Australia: Exoneration of Kathleen Folbigg of infanticide raises important legal issues

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Australian mother Kathleen Folbigg was exonerated late last year of the murder of three of her infant children and manslaughter of the fourth, as well as causing grievous bodily harm to one son. She had been convicted in 2003 and sentenced to 40 years jail, reduced on appeal to 30 years. She served 20 years, including five in solitary confinement. She protested her innocence before and during the trial and in subsequent appeals.

New genetic evidence about potentially lethal mutations in her children led the New South Wales (NSW) Court of Criminal Appeal, after a campaign by scientists, to accept on December 14 that there was reasonable doubt of Folbigg's guilt, sufficient to quash her convictions.

At the time of her trial in the NSW Supreme Court in April-May 2003, genetic science was not sufficiently developed, despite ground-breaking strides, to detect the particular mutations that once discovered in her children were to provide the impetus for Folbigg's release.

While the advances in genetic science were certainly instrumental in Folbigg's exoneration of all charges, an examination of her 2003 trial highlights the danger of undermining the basic legal principle of the presumption of innocence. This is particularly the case as there was no direct physical or eyewitness evidence that she had murdered or harmed her children in any way.

Folbigg's children, Caleb (aged 19 days) Patrick (8 months) Sarah (10 months) and Laura (19 months), died between 1989 and 1999. Patrick additionally suffered an ALTE (acute life threatening episode) four months before his death, during which he had an epileptic seizure that left him blind. These events were the basis of the five charges against her.

Although no suspicion was aroused by the three previous deaths, after the fourth death charges of murder were brought against Folbigg for the death of all of them as well as the one of grievous bodily harm. In a pre-trial submission, her defence team insisted that the charges should not be brought together in one trial. They applied for the alleged killings of Caleb, Sarah and Laura to be heard individually and also separate from the two counts relating to Patrick.

A crucial medical and legal issue was at stake. The deaths of the Folbigg children elicited varying medical explanations following each autopsy. In the case of Caleb and Sarah, death was deemed to be due to SIDS (Sudden Infant Death Syndrome). The defence argued that the prosecution would not establish clear similarities between the four deaths except by relying on an impermissible reversal of the onus of proof, which requires prosecutions to prove, beyond a reasonable doubt, that crimes were committed.

The judge had to decide whether evidence of a connection between the deaths prior to the fourth was sufficient to outweigh the obvious prejudice against the accused. Taking the four deaths together rather than separately implied an unproven connection even before the trial started that, in the absence of any evidence to the contrary, pointed to murder. Supreme Court Justice James Wood rejected the defence application for separate trials.

Folbigg's defence appealed the decision in the Court of Criminal Appeal which upheld Wood's decision and ruled against separate trials. Its ruling was based on what it considered the extreme improbability of four deaths and one ALTE occurring to children in the immediate care of their mother, particularly in the light of entries in Folbigg's diary—the main evidence against her. The defence applied unsuccessfully for a stay of the trial to appeal against this judgment to the High Court of Australia.

The ruling was a major setback that loaded the trial against Folbigg. The trial judge, Graham Barr, ruled that experts would not be allowed to testify directly about the cumulative improbability of recurrent infant deaths that went beyond the area of their medical expertise, but the prosecution found other means to emphasise the unlikelihood.

Moreover, the appeal court decision made explicit the significance of Folbigg's diary entries in establishing the admissibility of the argument that the coincidence of four deaths pointed to murder. In opening, the prosecutor Mark Tedeschi SC quoted at length from the diary entries, presenting them as proof of Folbigg's guilt which she was otherwise unwilling to admit.

In reality, the diary entries contained no unambiguous admission of intent to murder or that there had been four murders. Folbigg was clearly disturbed by the unexplained deaths of her children and, in some instances, berated herself for their deaths.

The prosecution carefully selected diary entries to paint Folbigg in the blackest terms. It stressed the entry about Laura: "[She] is a fairly good-natured baby. Thank goodness. It has saved her from the fate of her siblings. I think she was warned."

She wrote about Laura: "I feel like the worst mother on earth. Scared that she'll leave me now like Sarah did. I know I was short tempered and cruel sometimes to her & she left. With a bit of help."

What was signified by "I think she was warned" and "With a bit of help" did not in any sense constitute an admission of murder.

The prosecution collated what it considered the most damning entries into a written document that was provided to the jurors and proved to be a cornerstone of its case.

The defence submitted that the jury should not read the entries literally and out of context, but from the point of view of a grief-stricken mother struggling to come to terms with the loss of her children.

The defence also unsuccessfully sought to block expert prosecution witnesses from testifying as to the collective significance of the childrens' deaths.

Misleading statistical evidence

More than half of the six-week trial was taken up with expert medical witnesses, including two GPs, numerous pathologists and paediatricians, two sleep specialists, an epidemiologist, a paediatric pathologist and a paediatric neurologist. Nineteen were called by the prosecution, with the defence fielding just two.

The prosecution circumvented the restriction on presenting misleading statistical evidence. A number of the medical experts were asked whether in their own experience or in the medical literature there was any case of

three or more unexpected infant deaths in one family due to natural causes. All answered "No."

The experts did not and could not rule out the possibility that an as-yet-unidentified factor or factors might be responsible for the deaths. However, the implication was that the linking factor was homicide. The defence argued strongly that the prosecution's questions were prejudicial, but was over-ruled by Judge Barr.

One prosecution expert did, under cross examination, bolster the defence case. Leading pathologist, Professor John Hilton, had performed the autopsy on Sarah Folbigg in 1993 and stated in court that he had recorded that she had died of SIDS. When the prosecution called on him to revisit the finding and admit that it was incorrect, Hilton refused to do so.

