Contents

List of Diagrams	xxix
Table of Cases	xxxi
List of Abbreviations	lxxvii
I THEMES AN	ND QUESTIONS
I. IIIIII III	TO QUEUTION
1. Introduction	5
A. Overarching Themes	7
1. Child abuse as a social and legal co	onstruction 7
2. The protection of the family as a p	
3. Child abuse and moral panics	9
4. A federation of agencies?	12
B. A Note on the Comparative Analysis of	of Other Jurisdictions
1. Canada	13
2. Australia	15
3. New Zealand	15
4. The United States	16
5. Scotland	17
II. THE LEGAL FRAMEWORK	FOR ADILIDICATING
ALLEGAT	
ILLLUTI	
2. Family Law	21
A. Tracing the Influences on the Current	Law 25
1. Scandals	25
2. Shifts in childcare policy	26
3. The European Convention on Hu	man Rights and the United Nations
Convention on the Rights of the C	Child 28
B. The Principles of Family Law Relating	to Child Protection 31
1. English law	31
(a) The welfare principle	32
(b) A child/parent relationship is fu	indamental and lifelong 34
(c) Partnership between parent and	d state 35
(d) The state may only intervene or	ice statutorily defined thresholds have been
crossed	36
	d for the child and should be avoided 36
(f) A court order is the last resort	37
2. Principles of child protection law	
3. Principles of child protection law	in Canada 39

xiv

		Principles of child protection law in Australia	41 43
		Principles of child protection law in New Zealand	
		Structure of English Family Law Legislation Relating to Child Protection	45
D.		ering Services to Children	48
	1.	Offering services to children in England and Wales	48
		(a) Defining 'in need'	48
		(b) Services which may be offered under Part III	49
		Offering services in the United States	54
		Offering services in Canada	56
		Offering services in Australia	57
		Offering services in New Zealand	58
	6.	Evaluation of the provision of services in jurisdictions	59
E.	Gra	nting a Court Order	59
	1.	Care or supervision orders in England and Wales	61
		(a) The threshold criteria	62
		(b) Creating the significant harm standard	62
		(c) 'Satisfied'	64
		(d) Is likely to suffer significant harm	67
		(e) Attributing the harm or likelihood of harm to the care of the child	69
		(f) Factors in the decision on whether to make an order	73
		(g) The effects of a care or supervision order	75
		(h) Interim care or supervision orders	77
		(i) Duties of the local authority when looking after children	77
		(j) Contact	78
		(k) Additional powers under a care order	79
		(l) Discharging a care or supervision order	80
	2.	Court orders in the United States	80
	3.	Court orders in Canada	86
		Court orders in Australia	88
	5.	Court orders in New Zealand	90
F.	Mo	nitoring State Care of a Child	93
		Monitoring local authority care of a 'looked after' child in England and Wales	93
		Monitoring state care of a child in the United States	100
G.	Alle	gations of Child Abuse in Private Proceedings	103
•		Orders under the Children Act 1989	104
		Making decisions in proceedings between family members	
		in the United States	108
	3.	Making decisions in proceedings between family members in Canada	110
	4.	Making decisions in proceedings between family members in Australia	111
	5.	Making decisions in proceedings between family members in New Zealand	113
Н.	Eva	luation—Has Family Law Struck the Right Balance?	116
Lia	hilit	y in Criminal Law	119
A.		cing the Influences on the Current Law	121
		The 'failure' of the criminal law in cases of child abuse Fear of 'Paedophiles'	121 123
	2.	Fear of 'Paedophiles'	120

Contents

	3.	The European Convention on Human Rights and the United Nations Convention on the Rights of the Child	126
R	Dei	nciples of Criminal Law	128
ь.		The harm principle	128
		Liability for acting rather than failing to act	128
		The subjectivist principle	129
		Legal certainty	130
		Presumption of innocence	131
C.	Но	omicide	133
	1.	Murder	134
	2.	Manslaughter	138
		(a) Voluntary manslaughter	138
		(i) Provocation	138
		(ii) Diminished responsibility	142
		(b) Involuntary manslaughter	142
		(i) Unlawful or dangerous act (constructive) manslaughter	142
		(ii) Criticisms of the offence	143
		(iii) Gross negligent manslaughter	145
	3.		146
	4.	Homicide law in the United States	148
		(a) Inferring an intention to kill in cases of prolonged abuse	148
		(b) Homicide by abuse	149
		(c) An infanticide offence or defence?	150
	5.	Homicide law in Canada	151
		(a) Acts and omissions	152
		(b) Causation	153
		(c) Intention to cause death in cases of repeated abuse	154
	6.	Homicide law in Australia	155
	7.	Homicide law in New Zealand	157
	8.	Establishing liability when the identity of the person	
		who killed the child is not clear	158
		(a) The Law Commission proposals	159
		(i) Cruelty contributing to death	159
		(ii) Failure to protect	160
		(b) The Domestic Violence, Crimes and Victims Act 2004	163
		(c) Establishing liability in the United States	166
		(d) Establishing liability in Canada	168
		(e) Establishing liability in Australia	172
		(f) Establishing liability in New Zealand	174
	9.	Evaluation: killing by carers—has the law gone far enough?	176
D.	No	on-Fatal Offences Against the Person	177
		Ill-treatment and neglect	178
		Offences against the person	181
	3.	Psychiatric injury	183
	4.	Reasonable parental chastisement	185
	5.	Allowing physical chastisement in the United States	188

xvi

		6. 'Justifiable force' in Canada	189
		7. 'Reasonable chastisement' in Australia	191
		8. 'Reasonable force' in New Zealand	191
	E.	Sexual Offences Against Children	192
		1. Sexual offences in English Law: the Sexual Offences Act 2003	192
		(a) Offences against children under 13	193
		(b) Sexual offences against children under the age of 16	199
		(c) Meeting a child following sexual grooming	202
		(d) Abuse of trust	205
		(e) Familial sexual offences	206
		2. Sexual offences in the United States	207
		3. Sexual offences in Canada	208
		4. Sexual offences in Australia	211
		5. Sexual offences in New Zealand	212
	F.	Evaluation—An Adequate 'Fit' Between Current Conceptions of Child Abuse	
		and the Criminal Law?	213
4	Lia	ability in Tort and Human Rights Law	216
1.		Tracing the Influences on the Current Law	218
	11.	1. The objectives of suing in tort	218
		(a) To supplement or supplant criminal prosecution	219
		(b) To 'empower' victims: tort law as therapy	220
		(c) To make the abuser and the system within which he operated	
		accountable to victims	221
		(d) To expose the wider context of the alleged abuse to external scrutiny	225
		(e) To obtain individuated compensation	227
		2. Some points on procedural issues	229
	B.	The Tort Liability of the Abuser	235
		1. Liability in battery for physical and sexual abuse	235
		(a) Does battery require proof of fault?	236
		(b) The issue of consent	239
		(i) Allocation of the burden of proof	239
		(ii) Vitiation of consent	240
		(c) Negligent battery?	244
		(d) Actionable harm	245
		(e) Liability for unforeseen consequences	245
		2. Liability for intentional infliction of mental suffering	246
		3. Liability in negligence for neglect	247
		4. Evaluation: making tort law fit the reality of child abuse?	248
	C.	The Principles Relating to the Civil Liability of Third Parties who Fail	2/0
		to Protect a Child	248
		 Tort liability for omissions The structure of liability in paglicance 	248
		2. The structure of liability in negligence	251 252
		(a) The initial premise (b) The test for duty of same	
		(b) The test for duty of care3. The structure of liability for breach of statutory duty	252 257
		J. THE SHACIAL OF HADINLY FOR DICACH OF STATUTORY AUTY	4)/