The prosecution, having called Hilton as a witness, did everything it could to undermine his credibility, suggesting his expertise was outdated. Another prosecution witness, pathologist Dr Allan Cala, opposed Hilton's determination of SIDS as the cause of Sarah's death.

Cala was a leading expert for the prosecution. He had carried out the autopsy on Laura Folbigg in 1999, which preceded the suspicion that was raised of foul play. He insisted that all four children died in circumstances consistent with deliberate smothering, despite the fact that there was no definitive physical evidence to prove that conclusion.

The defence expert witness, Professor Roger Byard, stated that it was possible for SIDS to recur in one family. He testified that it was inappropriate to generalise about the likelihood of repeat deaths in the Folbigg family. Other defence witnesses included three of Folbigg's friends, who testified she was a good mother.

However, the defence called no expert psychiatric or psychological witnesses to challenge the prosecution's claims that the diaries indicated murderous intent and actions, and state that they could be interpreted as the confused thoughts of a grief-stricken mother.

The prosecution relied heavily on the claim that four infant deaths in one family must be more than "amazing" coincidence. It even presented a table of coincidences to the jury that had been pared down from 19 points presented to Justice Wood to nine—all of which were circumstantial.

In his closing address, prosecutor Tedeschi declared that never in the history of medicine had there been a case where four children from the one family had suffered sudden death leaving no known traces of obvious illness or disease and without any previous period of illness.

"You might have some person living in the backwards (sic) of India who has been hit by lightning four times, but it is an expression of its rarity that there has never been—if this be the case that there had not been recorded that the same person has been hit by lightning four times. It is probably more common that a person has been hit by lightning four times than what has happened to this family… The only reasonable conclusion is that Kathleen Folbigg killed them."

Tedeschi's argument echoed the discredited "Meadow's Law," on which several prosecution experts relied: a dictum that negated the presumption of innocence by pronouncing that one unexpected infant death in a family may be determined as SIDS, two are suspicious and any more than two are murder.

In a British infanticide case, *R v Clark*, Sir Roy Meadow, asked about the probability of repeated SIDS deaths in one family, stated that this was unheard of and that the chance of two natural SIDS deaths in one family was "one in 73 million." He urged the term SIDS be abandoned because it allowed "most cases" of child murder to go undetected.

Statisticians exposed the dubious statistical methods by Meadow to derive his probabilities. He was later found to have breached the bounds of his expertise and struck off the British Medical Register for a period.

Meadow personified a tendency in examining unexplained infant deaths toward a punitive approach. In some of his research he included cases in which he himself had testified against the mother. Conflating his own research on Munchausen Syndrome by Proxy (where mothers manufactured illness in a child in order to seek treatment) with earlier quantitative research into the relationship between SIDS and smothering, he theorised that recurrent unexplained infant deaths were necessarily homicide. A strong opponent of Meadow's methodology was Professor John Hilton.

In a direct bearing on Folbigg's case, the Court of Appeal of England and Wales rejected Meadow's evidence in several cases and the convictions of infanticide were overturned, including that of Sally Clark, as well as later convictions in *R v Anthony* and *R v Cannings*. In the first two cases, Meadow was criticised for providing incorrect and grossly misleading statistical evidence. In the case of *Cannings*, the judge declared that Meadow maintained an overly dogmatic approach to investigating multiple infant deaths.

Subsequent appeals also failed in an adverse environment, in which a law-and-order orientation prevailed over caution due to the limitations of science. This was exemplified in the media coverage of the Folbigg trial and its aftermath, underlined by sensationalist headlines in the tabloid press at Folbigg's expense.

After her conviction, the *Sydney Morning Herald* used Meadow's work uncritically as objective proof of the verdict. "It was not till the late 1990s, after three of Folbigg's children were dead, that seminal research by Roy Meadows dashed the myth that SIDS (Sudden Infant Death Syndrome) could be genetic." ("How to stop more children from dying" 24 May 2003)

In the wake of the trial, the NSW state Labor government of Premier Bob Carr responded to the media crusade over child death by tightening police powers.

In a July 2003 debate in the NSW Legislative Council, members of parliament cited a *Sydney Morning Herald* article, "Gag kept final death from police." The newspaper claimed: "The NSW Child Death Review Team was unable to pass to police its suspicions about the death of the fourth Folbigg child."

Declaring that Laura's life could have been saved, the MPs called for removal of confidentiality restrictions that constrained the Child Death Review Team from informing the Department of Community Services, the NSW Police and the Coroner of its suspicions about her death. By the end of 2003, the Carr government enacted legislation in line with those demands.

Two decades later, scientists identified mutations in the four Folbigg children that in all probability caused their deaths and campaigned for the overturn of Kathleen Folbigg's sentence. In light of the genetic link between the deaths, the diary entries were seen for what they were—the thoughts of a distressed mother.

Outside the Court of Appeal last December, a vindicated Folbigg told the assembled press conference: "The system preferred to blame me rather than accept that, sometimes, children can and do die suddenly, unexpectedly and heartbreakingly. I think the system and society needs to think before they blame a parent of hurting their children."

The fact that Folbigg was wrongly convicted and spent 20 years in jail for crimes that she did not commit shows the perils of undermining basic legal principles. The decision to hear all the charges in one trial on the basis that her vague and confused diary entries could demonstrate a link was highly prejudicial to Kathleen Folbigg and compromised the presumption of innocence. Her ultimate exoneration in 2023 underlines just how dangerous that approach is.

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