		Contents	xvii
	4.	The structure of secondary liability	258
		(a) Vicarious liability	258
		(b) Non-delegable duty	259
	5.	Liability in equity: the Canadian experiment with fiduciary duty	261
D.	The	e Tort Liability of the Passive Parent or Carer	262
	1.	A duty of care to protect from harm by a third party	263
		(a) A parental immunity doctrine?	263
		(b) A duty to take positive action?	267
	2.	Breach of the duty to protect	274
		(a) The level of culpable knowledge of the risk	274
	2	(b) A subjectivized standard of care?	276
	3.	Non-interference as causing harm to the child	279
	4.	Evaluation: victimizing victims?	280
E.		use in an Institutional Setting: the Tort Liability of a Party with a Legal	
		nnection with the Abuser	282
	1.	The dynamics of abuse in an institutional setting	282
	2.	Primary liability in negligence	286
		(a) Negligence in hiring the abuser	289
		(b) Negligence in failing adequately to train and supervise the abuser	292
	2	(c) Negligence in dealing with complaints of abuse Vicarious liability for the intentional tort of the abuser	296 298
	5.	(a) The conventional approach	298
		(b) Rewriting the rules of vicarious liability: the Canadian policy-based	270
		approach	299
		(c) Rewriting the rules of vicarious liability: the English response	304
		(d) Rewriting the rules of vicarious liability: the Canadian shift	
		towards rules	306
		(e) Adhering to the orthodox rules of vicarious liability: the Australian response	309
		(f) New Zealand law: avoidance of institutional care	312
		(g) American law: a diversity of approaches	312
		Non-delegable duty	312
	5.	Abuse in an institutional setting: fixing blame	315
F.	The	Tort and Human Rights Liability of Child Protection Agencies	319
	1.	The evolution of civil liability of public authorities to compensate	
		members of the public	321
		(a) Justiciability: threshold or fall-back?	323
		(b) Common law negligence: converting a statutory discretion to act	
		into a duty to act	329
		(i) The negligence liability of investigatory agencies: weaving	220
		blanket immunity	329
		(ii) The negligence liability of investigatory agencies: unravelling	222
		blanket immunity	332
		(iii) The negligence liability of investigatory agencies in New Zealand	339 339
		(iv) The negligence liability of investigatory agencies in Australia(v) The negligence liability of investigatory agencies in Canada	340
		(vi) The negligence liability of investigatory agencies in Canada (vi) The negligence liability of investigatory agencies in the	540
		United States	341
	2.	Liability of child protection investigators to the child	346

	(a)	Failure	e to investigate an abuse allegation	346
		(i) B	reach of a statutory duty to investigate	347
			iability for negligent failure to investigate in New Zealand law	348
			iability for negligent failure to investigate in Australian law	349
			iability for negligent failure to investigate in Canadian law	350
			iability for negligent failure to investigate in American law	351
	(6)		ent investigation of an abuse allegation by social services	356
	(0)	0 0		370
			iability of social services for negligent investigation in	25/
			View Zealand law	356
			iability of social services for negligent investigation in	
			nglish law	357
			iability of social services for negligent investigation in	
		C	Canadian law	359
	(c)	Neglige	ent investigation of an abuse allegation by police child	
		protect	ion officers	361
		(i) L	iability of police for negligent investigation in English law	361
			iability of police for negligent investigation in Canadian law	364
			iability of police for negligent investigation in Australian law	365
	(d)		ent investigation of an abuse allegation by health professionals	
	(00)		alth authorities	366
			lisdiagnosis of abuse or neglect	367
			ailure to report suspected abuse to the authorities	368
			nmunity from civil liability for reporters of suspected abuse	371
				372
2	т . 1		Vitness immunity	3/2
3.			f social services for failure to protect the interests of a	27/
		d in car		374
	(a)	Neglige	ent placement or monitoring of a child with a foster	374
		3	legligent placement or monitoring of a child in care in	
			nglish law	374
			legligent placement or monitoring of a child in care in	0, -
			Canadian law	376
			Tegligent placement or monitoring of a child in care in	370
				377
			View Zealand law	3//
			legligent placement or monitoring of a child in care in	270
			ustralian law	378
			legligent placement or monitoring of a child in care in	
			merican law	379
	<i>(b)</i>	0 0	ent placement of a dangerous child with a foster family	381
		(i) N	legligent placement of a dangerous child with a foster family in	
		E	nglish law	381
		(ii) N	legligent placement of a dangerous child with a foster family in	
		C	Canadian law	383
		(iii) N	legligent placement of a dangerous child with a foster family in	
			merican law	383
	(c)	Neglige	ent management of a child in care	385
		0 0		

Contents	X13

		4.	Failure of a child protection agency to protect a child's human rights	387
			(a) Breach of the European Convention on Human Rights	388
			(i) Positive rights to protection	389
			(ii) The standard required for a finding of breach of a positive	
			obligation	391
			(iii) Remedies for breaches of human rights	393
			(b) Liability under the Human Rights Act 1998	394
		5.	Constitutional tort liability of child protection agencies in American law	396
			(a) A violation of a constitutional right	397
			(i) Creating a 'constitutional tort'	398
			(ii) Circumventing DeShaney: a state-created or state-enhanced danger	
			to a child as a substantive due process right	400
			(iii) Circumventing DeShaney: affirmative duty arising from taking	
			control of a child as a substantive due process right	402
			(iv) Circumventing DeShaney: reliance on a procedural due process	
			right	403
		6	Liability of child protection investigators to the suspect	406
		0.	(a) Liability in negligence	406
			(b) Liability in the bad faith torts	408
			(c) Liability in defamation	409
		7	Evaluation: is tort law the enemy or the instrument of effective child	40)
		/ .	protection?	411
			(a) Liability for failing to act	411
			(b) The human rights alternative	412
			(c) Negligence liability and public policy: efficacious or pernicious?	414
				414
			(i) 'Defensive practice' versus standard-setting for public services	
			(ii) Direct accountability versus opening the floodgates	415
			(iii) Investing in child protection versus diversion of scarce resources	417
			(iv) Constraining fears of liability: good faith qualified immunity	418
			III. THE INQUIRY PROCESS	423
				125
5.	Inv	resti	gating and Evaluating Allegations of Abuse	425
	A.	Tra	cing the Influences on the Current English Guidance	428
		1.	Scandals	429
			(a) Child deaths	429
			(b) Investigations into child sexual abuse	430
			(c) Abuse and mismanagement in an institutional setting	431
		2.	The influence of research and inspectorate reports	432
	B			434
	Ъ.		minant Themes of the Guidance for Investigators	434
			Coordination, agreed procedure, and shared information	
			Partnership between parents and investigators	438
	-		The involvement of children	440
			e Procedures	441
	D.	Rep	porting Child Abuse	442
		1.	Reporting child abuse in England and Wales	443
			(a) Education	443

		(b) Professional identification of child maltreatment	444
		(i) The nature of the concern that should be referred	445
		(ii) Confidentiality	446
	2.	Reporting child abuse in New Zealand	449
	3.	Reporting child abuse in the United States	450
	4.	Reporting child abuse in Australia	452
	5.	D 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	453
	6.	Evaluation: do mandatory reporting provisions help?	454
E.		sponding to a Report	455
		Starting an investigation in England and Wales	458
		(a) Children Act 1989 s 47 inquiry	458
		(b) Other mechanisms for starting an inquiry by a local authority	459
	2.	Gathering information	460
	3.	Starting an investigation in the United States	461
	4.		462
	5.	Starting an investigation in New Zealand	463
		Starting an investigation in Australia	465
F.	Pro	otecting the Child Immediately	466
	1.	Separation without a court order in England and Wales	467
		(a) Removing the alleged abuser	467
		(b) Undertakings	468
		(c) Placing the child outside the home	468
		(d) Using police protection powers	469
	2.	Court orders in England and Wales	471
		(a) The emergency protection order	471
		(b) Orders for the removal of the alleged abuser instead of the child	475
		(i) The development of exclusion orders	475
		(ii) The content of exclusion orders	476
		(iii) Occupation orders	477
	3.	Emergency protection in the United States	479
	4.	Emergency protection in Canada	481
	5.	Emergency protection in Australia	483
	6.	Emergency protection in New Zealand	484
	7.	Evaluation: is the need to protect children from unnecessary change	
		valued sufficiently in emergency protection law?	485
G.	Ga	thering Evidence from the Child	486
		Facilitating an assessment	486
		(a) Child assessment orders	487
		(b) Refusing to be examined	489
	2.	Interviewing a child	490
		(a) Legal concerns about questioning techniques	491
		(i) Suggestibility	492
		(ii) Interviewer bias	495
		(iii) Multiple interviews	497
		(iv) Use of props	498
		(v) Protection from system abuse	499
		(b) The development of guidance for interviews to be used as evidence	
		in civil family proceedings	499

C	
Contents	XX

		(c) The development of guidance for interviews to be used as evidence	
		in a criminal trial	500
		(d) Content of the interview	502
		(e) Interview protocols in the United States	504
		(f) Interview protocols in other jurisdictions	505
		(g) Evaluation—an example of procedure improving practice	507
		3. Medical examination	507
		(a) Guidance on medical examination in England and Wales	507
		(b) The development of guidance in other jurisdictions	509
	H.	Further Phases of the Child Protection Process	510
		1. The child protection conference	510
		(a) Organization of the conference	510
		(b) Parental and child involvement	512
		2. Family group conferences	513
		3. Child protection mediation	516
		4. The decision to apply for a civil order to protect the child	517
	I.	Further Phases of a Criminal Investigation	518
		1. Interview with the suspect	518
		2. The search for corroboration	520
		3. The evaluation of the evidence collected	521
		(a) Application of the sufficiency of evidence test	522
		(b) Application of the public interest test	523
	J.	Evaluation: Legal Procedures to Guide the Inquiry Process: A Help or a Hindrance for Investigators?	524
		IV. ADJUDICATION OF THE ALLEGATION	527
5.	Int	troduction: Themes and Influences	529
	A.	Systems with Different Objectives?	531
	B.	Inquisitorial versus Adversarial Inquiries?	531
	C.	Free Proof versus Filtered Proof?	532
	D.	Visible Justice versus Invisible Justice?	533
	E.	System Abuse?	538
7	Acc	cess to Evidence	539
6			542
	Λ.	Disclosure of Evidence in Child Protection Proceedings 1. Disclosure by the local authority to the family	543
		2. Disclosure by the family to the local authority or other investigators	546
	D		
	D.	Prosecution and Defence Disclosure of Evidence in Criminal Proceedings 1. Prosecution disclosure	548 548
		(a) Staged disclosure under the CPIA 1996 and the CJA 2003	548
		(a) Stagea assciosure unaer the CPIA 1996 and the CJA 2005 (b) Treatment of 'sensitive material'	549
		(c) Prosecution claims to public interest immunity	549
		2. Defence disclosure	551
		Dienee dieeleene	

xxii

C.	Dis	sclosure of Evidence in the Possession of Third Parties	552
	1.	Third party disclosure in English law	553
		(a) Disclosure to investigators and prosecutors of information	
		possessed by the family court or a third party	553
		(b) Disclosure to the defence of information possessed by a third party	558
		(i) Legal professional privilege	559
		(ii) Confidentiality	559
		(iii) The 'mere credibility' rule	560
		(iv) Public interest immunity claims	561
		(v) Two tests and two balancing acts?	562
	2.	Third party disclosure in American law	568
		(a) Access by an accused to child protection records	568
		(b) Privilege for confidential relationships	571
	3	Third party disclosure in Canadian law	572
	٥.	(a) Disclosure in child protection proceedings	572
		(b) The prosecution's obligation to obtain relevant information	112
		possessed by third parties	574
			2/4
		(c) Privilege for confidential relationships in civil and criminal	574
		proceedings	3/4
		(d) Procedures for disclosure of confidential records in criminal	577
	/	proceedings Thind name disclosure in Assemblian laws	577 583
	4.	Third party disclosure in Australian law	
		(a) Pre-trial disclosure in criminal proceedings	583
		(b) Public interest immunity	584
		(c) Confidential communications	584
4		(d) Admissions and disclosures made in family mediation and	-0-
		therapy conferences	585
		(e) Sexual assault communication privilege	586
	5.	Third party disclosure in New Zealand law	589
		(a) Prosecution and defence disclosure in criminal proceedings	589
		(b) The public interest and absolute class privilege	589
		(c) Discretionary protection for confidentiality	591
D.	Acc	cess to Evidence: A Coherent System or Serendipity?	594
		A privilege for social services records?	595
		A privilege for counselling records?	595
Th	ne C	hild Witness	598
A.	Tes	timonial Competence and Compellability	599
		Testimonial competence and compellability in English law	599
		(a) Criminal cases	599
		(b) Civil cases	606
	2.	Testimonial competence and compellability in Australian law	607
		Testimonial competence and compellability in Canadian law	609
		Testimonial competence and compellability in New Zealand law	610
		Testimonial competence and compellability in Scottish law	611
		Testimonial competence and compellability in American law	612
	7.	Evaluation: should competence be incontestable?	613

		Contents	xxiii	
В.	Pro	cedures for the Testimony of Child Witnesses	614	
	1.	Tracing the influences on the current law	614	
		(a) The international human rights context	615	
		(b) The background to reform in England and Wales	618	
		(i) The Pigot Report	618	
		(ii) The 1988 and 1991 Reforms	618	
		(iii) Problems with 'Half-Pigot'	620	
	2.	Special Measures Directions under the Youth Justice and Criminal		
10.5		Evidence Act 1999	625	
		(a) Eligibility for Special Measures	629	
		(i) Gateways to the Special Measures	629	
		(ii) Child witnesses 'in need of special protection'	629	
		(b) Optional Special Measures Directions	631	
	3.	Problematic Special Measures	633	
		(a) The inflexible primary rule	633	
		(i) Mandatory admission of the video interview	633	
		(ii) Restrictions on supplementary examination-in-chief	634	
		(iii) Mandatory use of the videolink	637	
		(b) Pre-trial cross-examination	638	
		(i) The potential advantages of pre-trial videotaped testimony	638	
		(ii) The potential drawbacks of pre-trial videotaped testimony	641	
		(iii) Could 'full-Pigot' work? Lessons from other jurisdictions	644	
		(iv) Could pre-trial videotaped cross-examination work in England		
		and Wales?	657	
		(v) Is 'full-Pigot' still needed?	660	
		(c) Intermediaries	663	
		(d) Mandatory application to defence child witnesses	671	
		(e) Exclusion of child defendants from Special Measures	672	
		(f) The challenge to Special Measures Directions under the		
		Human Rights Act 1998	675	
	4.	Implementation of Special Measures Directions	679	
	5.	Pause for a rethink: the Home Office review	684	
	6.	Evaluation: can the adversarial trial provide justice for children?	684	
9. Te	sting	the Credibility of the Child Complainant	688	
A.	Co	rroboration Warnings	690	
	1.	Corroboration warnings in English law	690	
	2.	Corroboration warnings in Australian law	692	
	3.	Corroboration warnings in Canadian law	694	
		Corroboration warnings in New Zealand law	695	
		Corroboration warnings in American law	695	
	6.	Evaluation: law and practice in conflict?	696	
B.	Hearsay Evidence			
		The common law hearsay rule defined	698	
		The impetus for hearsay reform	705	
	3.	TT	706	
		(a) The admissibility of out-of-court statements by a non-witness	707	
		(i) The preserved common law exceptions	707	

xxiv

		(ii) Unavailable witnesses	708
		(iii) Business documents	712
		(iv) Judicial inclusionary discretion	713
		(v) Exclusionary discretion?	714
		(b) The admissibility of hearsay statements by a witness	715
	4.	Hearsay reform in English civil cases	716
	5.		718
		(a) Hearsay in Canadian criminal courts	718
		(b) Hearsay in Canadian civil courts	724
	6.	Hearsay reform in Australian law	725
		(a) Hearsay in Australian criminal courts	725
		(b) Hearsay in Australian civil courts	727
	7.	Hearsay reform in New Zealand law	727
	8.	Hearsay reform in American law	729
		(a) The constitutional dimension to the hearsay rule	729
		(b) American hearsay reform at common law	730
		(c) American hearsay reform by statute	731
	9.	Evaluation: special admissibility rules for child hearsay?	735
C.	'Re	ecent' and Delayed Complaint	737
	1.	Recent complaint in English criminal cases	737
		(a) The common law doctrine	737
		(b) Application of the recent complaint doctrine to young complainants	741
		(c) Statutory reform	744
	2.	Recent complaint in English civil cases	745
	3.	Recent complaint in American law	745
	4.	Recent complaint in Canadian law	746
	5.	Recent complaint in New Zealand law	748
	6.	Recent complaint in Australian law	750
	7.	Recent complaint in South African law	752
	8.	Evaluation: a useful albeit illegitimate doctrine?	753
D.	Ch	aracter Evidence Pertaining to the Complainant	755
	1.	Evidence of bad character in English criminal cases	755
		(a) Admissibility at common law	755
		(b) Statutory reform	757
	2.	Evidence of bad character in English civil cases	759
	3.	Special protection for complainants in sexual assault cases: restrictions on	
		cross-examination on previous sexual experience	760
		(a) Previous sexual experience in child abuse prosecutions in England	
		and Wales	762
		(i) The statutory framework	762
		(ii) Previous or subsequent allegations of sexual abuse made against third parties	767
		(iii) Motive to fabricate the allegations against the defendant	774
		(iv) Previous abuse to explain medical findings of sexual abuse	777
		(v) Previous abuse to explain inedical findings of sexual abuse (v) Previous abuse or other sources to explain the child's precocious	///
		knowledge or sexualization	777
		(b) Previous sexual experience in child abuse prosecutions in Canadian law	779
		(i) The statutory framework	779
		(1) LILO CERCETT LITTLE TOTAL	111

Contents	XXV
COTOCTOOS	2221

		(ii)	Previous or subsequent allegations of sexual abuse against third	
			parties in Canadian law	782
		(iii)	Motive to fabricate the allegations against the defendant in	
			Canadian law	785
		(iv)	Previous abuse to explain medical findings of sexual abuse or the	
			child's premature sexualization in Canadian law	785
		(c) Prev	vious sexual experience in child abuse prosecutions in American law	786
		(i)	The statutory framework	786
		(ii)	Previous or subsequent allegations of sexual abuse against third	
			parties in American law	787
		(iii)	Motive to fabricate the allegations against the defendant in	
			American law	788
		(iv)	Previous abuse to explain medical findings of sexual abuse in	
			American Law	788
		(v)	Previous abuse or other sources to explain the child's precocious	
			knowledge or sexualization in American law	789
		(d) Prei	vious sexual experience in child abuse prosecutions in Australian law	790
			The statutory framework in Australian law	790
			Previous or subsequent allegations of sexual abuse against third	
			parties in Australian law	792
		(iii)	Motive to fabricate the allegations against the defendant in	
		,	Australian law	793
		(iv)	Previous abuse to explain medical findings of sexual abuse	794
			Previous abuse or other sources to explain the child's precocious	
		()	knowledge or sexualization in Australian law	794
		(e) Prev	vious sexual experience in child abuse prosecutions in New Zealand law	795
			The statutory framework in New Zealand law	795
			Previous or subsequent allegations of sexual abuse against third	
		\ /	parties in New Zealand law	796
		(iii)	Motive to fabricate the allegations against the defendant in New	
		` ,	Zealand law	797
		(iv)	Previous abuse to explain medical findings of sexual abuse	798
			Previous abuse or other sources to explain the child's precocious	
			knowledge or sexualization in New Zealand law	798
	4.	Evaluati	on: the credibility conundrum	799
				, , , ,
10. 7	Testing	the Cr	edibility of the Alleged Abuser	803
			ses of Character Evidence	804
				בטט
В.			ant's Other Misconduct as Direct Proof of Guilt: Reasoning from	004
	_		n Criminal Cases	806
			cedural context	806
			ng probative value and potential prejudicial effect	807
			for controlling the admissibility of propensity evidence	813
		-	ity or 'similar fact evidence' in English criminal law before	
			ninal Justice Act 2003	814
		(a) The	'other purposes' model constructed	814
		(i)	One approved purpose: 'background' evidence	817
			'other purposes' model dismantled	818
		(c) Prob	bative value, collusion and unconscious contamination	820

xxvi

		(d) Propensity evidence in child physical abuse and homicide	822
		(e) Joinder and severance of counts	823
		(f) Propensity evidence and institutional abuse	825
		(g) Propensity to comply with the law: good character evidence	826
		5. Propensity evidence in American criminal law	827
		(a) The 'other purposes' model in American law	827
		(b) Propensity evidence to prove guilt in American law	829
		6. Propensity evidence in Australian criminal law	832
		(a) Admissibility of propensity evidence in Australian common law	832
		(b) Admissibility of other misconduct evidence under Australian statutes	833
		(c) 'Relationship evidence' in Australian law	837
		(d) The risk of collusion and unconscious influence in Australian law	838
		(e) Joinder and severance of charges in Australian law	839
		7. Propensity evidence in New Zealand criminal law	841
		(a) Admissibility of propensity evidence in New Zealand common law	841
		(b) Background evidence in New Zealand law	842
		(c) Proposals for statutory reform of the New Zealand doctrine	842
		8. Propensity evidence under Canadian criminal law	843
		(a) The standard of proof on the voir dire in Canadian law	847
		(b) Collusion and unconscious contamination in Canadian law	847
		(c) Joinder and severance of counts in Canadian law	848
	C.	The Defendant's Previous Misconduct as Credibility Evidence in Criminal Cases	849
		1. The first model: defendants lose their shield by choosing to testify	850
		2. The second model: defendants retain their shield, subject to forfeiture	852
	D	Radical Reform: Expanded Admissibility of Propensity and Credibility Evidence	
	D.	Under the Criminal Justice Act 2003	854
		1. The new statutory model	854
		2. Joinder and severance	860
		3. The new statutory model: judicial interpretation	860
	Б		862
	E.	Propensity and Credibility Evidence in Civil Cases	
	F.	Evaluation: An Irresolvable Conflict of Incommensurable Concepts?	864
		1. The probative value of propensity evidence in child sexual abuse cases: a	
		special rule?	866
		2. Propensity evidence in child physical abuse and homicide	868
		3. Collusion and contamination	868
		4. Joinder of counts in a single trial	869
. 1	т	L - A J: L:1: C E E.: J	072
LI		he Admissibility of Expert Evidence	872
	A.	General Principles	873
		1. The legal questions	873
		2. Expert qualifications	874
	B.	Expert Evidence Relating to Physical Signs of Abuse or Neglect	875
	C.	Expert Evidence Relating to Psychological Signs of Abuse or Neglect	882
		1. Psychological behaviour as diagnostic evidence	884
		2. Psychological behaviour as 'rehabilitative' evidence	886
		3. Expert analysis of the child's disclosure	887
		4. The admissibility of expert psychological evidence in English civil courts	890

	• •
Contents	XXV11

			The admissibility of expert psychological evidence in English criminal courts	892
			The admissibility of expert psychological evidence in American courts	895
			The admissibility of expert psychological evidence in Canadian courts	899
			The admissibility of expert psychological evidence in New Zealand courts	902
			The admissibility of expert psychological evidence in Australian courts	906
			The admissibility of expert psychological evidence in Scottish courts	908
			Evaluation of behavioural science and the child witness	908
		12.	Behavioural psychology and the defendant: offender profiling	912
			(a) Offender profiling as prosecution evidence	912
			(b) Offender profiling as defence evidence	913
	D.	Eva	luation: Is Expert Evidence Superfluous, Dangerous or Probative?	917
12	. T		CHILD ABUSE LAW AND POLICY: EVALUATION les and Future Directions	923 925
			ere the Law is Now	925
			nts of Mismatch Between Legal Systems	927
	C.	Leg	al Doctrines Which Condone Stereotypes	928
	D.	Poir	nts of Mismatch Between Black Letter Law and Practice	931
	E.	Neg	gative Effects of the Law on Practice	931
	F.	Fut	ure Directions	934
	Bil	bliog	raphy	935
		dex		975